INFORMATION TO USERS

This was produced from a copy of a document sent to us for microfilming. While the most advanced technological means to photograph and reproduce this document have been used, the quality is heavily dependent upon the quality of the material submitted.

The following explanation of techniques is provided to help you understand markings or notations which may appear on this reproduction.

1. The sign or "target" for pages apparently lacking from the document photographed is "Missing Page(s)". If it was possible to obtain the missing page(s) or section, they are spliced into the film along with adjacent pages. This may have necessitated cutting through an image and duplicating adjacent pages to assure you of complete continuity.

2. When an image on the film is obliterated with a round black mark it is an indication that the film inspector noticed either blurred copy because of movement during exposure, or duplicate copy. Unless we meant to delete copyrighted materials that should not have been filmed, you will find a good image of the page in the adjacent frame.

3. When a map, drawing or chart, etc., is part of the material being photographed the photographer has followed a definite method in "sectioning" the material. It is customary to begin filming at the upper left hand corner of a large sheet and to continue from left to right in equal sections with small overlaps. If necessary, sectioning is continued again—beginning below the first row and continuing on until complete.

4. For any illustrations that cannot be reproduced satisfactorily by xerography, photographic prints can be purchased at additional cost and tipped into your xerographic copy. Requests can be made to our Dissertations Customer Services Department.

5. Some pages in any document may have indistinct print. In all cases we have filmed the best available copy.

University
Microfilms
International

300 N. ZEEB ROAD, ANN ARBOR, MI 48106
18 BEDFORD ROW, LONDON WC1R 4EJ, ENGLAND

BUCKNER, KERMIT GEORGE, JR.

AN ANALYSIS OF CHIEF JUSTICE BURGER'S INFLUENCE IN SUPREME COURT CASES AFFECTING PUBLIC EDUCATION

The University of North Carolina at Greensboro ED.D. 1980

AN ANALYSIS OF CHIEF JUSTICE BURGER'S INFLUENCE IN SUPREME COURT CASES AFFECTING PUBLIC EDUCATION

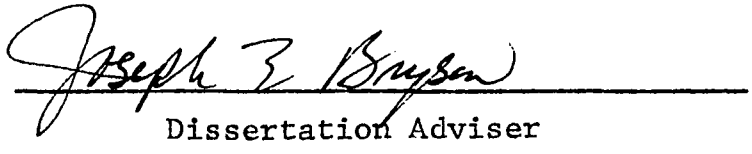
by

Kermit George Buckner, Jr.

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
1980

Approved by



Dissertation Adviser

APPROVAL PAGE

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

Dissertation Adviser Joseph E Bryson

Committee Members Shrinanji A. Sharma

Louis V. Edwards

Donald W. Russell

Jan. 15, 1980
Date of Acceptance by Committee

Jan. 15 1980
Date of Final Oral Examination

BUCKNER, JR., KERMIT GEORGE. An Analysis of Chief Justice Burger's Influence in Supreme Court Cases Affecting Public Education. (1980) Directed by: Dr. Joseph E. Bryson. Pp. 248.

This historical study has as its purpose an examination of Chief Justice Warren E. Burger's influence in Supreme Court decisions affecting education. Reviewed in the study are Supreme Court cases involving education which were heard by the Court from the time Chief Justice Burger assumed leadership in 1969 until the end of the October 1978 term. The means available to the Chief Justice for influencing Court decisions have been examined, and opinions, voting patterns, assignment of the duty to write the majority opinion, voting blocs, and Court unity have been analyzed in order to evaluate Chief Justice Burger's influence on education cases.

The study contains six chapters. Chapter II presents an analysis of the historic role played by Supreme Court Chief Justices in influencing the Court's decision-making process and an analysis of relevant literature addressing Chief Justice Burger's leadership record. Chapters III, IV, and V present an analysis of the public education cases involving religious issues, desegregation issues, and constitutionally guaranteed rights issues. Chapter VI presents a summary and conclusions.

In cases dealing with church and state issues in public education, the Chief Justice has supported an accommodationist position. Chief Justice Burger seems to have been able to influence some decisions by means of the assignment of the majority opinion and his ability to vote last in conference.

Church and state decisions during this period, however, do not appear to be consistently affected by Chief Justice Burger's efforts to influence.

In cases dealing with desegregation issues in public education, the Chief Justice has supported efforts to desegregate public schools as mandated by the Brown decision. Efforts to expand the Brown decision through the use of busing and efforts to apply Brown to Northern schools have been fought by the Chief Justice. In desegregation cases, Chief Justice Burger appears to have been successful in influencing some decisions. When compared with the record of former Chief Justice Warren, however, Chief Justice Burger's record shows that he has not been able to bring unity to the Court nor to lead as the former Chief Justice had done.

In cases dealing with constitutionally guaranteed freedoms, the Chief Justice has taken a restrictionist stance. The influencing efforts of Chief Justice Burger seem to have been aimed at limiting access to the Court for those with claims that their rights have been violated. The Chief Justice again has used the influencing powers available to him in order to win support for his position and to split the Court in decisions he does not support.

Chief Justice Burger's efforts to influence the Court in education cases have been limited by philosophical splits in the Court. The Burger Court has been marked by the formation of blocs and split decisions. Since the Chief Justice is the

member who is traditionally looked to as the Court unifier, the division on the Burger Court appears to indicate Chief Justice Burger's inability to utilize social and task leadership skills to attract his fellow justices to a position he favors and to indicate also his unwillingness to compromise when the majority does not support his position. Though Chief Justice Burger has been able to influence a number of education decisions by means of his right to assign the majority opinion and to vote last in the conference, the record shows that he has had limited influence in education decisions.

ACKNOWLEDGMENTS

This writer would like to express his sincere appreciation to his major adviser, Dr. Joseph E. Bryson, without whose guidance and counsel this study would not have been possible. A debt of gratitude is also owed the other members of the committee: Dr. Lois V. Edinger; Dr. Joseph S. Himes, Dr. Donald W. Russell; and Dr. Chiranji Lal Sharma.

The writer is also indebted to Brenda Bost, Ellene McIntyre, and Eleanor Sifford for their help in this study. The support and assistance of Mr. and Mrs. Ira Foote and Mr. and Mrs. Kermit Buckner, Sr. and the understanding of my son Patrick and my daughter Allison were essential to the completion of the study. The greatest debt of gratitude is owed to my wife Judy who served as critic, adviser, and surrogate father.

TABLE OF CONTENTS

LIST OF TABLES

Chapter I

INTRODUCTION

The Supreme Court's Impact on Education

John C. Hogan has estimated that approximately forty thousand state, federal, and Supreme Court decisions, rendered between 1789 and 1971, have affected either the organization, administration, or programs of the schools in some way.[1] Federal, including Supreme Court, cases have increased since 1897, and there has been a sharp increase since 1956.[2] Yet education is never directly at issue before the United States Supreme Court because neither the Constitution nor its amendments explicitly mention education.

> Two means for obtaining federal court jurisdiction in cases affecting education are: by questioning the validity of a state or federal statute under the United States Constitution, or by alleging that some constitutionally protected right, privilege or immunity of the individual has been violated.[3]

---

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

[2]Ibid.

[3]Ibid., p. 8.

Supreme Court involvement in education had its beginnings in Trustees of Dartmouth College v. Woodward.[4] In this case the Court, under Chief Justice John Marshall, ruled that the state legislature could not alter the charter that had been granted by the English crown without the consent of those to whom it had been granted. From this beginning the Court's involvement in school issues has expanded.

Initially, the Court maintained what has been called the "classical view" of the role of the judiciary in educational matters.[5] The "classical view" endured until about 1950 and may be defined as the Court's attitude that education was a state and local matter which should get federal attention only if, as Justice John M. Harlan noted, there is a "clear and unmistakable disregard of rights secured by the supreme law of the land."[6] The "classical view" resulted from the Court's interpretation of the Tenth Amendment which provides that all powers not delegated to the United States be reserved to the states or the people.

The five stages in the historical development of the Court's role in education matters are the following:

---

[4]Trustees of Dartmouth College v. Woodward, 4 Wheaton (U.S.) 518 (1819).

[5]Hogan, p. 11.

[6]Ibid.

I. THE STAGE OF JUDICIAL LAISSEZ-FAIRE. From 1789 to about 1850 the federal and state courts ignored education. Federal courts viewed it as a state and local matter, and state courts were rarely called upon to intervene in a school matter.

II. THE STAGE OF STATE CONTROL OF EDUCATION. During the period from 1850 to about 1950, state courts asserted that education was exclusively a state and local matter. Few cases affecting education were presented to the Supreme Court of the United States, and consequently a body of case law developed at the state level which permitted, if not actually sanctioned, educational policies and practices that failed to meet federal constitutional standards and requirements.

III. THE REFORMATION STAGE. Beginning about 1950 (and continuing until today), the federal courts, the Supreme Court in particular, recognized that educational policies and practices as they had developed under state laws and state court decisions were not in conformity with federal constitutional requirements. This is the period of federal infusion of constitutional minima into existing educational structures.

IV. THE STAGE OF EDUCATION UNDER SUPERVISION OF THE COURTS. Concurrent with the reform stage, there has been a tendency of the courts, federal and state, to expand the scope of their powers over the schools (e.g. intervention in matters affecting the administration, organization, and programs of the schools; retaining jurisdiction over cases until their mandates, orders, and decrees have been carried into effect.). It is clear that a new judicial function is taking place.

V. THE STAGE OF STRICT CONSTITUTION. Beginning March 21, 1973, there has been a further development that will affect the role of federal courts in education: the landmark decision in the school finance case, San Antonio Independent School District v. Rodriquez, wherein the Supreme Court of the United States declared: "Education is not among the rights afforded explicit protection under our federal

> Constitution. Nor do we find any basis for saying it is implicitly so protected." The "strict construction" posture of the Nixon Court is bound to affect the trend of court decisions concerned with the organization, administration, and programs of the public schools which has so clearly marked the period since about 1950.[7]

During the past twenty years, federal and state court decisions have made sweeping changes in the operation of the public schools. The power to carry out these changes stems, in great part, from the decisions of the Supreme Court since 1950 which support and sanction public school actions.[8]

This increase in federal, and especially Supreme Court, involvement in public education has been met with mixed responses from educators. Some have accused the Court of usurping administrative powers formerly held by school boards and administrators.[9] One principal reacted to the Tinker decision[10] in which the Supreme Court ruled that the student does not lose his Constitutional rights when he enters the school door by saying, "You know, if I cannot make a regulation limiting the length of my students' hair, I don't believe

---

[7]Ibid., pp. 5-6.

[8]Ibid., p. 7.

[9]Dan L. Johnson, "The First Amendment and Education - A Plea for Peaceful Coexistance," Villanova Law Review 17 (June, 1972), p. 1027.

[10]Tinker v. Des Moines, 393 U.S. 503 (1969).

I have the authority and power to prevent fornication in the hall ways of my school."[11]

Other educators have welcomed the Court's involvement in educational affairs. Many feel the Court is merely calling attention to past abuses which, being unquestioned, were accepted as standard administrative practice. Some local school boards, being unable to obtain desired reforms in any other manner, have resorted to Court action which has forced the reforms. In these cases the litigants ended the judicial process once a favorable decision had been reached.[12]

The Court itself has stated on several occasions that it should not interfere in the resolution of conflicts which arise in the daily operation of school systems.[13] Justice Hugo L. Black warned of the potential problems involved in Supreme Court intervention in public school affairs when he stated:

> However wise this Court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum in every public school in every hamlet and city in the United States. I doubt that our wisdom is so nearly infallible.[14]

---

[11]Ibid., p. 1029.

[12]Hogan, p. 13.

[13]Ibid., p. 12.

[14]Epperson v. Arkansas, 393 U.S. 114 (2968).

In 1835 Alexis De Tocqueville made an observation on the American political system saying, "Hardly any question arises in the United States that is not resolved sooner or later into a judicial question."[15] Beginning in the 1950's public school officials have come to realize how accurate Tocqueville's observation was. As John C. Hogan states:

> A new judicial function is clearly emerging: it involves supervision of the schools by the courts to assure that Constitutional minima required by the First and Fourteenth Amendments are met.[16]

Purpose

This historical study has as its purpose an examination of Chief Justice Warren E. Burger's influence in Supreme Court decisions affecting public education. The means available to the Chief Justice for influencing Court decisions will be examined in order to evaluate Chief Justice Burger's utilization of his influencing powers in public school cases. Chief Justice Burger's opinions written for the Court, his dissents, and his concurring opinions will be reviewed. Voting patterns, the assignment of the opinion writing duty, voting blocs, dissenting and concurring opinions, and the unity of the Court will be analyzed in an effort to discern whether the Chief Justice has been an influencing factor. The study attempts to

---

[15]Walter F. Murphy and Herman Pritchett, Courts, Judges and Politics (New York: Random House, 1961), p. 33.

[16]Hogan, p. 9

inform school administrators, school boards, and the general public how Chief Justice Burger has influenced public school cases.

Methods of Procedure

This study utilized the United States Supreme Court Reports as the primary source of Court decisions for the period under study. Secondary sources include books, journal articles, dissertations, magazine articles, and transcripts of television news shows which examine the role of the Chief Justice in Court decision-making and examine the influence former Chief Justices have had on Court decisions. The cases are grouped under the following major headings:

1. Religion: cases in which violations of rights as granted under the First Amendment to the Constitution are at issue.

2. Desegregation: cases dealing with the creation of unitary school systems and enforcement of desegregation orders.

3. Constitutionally guaranteed human rights: cases dealing with the rights of teachers and students as granted by the Constitution.

All primary and secondary sources are listed in the bibliography.

Scope and Limitations

This study includes decisions of the United States Supreme Court which were rendered from the beginning of the October term of 1968 through the end of the October term of 1978. The

cases studied concern elementary and secondary school issues and omit most cases which involve higher education and persons not directly involved in education. The cases in which Chief Justice Burger wrote an opinion represent the majority of cases considered, though other public school cases which reflect the influence of the Chief Justice were considered.

An attempt is made to analyze Chief Justice Burger's impact on Supreme Court decisions affecting public elementary and secondary education. This study will analyze the position of Chief Justice as a factor in Supreme Court decisions.

United States Supreme Court Reports and other appropriate literature will be used to review chronologically Burger Court rulings in public education cases in order to ascertain trends and gain insights into future rulings and into Chief Justice Burger's impact on potential cases.

Definitions of Terms Used

accommodationist: advocate of state aid for religious schools.

appeal: to take a case to a higher court for review. Generally, a party losing in a trial court may appeal once to an appellate court as a matter of right. If he loses in the appellate court, appeal to a higher court is within the discretion of the higher court. Most appeals to the United States Supreme Court are within the court's discretion.

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

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

bill of attainder: law inflicting penalty without due process; also may be ex post facto.

brief: a document prepared by counsel to serve as the basis for an argument in an appellate court.

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

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

comity: describes the defense of a court into another jurisdiction; for example, a Federal Court allowing a state court to decide a case when it could have made the decision itself.

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

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

de facto: existing equally in fact, such as holding office, but not de jure.

de jure: legitimate, within the law; usually referring to having a legal claim to an office but never having held such office.

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

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

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

ex post facto: after the fact; generally, a law which makes an act illegal prior to the adoption of the law.

find the law theory: the theory that judges decide cases solely on the basis of law with no influence from other factors.

injunction: a court order prohibiting the person to whom it is directed from performing a particular act.

"Minnesota Twins": name given Chief Justice Burger and Justice Harry Blackmun because both are from Minnesota and almost always voted on the same side during their early years on the Court.

moot: unsettled; undecided. A moot question is also one which is no longer material.

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

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

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

petitioner: one who files a petition with a court seeking action or relief, including a plaintiff or an appellant. But a petitioner is also a person who files for other court action where charges are not necessarily made; for example, a party may petition the court for an order requiring another person or party to produce documents. The opposite party is called the respondent.

plaintiff: a party who brings a civil action or sues to obtain a remedy for injury to his rights. The party against whom action is brought is termed the defendent.

remand: to send back.

respondent: one who is compelled to answer the claims or questions posed in court by a petitioner. A defendent and an appellee may be called respondents, but the term also includes those parties who answer in court during actions where charges are not necessarily brought or where the Supreme Court has granted a writ of certiorari.

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

sectarian: parochial group.

separationist: advocate of no state aid for religious schools.

social leadership: potential for leadership of the court deriving from the use of social skills.

statute: a written law enacted by a legislature. A collection of statutes for a particular government division is called a code.

stay: to halt or suspend further judicial proceedings.

task leadership: potential for leadership of the court deriving from a justice's ability to keep the court on task.

tenure: generally, same as continuing contract. In some states, infers greater protection; for elected officials, refers to length of term of office.

vacate: to make void, annul or rescind.

Organization of the Remainder of the Study

This study contains six chapters. Chapter II will present an analysis of the historic role of Supreme Court Chief Justices as factors in the Court's decision-making process and an analysis of relevant literature addressing Chief Justice Burger's leadership record. Chapters III, IV, and V will present an analysis of the public education cases involving religious issues, desegregation issues, and constitutionally guaranteed human rights issues. Each chapter will contain a comparison of cases involving similar issues which preceded and followed.

Chapter VI will present a summary and a conclusion drawn from the information advanced in the preceding chapters. A statement will be made indicating the degree to which Chief

Justice Burger has influenced Supreme Court cases dealing with public education based on the cases analyzed.

CHAPTER II

BACKGROUND

The Historic Role of Chief Justices in Court Decision-Making

The Judiciary Act of 1789 created the federal court system. This system consisted of a Supreme Court of six members and one district court for each of the thirteen states.

> The districts were divided into three circuits and a circuit court was created for each. Since the act (Judiciary Act of 1789) made no provisions for circuit court judges, each circuit court was presided over by two Supreme Court justices and the judge of the district where the court was held.[1]

This situation resulted in Supreme Court justices having to "ride circuit" in an era when travel was slow and arduous. This hardship along with the fact that justices often heard a case twice if it were appealed to the Supreme Court, caused many of the early justices to resign.[2]

John Jay, the first Chief Justice, resigned after six years to become governor of New York. Jay had so little regard for the position of Chief Justice that he had campaigned for the gubernatorial position while still serving on the Court. During his brief tenure as heard of the Court, Jay wrote only

---

[1]The Supreme Court: Justice and the Law (2d ed.; Washington, D. C.: Congressional Quarterly, 1977), p. 7.

[2]Ibid., p. 2.

one opinion, and this decision was overruled by a constitutional amendment.[3] Jay's main contribution to the American constitutional system came as a result of his refusal to give President George Washington a written opinion on the law involved in a case which was in the courts.[4] This refusal helped establish the separation of powers and discouraged Washington's tendency to treat the Chief Justice as a member of his administration.[5]

John Rutledge served as interim Chief Justice following Jay's retirement. Rutledge was the only man to serve an interim term and then fail to get Congressional confirmation. Most Court scholars attribute this to the fact that there was some question about his sanity following the death of his wife. Rutledge, too, only wrote one opinion while serving as Chief Justice.

Chief Justice Rutledge was followed by Oliver Ellsworth in 1796. During Ellsworth's term the Court began to establish its right to review government actions and judge their conformity with the provisions of the Constitution.[6] Chief Justice Ellsworth, however, had no part in these cases.[7] Ellsworth's

---

[3]Chisholm v. Georgia, 2 Dall. 419, II Ed. 440 (1793).

[4]Kenneth B. Umbreit, Our Eleven Chief Justices, (Port Washington, New York: Kennikat Press, 1969), p. 43.

[5]Ibid.

[6]Walter Murphy and Herman Pritchett, Courts, Judges, and Politics, (New York: Random House, 1961), p. 156.

[7]Umbreit, p. 103.

work on the Judiciary Act had had far more influence on the development of the Court than had any decision he rendered while serving as Chief Justice.[8]

During the tenure of the first three Chief Justices, the Supreme Court had little power or influence. The Court was treated as a part of the administration by President George Washington, and the Chief Justice often felt that his position was far less desirable than that of a political office. Yet during this period the foundation was being laid for the review of legislative action.

One of the most important contributions made by John Jay, the first Chief Justice, was his refusal of President John Adams' attempt to nominate him to serve a second term as Chief Justice following the retirement of Chief Justice Ellsworth. This event was significant because it made possible the nomination of the man who has generally been considered to be the greatest Chief Justice who ever served.

Chief Justice John Marshall was the first Chief Justice to utilize fully the leadership potential of the position. Marshall has been given credit for making the judicial branch equal with the other branches of government.[9] The most important case decided during Chief Justice Marshall's tenure on the Court and one of the most important cases that has ever

---

[8]Ibid., p. 101.

[9]The Supreme Court: Justice and the Law, p. 7.

been decided by the Court was Marbury v. Madison (1803).[10] Chief Justice Marshall wrote this opinion, as he did most of the decisions of the Court while he was Chief Justice, and reasoned that the Constitution, which the Supreme Court Justice takes an oath to support, was the supreme law of the land. The Chief Justice reasoned that it was the responsibility of the judiciary to interpret the law, and he concluded that the Supreme Court could not enforce a statute that the justices believed to be in violation of the provisions of the Constitution. With this decision the Court's right to rule on the constitutionality of legislation was established. In writing this opinion, Chief Justice Marshall not only established the Court's claim to power and influence, but also demonstrated the leadership potential that was available to the Chief Justice. This potential had not been seen by his predecessors.

In the very broadest of terms, Marbury v. Madison established the Court's supremacy not only over judicial proceedings, but also over the other political processes insofar as Constitutional questions were involved:

> . . . the Supreme Court is the authoritative interpreter of the Constitution; therefore, government officials are oath-bound to obey Supreme Court interpretations of the Constitution whenever they make policy decisions.[11]

---

[10]Marbury v. Madison, 1 Cranch, 137, 2 L.Ed. 60 (1803).

[11]Ibid., p. 157.

Chief Justice Marshall's claim that the Court had the right to rule on the constitutionality of legislation did not stand unchallenged. Justice Gibson of the Pennsylvania Supreme Court, in referring to the right to constitutional reviews, stated: ". . . the grant of a power so extraordinary ought to appear so plain, that he who should run might read it."[12]

There have been other critics of the Maybury v. Madison, most notably Presidents Andrew Jackson and Abraham Lincoln. Yet, Chief Justice Marshall's opinion has withstood all attacks, and the Court has maintained its powers. Alexis de Tocqueville's 1835 observation that the Court has been "invested with immense political power" remains true today.[13]

Chief Justice Marshall was by birth a frontiersman. Coming to the Court at a time when the Chief Justice had been expected to act as though he were a member of the President's cabinet, this frontiersman nevertheless established the power and independence of the judiciary which neither the colonial aristocrats nor conservative New Englanders who preceded him had been able to do.

Chief Justice Marshall dominated the Court as no other Chief Justice before or after:

---

[12]The Supreme Court: Justice and the Law, p. 7.

[13]Ibid., p. 7.

> During the thirty-four years that Marshall presided over the Supreme Court his personal views can, except in a few relatively unimportant instances, be treated as equivalent to the views of the Court. No Chief Justice before or since has dominated his colleagues the way Marshall did.[14]

This Chief Justice originated the practice of one justice, usually himself, giving the Court's opinion rather than each justice writing a separate opinion. Much to the displeasure of some of his associate justices, Marshall reserved the right to give the Court's opinion in the most important cases. This tradition extends to the present.

Chief Justice Marshall successfully, at least for his time, handled a delicate problem in the Court's ability to make constitutional interpretations.

> As Justice Robert Jackson was to observe in 1952, the materials of constitutional interpretation are often "as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." The declaratory theory of the judicial function obscures the fact that constitutional interpretation necessarily involves a highly personalized choice among conflicting public policies, . . . Marshall did not hesitate to embrace this concept of the judge as devoid of will, operating only as a competent and disinterested technical expert in matters constitutional.
>
> Just as the myth that judges in private law disputes only "find" law was a price that had to be paid to keep individuals from resorting to violence so the myth of the judge as the neutral expert who decides policy disputes by reference to a transcendent - and inscrutable - body of law was necessary to hold together the intricate patterns of government organization which had been woven into the tapestry of the American Constitution.[15]

---

[14]Umbreit, p. 169.

[15]Murphy and Pritchett, p. 158.

No one questioned how the Court made its judgments during the early years of the Republic. The myth that courts were able to eliminate all prejudice and external influence as they ruled on a case was created. Since that time a number of justices have spoken about the process of judicial decision making, and this myth has been questioned.[16]

Chief Justice Marshall changed the role of the Supreme Court and that of the Chief Justice. The impact of his influence upon the function of the Court and its Chief Justice has been felt from the time he served to the present. This influence extended even into the area of education, as he was responsible for writing the opinion in the first case dealing with education, Dartmouth v. Woodward (1819).[17] This case served as a precedent and has been used to justify the Court's involvement in education even though the federal Constitution makes no mention of education (See Chapter I, p. 2).

Many people felt that the Court, as it had developed, could not survive Chief Justice Marshall's death.[18] The task of following Chief Justice Marshall was, therefore, ominous.

---

[16]The Supreme Court: Views from Inside, (New York: W.W. Norton Company, 1958).

[17]Dartmouth College v. Woodward, 4 Wheaton (U.S.) 518 (1819).

[18]Umbreit, p. 199.

Chief Justice Roger Taney was a conservative who wanted to preserve the social system into which he had been born.[19] He had served as a state senator in his native Maryland and Attorney-General of both Maryland and the United States. Chief Justice Taney's entire reputation rested for many years on the opinion he had written in one case. In Dred Scott v. Sanford (1857)[20] the Chief Justice had insisted that a slave is property; therefore, the Congress could not pass a law which deprived any citizen of property. "This opinion was not accepted by the general public outside of the South, and it served to show how Chief Justice Taney was out of touch with public opinion."[21] The reputation of both the Court and Chief Justice Taney suffered greatly as a result of the Dred Scott decision. Yet the "right of property concept" which is part of the Dred Scott decision became the Court's dominant issue until well into the next century.[22]

Chief Justice Taney's actions in the Dred Scott case seem to reveal some of his weaknesses as Chief Justice. Chief Justice Marshall always took care to see that he did not arouse public resentment.[23] Chief Justice Taney in failing to follow this practice weakened the Court and himself:

---

[19]Ibid., p. 241.

[20]Dred Scott v. Sanford, 19 How. 393, 15 L.Ed. 691 (1857).

[21]Umbreit, p. 241.

[22]The Supreme Court: Justice and the Law, p. 7.

[23]Umbreit, p. 241.

> Taney forgot that the power which the Court wielded rested on an almost purely moral basis and it was his forgetfulness here which was responsible for his impotence when he attempted to uphold the Bill of Rights during the storm of civil war. He must take the full responsibility for the mistake. It is peculiarily the type of responsibility which belongs to the head of the Court.[24]

History has taken a more favorable view of Chief Justice Taney than his contemporaries did, and his Dred Scott opinion has not kept him from being ranked as a great justice.[25]

Following his death in 1864 Chief Justice Taney was replaced by Salmon P. Chase. Chief Justice Chase believed that he was destined to govern.

> His desire to govern cannot be described as vanity; it was far deeper than that. It was an intense egotism, a confirmed conviction that there was nobody in the country who was quite his equal as a statesman, a conviction which preyed on him to such an extent that it made much of his life unhappy.[26]

The reputation that this Chief Justice developed as an efficient administrator was matched by his physical appearance.

> Lincoln once remarked that "Chase is about one and a half times bigger than any other man that I ever knew." It was more than height and bulk that made even his physical appearance conspicuous. He "was one of those few men," said one who knew him well, "who, even in crowds, attracted general observation."[27]

---

[24]Ibid.

[25]Albert Blaustein and Roy Mersky, The First One Hundred Justices, (Hamden, Connecticut: Archer Books, 1978), p. 37.

[26]Umbreit, p. 241.

[27]Ibid., p. 250.

Chief Justice Chase, in spite of his physical and mental prowess, never became a strong leadership force on the Court. "No one ever doubted his ability, but no one ever became enthusiastic about it. He was too competent. He struck people not as a great political leader, but as an incomparably efficient machine."[28]

The record of the Chase Court shows that the Chief Justice could often be found in the minority. He seemed to have had very little influence with his colleagues.[29] In view of his strength of character and talent for administration, it might seem strange that the Chief Justice was not able to gain the influence over his colleagues that some of his predecessors had. However, most seem to think this inability was a result of his vanity and the fact that he could not persuade people that he had given up politics.

The lack of control on the part of Chief Justice Chase may be seen in the Greenback Case.[30] This case concerned the issue of using paper currency as legal tender for debts. President Grant was in favor of the Congressional Act because it would allow the railroads to pay their debts in currency rather than gold. After the Court ruled 4-3 that the Act was unconstitutional, the President appointed two justices to fill

---

[28]Ibid.

[29]Ibid., p. 283.

[30]Hepburn v. Griswold, 75 U.S. 8 Wall 603.

existing vacancies, and the case was reopened with the earlier decision being reversed 5-4. Chief Justice Chase reacted to this action by saying, "The re-opening of the case was a serious mistake and the overuling in such a short time, and by one vote, of the previous decision, shook popular confidence in the Court."[31]

Chief Justice Chase was followed in 1874 by Morrison Remick Waite. Chief Justice Waite headed the Court during a period when it functioned with general satisfaction. This condition has caused some to call Chief Justice Waite inferior, while others have pointed to it as an indication of his greatness.[32]

Chief Justice Waite is not known for his domination of the Court in the style of Marshall. His strength could be found more in the social skills he was able to use in order to win the personal friendship of those with whom he came into contact.[33]

> In part, Waite's failure to gain a great reputation is due to the fact that the Court functioned too successfully during his term of office. Institutions which function competently, efficiently, and quietly do not often attract the public eye.[34]

---

[31]The Supreme Court: Justice and the Law, p. 21.

[32]Umbreit, p. 295.

[33]Umbreit, p. 297.

[34]Ibid., p. 300.

Some indication of Chief Justice Waite's social skills may be gained from reviewing the events which took place as he assumed the leadership of the Court. After the death of Chief Justice Chase, the associate justices each campaigned to get the nomination from President Grant. The President had had a great deal of trouble getting confirmation of a nominee, and Morrison R. Waite had been his fourth recommendation. Though the Chief Justice had a successful professional law record, there were many other lawyers in the country with a greater practice. This situation caused some resentment on the part of the other justices, and Chief Justice Waite found their reception to be rather cold.

> The day the new Chief Justice took his seat he came, after the adjournment of the Court, to the office of General Cowen, the Acting Secretary of the Interior, a fellow Ohioan and an old friend, who had been one of the most active in suggesting his nomination to the President. Waite was obviously much upset and, after considerable hesitation, stated the reason. "Those fellows up there," he said, jerking his head in the direction of the courtroom, "want to treat me as an interloper. I was met today by the senior Associate Justice, who has been presiding since the vacancy, with the suggestion that, as I am a stranger to the Court and its methods, I would better allow him to continue to preside for a time until I learn the formalities of the Court. Now, I do not want to be considered unamiable or unreasonable, but before I act, I want your opinion, as a friend, as to what I shall do under the circumstances."[35]

In spite of his initial difficulties with the Associate Justices, the new Chief Justice soon established his position

---

[35]Umbreit, p. 316.

as the head of the Court. The Waite Court was no easy court to lead. Each of the Associate Justices had been appointed at an advanced age, and all had distinguished themselves in their own communities. This made Chief Justice Waite's job all the more difficult.[36]

Melville Weston Fuller became Chief Justice in 1888. He was the first Chief Justice who was a physically small man. Chief Justice Fuller used his social leadership skills well. He is said to have been one of the Court's most outstanding presiding officers.[37] The way in which Chief Justice Fuller handled the disagreements and social operations of the Court seems to have been his greatest strength as its leader , for he was not known for his intellectual prowess. On many occasions he exercised his skills to keep the Court from exploding.[38]

One of these situations occurred during the deliberations over the Fong Yue Ting v. United States (1893) case.[39] In this case Justice Horace Gray wrote the opinion for the majority; however, after reading the dissent written by Justice Stephen Field, he changed the wording of his majority opinion.

---

[36]Ibid., p. 317.

[37]Glendon Schubert, Ed., Judicial Behavior: A Reader in Theory and Research (Chicago: Rand McNally and Company, 1964), p. 171.

[38]Ibid.

[39]Fong Yue Ting v. United States, 149 U.S. 698 (1893).

This action upset Justice Field greatly, and he appealed to the Chief Justice to restore the original wording. Chief Justice Fuller was able to persuade Justice Gray to concede, and the incident was resolved.[40]

Another example of Chief Justice Fuller's social leadership skills may be found in the situation that developed between Justice Oliver W. Holmes and Justice John M. Harlan during the discussion of a case. Custome required that the justices not interrupt when one of their colleagues was stating his opinion on a case. However, Justice Holmes interrupted Justice Harlan's statement of his views with a caustic, "That won't wash!" This interruption brought a flush of anger to Justice Harlan's **face.** Chief Justice Fuller quickly added, "But I keep scrubbing away, scrubbing away," using his hands as if rubbing clothing on a washboard. The justices all broke into laughter, and the discussion continued without a bitter verbal battle.[41]

In spite of his social leadership skills, Chief Justice Fuller is ranked as only an average justice.[42] After his death Justice Holmes made a statement that indicates the degree to which Chief Justice Fuller failed to provide the kind of leadership other Chief Justices had provided.

---

[40]Schubert, p. 407.

[41]Ibid., p. 397.

[42]Blaustein and Mersky, p. 39.

> "Of course," wrote Justice Holmes immediately after Fuller's death, "the position of the Chief Justice differs from that of the other judges only on the administrative side." The "of course" indicates the degree in which Fuller fell short of his predecessors. Holmes' statement was technically true of any of the Chief Justices but practically Fuller was the first one of whom it was true. The prestige which goes with the headship of the Court is such as to give the Chief Justice a great advantage in the struggle of ideas which takes place in the conference room. Fuller's difficulty was a lack of ideas for which to struggle.[43]

Edward Douglas White was appointed Chief Justice in 1910 after having served as an associate justice since 1894. It is said that Chief Justice White looked so much like a Chief Justice that even if he had known no law, he should have been given the position.[44]

The new Chief Justice, like Chief Justice Fuller, excelled in the role of social leader of the Court. When the judges donned their gowns in the robing room, the Chief Justice would step to the center of the room and greet each of the associate justices in order of seniority.[45] Chief Justice Fuller was known for his ability to control flare-ups in conference. This was accomplished by turning the discussion at the proper moment.[46]

William Howard Taft followed Chief Justice White as head of the Court in 1921. The new Chief Justice had appointed the

---

[43]Umbreit, p. 343.

[44]Ibid., p. 366.

[45]Ibid., p. 384.

[46]Schubert, p. 171.

old Chief Justice to his position as well as five of the associate justices during the time that he was President of the United States.

Chief Justice Taft also excelled as social leader of the Court and was a strong advocate of teamwork as the means by which the Court should fulfill its responsibilities. He initiated the practice of calling several of the justices together at his home on Sunday afternoon for the purpose of discussing some of the most difficult cases in order to present a unified front.[47]

Chief Justice Taft recognized his intellectual limitations as is shown by his comment to his son in 1925. "I find myself constantly exposed to the humiliation of not discovering things in cases, especially in matters of jurisdiction which are very intricate and most exasperating."[48]

The Chief Justice overcame this handicap by asking Justice Willis Van Devanter to look over his uncirculated opinions and make suggestions. This practice along with the use of the social skills he already possessed made Chief Justice Taft an effective leader of the Court:

---

[47]Ibid., p. 413.

[48]Ibid., p. 396.

> The Chief Justice, as Taft once wrote, is the head of the Court, and while his vote counts but one in the nine, he is, if he be a man of strong and persuasive personality, abiding convictions, recognized by bearing and statesmanshiplike foresight, expected to promote teamwork by the Court, so as to give weight and solidity to its opinions.[49]

The best indication of the degree of success that Chief Justice Taft enjoyed as a leader of the Court can be found in the letter he received from his former associates shortly before his death:

> Dear Chief Justice:
>
> We call you Chief Justice still, for we cannot quickly give up the title by which we have known you for all these later years and which you have made so dear to us. We cannot let you leave us without trying to tell you how dear you have made it. You came to us from achievements in other fields, and with the prestige of the illustrious place that you lately had held, and you showed in a new form your voluminous capacity for work and for getting work done, your humor that smoothed the rough places, your golden heart that has brought you love from every side, and, most of all, from your brethren whose tasks you have made happy and light. We grieve at your illness, but your spirit has given life an impulse that will abide whether you are with us or are away.
>
> Affectionately yours,
>
> Oliver Wendell Holmes
> Willis Van Devanter
> J. C. McReynolds
> Louis D. Brandeis
> Geo. Sutherland
> Pierce Butler
> Edward T. Sanford
> Harlan F. Stone[50]

---

[49]Schubert, p. 397.

[50]Umbreit, pp. 449-450.

The next man to serve as Chief Justice, Charles Evans Hughes, had served as an associate justice from 1910 to 1916, having resigned to run for the office of President of the United States. He came to the Court as Chief Justice in 1930.

> There is a distinct difference to be found between his opinions as Chief Justice and as Associate Justice. In his first career on the bench his opinions sometimes showed a tendency to be prolix and dull. His opinions as Chief Justice have lost their lawyerlike regard for the precedents, but there is a new element: an occasional vigorous and pointed sentence illuminating the cloistered atmosphere of the Court like a flash of lightning.[51]

Chief Justice Hughes excelled as the Court's task leader and is said to have been the master of the conference. This Chief Justice was able to comprehend the details of hundreds of cases which enabled the Court to dispose of its business quickly.[52] Chief Justice Hughes was the dominant force in the conference.[53]

> The Chief Justice presides in open court and more importantly at the conference. He is then given an opportunity to exercise task leadership by stating his views first on cases and, as Hughes usually did, selecting the issues to be discussed.[54]

Chief Justice Hughes registered only 23 dissents in the 1,382 cases decided by the full court during his first nine

---

[51]Ibid., pp. 497-498.

[52]Schubert, p. 230.

[53]Ibid., p. 397.

[54]Ibid.

years as Chief Justice.[55] Discussions that threatened to get out of hand were controlled by the Chief Justice's comment, "Brethren, the only way to settle this is to vote."[56] Chief Justice Hughes is rated as a great justice, but he was not able to keep his Court from strike and anger over the human rights issues which were beginning to reach the Court in large numbers during his tenure:[57]

> Hughes exploited his authority with superb skill, yet he could not prevent his colleagues from splintering into angry factions, or keep his Court from engaging in a wasted and almost suicidal war against the twentieth century.[58]

Chief Justice Hughes was followed in 1941 by Harlan F. Stone who is probably the least effective leader the Court has ever had.

> . . . the Chief Justices serving in the period 1888-1958 were (with the exception of Stone) men of strong personality and first rate abilities who exerted steady and effective influence on those who served with them.[59]

The Court that Chief Justice Stone headed was frequently divided and the most quarrelsome in history.[60] This fact reveals the lack of leadership which the Court experienced

---

[55]Ibid., p. 409.

[56]Ibid., p. 397.

[57]Ibid., p. 398.

[58]Ibid, p. 37.

[59]Ibid., p. 171.

[60]Ibid., p. 171.

under him. Chief Justice Taft had realized Justice Stone's lack of leadership abilities in 1929 when he asserted that he was not a leader and would have trouble uniting the Court.[61]

The conferences which had lasted four hours under Chief Justice Hughes now lasted up to four days. Chief Justice Stone was accused of having his clerks prepare his statements for the conference. The associate justices could tell which clerk had prepared the statement by the length of time Stone took to state the case.[62]

> He (Stone) came to a Court characterized by efficiency and a high level of unanimity developed under Hughes' dominant leadership. But, almost immediately the Court began to deteriorate and was much more frequently divided than before.[63]

Chief Justice Stone adopted a style much different from that of Chief Justice Hughes. While still an associate justice, Stone had been frustrated by Chief Justice Hughes's methods. Chief Justice Stone refused to cut off discussions as the previous Chief Justice had done, and he even joined in angry wrangling with his associates, something his predecessor would have considered beneath his station. The Court under Justice Hughes had come to expect the Chief Justice to act as

---

[61]Ibid.

[62]Ibid.

[63]Ibid., p. 172.

both task and social leader. Chief Justice Stone gave them neither.

After serving on the Stone Court, the associate justices probably came to expect a different kind of leadership from that which they had received from Chief Justice Hughes.[64] It seems logical to assume that this would have prevented Chief Justice Fred M. Vinson from exerting the same kind of leadership that Chief Justice Hughes had exerted even if he had had the social charm and intellectual abilities to be such a leader.

Chief Justice Vinson served from 1946 to 1953. During this period the Court was continually asked to review civil rights cases. Though gains were made by desegregationists in graduate schools, the Vinson Court had a generally conservative civil liberties record. The accounts of the deliberations on the Brown case as it was being argued while Chief Justice Vinson headed the Court indicate that the Court and the Chief Justice favored continuing segregation.[65]

The Brown case was one of the most significant decisions in the area of education that the Court has delivered. The way in which Chief Justice Vinson handled this case gives some insights into his judicial philosophy. On December 13, 1952,

---

[64]Ibid., p. 398.

[65]Brown v. Board, 347 U.S. 483 (1954).

Chief Justice Vinson stated his views on the Brown case in conference. He noted that schools had been segregated in 1868 in the District of Columbia when the Fourteenth Amendment had been adopted. Further, he called the justices' attention to the fact that Congress had declined to pass a statute barring racial segregation in schools. In considering Justice Harlan's dissent in Plessy v. Ferguson, he noted that he was careful to avoid any reference to public schools.[66] This seems to indicate that the Chief Justice upheld the validity of segregation.[67] At this time in the deliberations of the Brown case, Court observers noted that the Chief Justice was joined by four of his associates in favoring affirmation of the lower court's verdict in allowing segregation.[68]

Chief Justice Vinson is another of the Chief Justices who used social leadership skills to compensate for weakness in other areas. This Chief Justice is reported to have been weak in technical ability but likeable and diplomatic.[69] The Court he inherited from Chief Justice Stone was badly in need of leadership that would ease the excess tension. The new Chief Justice was able to use his social skills to do that. Chief Justice Vinson, however, was rated a failure.[70] Any judgment

---

[66]Murphy and Pritchett, p. 505.

[67]Ibid.

[68]Ibid.

[69]Schubert, p. 171.

[70]Blaustein and Mersky, p. 40.

on this Chief Justice should be tempered by an awareness that his predecessor had destroyed any aura of legitimacy surrounding the Chief Justice's position as leader of the Court.[71]

Chief Justice Vinson died September 8, 1953, and was replaced by Earl Warren on October 5, 1953. Beginning with the Brown case, Chief Justice Warren served as leader of the Court during a time when more cases came before the Court concerning education than had ever been heard before. His influence on the Court was immediate as is shown by his impact on the Brown decision, which had already been argued before he arrived.

As was noted earlier, Chief Justice Warren inherited a Court that was badly divided over the segregation issue. As of December 13, 1952, the associate justices were split down the middle with four favoring approval of segregation and four favoring ruling it unconstitutional. In conference following the second argument in the Brown case, the new Chief Justice, suppressing any caution which might have been expected from someone lacking prior experience on the bench, stated that the Court must decide whether segregation was allowable in public schools. He concluded that segregation must be prohibited.[72]

---

[71]Schubert, p. 398.

[72]Murphy and Pritchett, p. 506.

> Upon reflection Warren's opening statement was a masterly one. It condemned no one; it was unemotional; it recognized differences among the states and in conditions relevant to the problem; it suggested tolerance in disposing of the matter; it referred humbly to the need for wisdom. Thus it projected a reasonable and concerned man with malice toward none - a judge faced with a case to decide whatever the impediments. At the same time one must be struck by the firmness with which Warren asserted at the outset that he was prepared and that the Court was obliged to bar consciously segregated public schools. Given the uncertainties with which some of the other justices were plagued at this time, strong leadership on the question was undoubtedly a key factor in the ultimate solution.[73]

Chief Justice Warren, beginning with the justices' split, worked to get the Court behind a unified position. He realized the importance of a unanimous decision in this case because of the emotional reaction which could be expected from the public:

> The unanimous opinion in the case must, of course, be attributed to Warren. Though he was reported as saying in 1968, "Well, gee, the Chief Justice doesn't write all of the important decisions," he did assign the segregation cases to himself and worked for unanimity from the start. Since we know he did not inherit a unanimous Court, it is probably correct to credit him with achieving the full agreement that ultimately prevailed. There is no hard and fast rule by which we can evaluate the significance of unanimity in these cases, though one supposes that the unanimity of the Court enhanced the acceptability of the decision.[74]

Following the Brown decision, Chief Justice Warren used his leadership to guide the Court into a period in which civil rights claims drew a major part of the Court's attention. In

---

[73]Ibid.

[74]Ibid., p. 510.

a series of rulings the Court adopted rules protecting the criminal defendant and suspect from the admission of improperly seized evidence at the trial,[75] denial of the right to have counsel,[76] and confessions given without being informed of rights:[77]

> The Warren Court's civil liberties record, reinforced by its easing access to the courts for those wishing to challenge government action, led to a considerable dependence on the federal courts. Groups increasingly turned initially to the courts for redress of their grievances, particularly against state and local officials, instead of using those courts as a last resort. This gave pause to the Court's observers, including some who supported its decisions. They wondered whether reliance on the courts might lead to atrophy of the legislative process, central to a democratic political system.[78]

The last case heard by the Warren Court, Powell v. McCormack (1969), was a case which had been accepted on appeal from the court of Judge Warren Burger. The Warren Court overturned the verdict of Judge Burger. Following the appointment of Chief Justice Burger, many pointed to this as an indication of the coming change in the Court.[79]

---

[75]Mapp v. Ohio, 367 U.S. 643 (1961).

[76]Gideon v. Wainwright, 372 U.S. 335 (1963).

[77]Miranda v. Arizona, 384 U.S. 436 (1966).

[78]Stephen L. Wasby, The Supreme Court in the Federal Judicial System, (San Francisco: Holt, Rinehart and Winston, 1978), p. 7.

[79]Henry Abraham, Justices and Presidents, (New York: Oxford Press, 1974), p. 239.

TABLE I

CHIEF JUSTICES OF THE UNITED STATES SUPREME COURT

Chief Justice	Term	Nominated By
John Jay	1789 - 1795	George Washington
John Rutledge	1795	George Washington
Oliver Ellsworth	1796 - 1799	George Washington
John Marshall	1801 - 1835	John Adams
Roger Taney	1836 - 1864	Andrew Jackson
Salmon Chase	1864 - 1873	Abraham Lincoln
Morrison Waite	1874 - 1888	U. S. Grant
Melville Fuller	1888 - 1910	Grover Cleveland
Edward White	1910 - 1921	William Taft
William Taft	1921 - 1930	Warren Harding
Charles Hughes	1930 - 1941	Hurbert Hoover
Harlan Stone	1941 - 1946	F. D. Roosevelt
Fred Vinson	1946 - 1953	Harry Truman
Earl Warren	1953 - 1969	Dwight Eisenhower
Warren Burger	1969 -	Richard Nixon

TABLE II

AVERAGE NUMBER OF OPINIONS PER CHIEF JUSTICE PER TERM

Name	Majority Opinions	Concurring	Concurring No Opinion	Dissenting	Dissenting No Opinion
John Jay	.20	-	-	-	-
John Rutledge	-	-	-	-	-
Oliver Ellsworth	2.00	-	-	-	-
John Marshall	14.91	-	-	.15	-
Roger Taney	9.29	.25	.11	.46	.61
Salmon Chase	16.75	.25	.13	1.00	3.75
Morrison Waite	62.29	.14	.36	1.71	2.00
Melville Fuller	35.71	.05	.38	1.52	4.81
Edward White	30.50	.20	.80	.50	4.40
William Taft	31.88	.13	-	.25	2.13
Charles Hughes	22.82	.18	.82	1.00	3.82
Harlan Stone	19.20	2.00	2.40	7.00	11.40
Fred Vinson	10.86	-	1.29	1.71	7.86
Earl Warren	10.31	.69	.63	2.94	.81
Warren Burger	13.25	7.25	5.25	8.75	4.75

Source:

Albert P. Blaustein and Roy M. Mersky, The First One Hundred Justices (Hamden , Connecticut: Archer Books, 1978) pp. 147-9.

Chief Justice Warren Earl Burger

In his speech designating Judge Warren E. Burger as the successor to retiring Chief Justice Warren, President Richard Nixon, said, "our Chief Justices have probably had more profound and lasting influence on their times and on the direction of the nation than most Presidents."[80] With this statement the President indicated his feelings about the importance of the position to which he was appointing this judge from the United States Court of Appeals for the District of Columbia.

The activism and support of human rights for which the Warren Court was known had drawn a great deal of criticism. Most notably, Richard Nixon was a critic of the Warren Court rulings, especially those that extended the rights of persons suspected of having committed a crime and the rulings that initiated the busing of public school students to achieve racial integration.[81] Following the Brown decision, President Dwight Eisenhower is reported to have said that appointing Chief Justice Warren was the "worst damnfool mistake I ever made."[82] Senator Sam J. Ervin, Democrat from North Carolina and a constitutional scholar, accused the Warren Court of

---

[80]Charles Moritz, ed., Current Biography, (New York: Wilson Company, 1969), p. 61.

[81]Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[82]The Supreme Court: Justice and the Law, p. 8.

revising the Constitution while professing to interpret it.[83] An "impeach Earl Warren" movement developed but never resulted in impeachment. This situation had a great impact upon President Nixon as he began the process of selecting a man to replace the person that he felt had been influential in Court rulings which were contrary to his philosophical position.

Warren Earl Burger, who was of Swiss-German Protestant background, was born on September 17, 1907, in St. Paul, Minnesota, the fourth of seven children. His father was a railroad cargo inspector who also worked as a traveling salesman. At the age of nine Warren Burger began delivering newspapers to help with the family finances, and he acquired a taste for the rags-to-riches stories of Horatio Alger. At John A. Johnson High School in St. Paul, the future Chief Justice participated in athletics and student government, and he was a good, but not outstanding, student. Burger declined a scholarship to Princeton University because the stipend was too small. Instead, Burger took extension courses at the University of Minnesota from 1925-1927 and then entered St. Paul College of Law, graduating third in his class in 1931. While attending law school, he earned his living as a salesman with the Mutual Life Insurance Company.[84]

---

[83]Ibid.

[84]Moritz, ed., Current Biography, p. 62.

Following his admission to the Minnesota bar in 1931, the future Chief Justice joined the firm of Boyesen, Otis, and Faricy as an associate. In 1935 he became a partner in the firm of Faricy, Burger, Moore, and Costello and was a capable lawyer until 1953. He also served as a member of the faculty at St. Paul College of Law, his alma mater, from 1931 to 1953.[85]

> His interest in the postwar civil rights struggle led to his appointment to the Governor's Interracial Commission, of which he was a member from 1948 to 1953. As the first president of the St. Paul Council on Human Relations, he became responsible for hiring experts to improve relations between the police and the city's Negro and Mexican-American minorities.[86]

The future Chief Justice was a lifelong Republican, and helped to organize the Young Republicans in Minnesota in 1934. In 1948 he was floor manager for Harold Stassen's campaign for the Presidential nomination at the Republican National Convention to Philadelphia. In 1952 he was again manager of Stassen's campaign, but threw his support to Dwight D. Eisehnower thus helping to ensure the general's nomination on the first ballot.[87]

In 1953 President Eisenhower appointed Warren Burger assistant attorney general in charge of the Civil Division of the Department of Justice. While serving on the Attorney General's staff, he agreed to handle a controversial case for

---

[85]Ibid.

[86]Ibid.

[87]Ibid.

the government. John Peters was a Yale professor who had been dismissed from his position as a part-time consultant to the United States Public Health Service. He appealed the dismissal to the Supreme Court, contending that he had been denied the right to face his accuser. The case fell to the future Chief Justice when Simon Sobeloff, the Solicitor General, refused to handle the case for the government because he felt Peters' constitutional rights had been violated. By handling the case, Assistant Attorney General Burger drew criticism from some liberals.[88]

In April of 1956 Assistant Attorney General Burger was sworn into the office of Judge of the United States Court of Appeals for the District of Columbia Circuit:

> Burger's confirmation was delayed for several months, because of unsubstantiated charges of prejudice made against him at the Senate Judiciary Committee hearings by three former employees of the Civil Division, whom he had dismissed for incompetence. He was sworn into office on April 13, 1956.
>
> During the thirteen years on the Court of Appeals, Burger became known as a conservative, especially in cases involving criminal justice, and his views in that area often clashed with those of his liberal colleagues on the court, and with opinions handed down by the Supreme Court.[89]

It was during his term on the Court of Appeals for the District of Columbia that Judge Burger established the

---

[88]Ibid., p. 63.

[89]Ibid.

reputation that attracted the interest of President Nixon. Judge Burger's philosophy was revealed in his speech at Ripon College in 1967.

> Governments exist chiefly to foster the rights and interests of their citizens - to protect their homes and property, and their persons and their lives. If a government fails in this basic duty, it is not redeemed by providing even the most perfect system for the protection of the rights of defendants in the criminal courts.[90]

Judge Burger was critical of the Supreme Court decisions in which the rights of persons accused of a crime were expanded.[91] In a dissenting opinion delivered in March of 1969, Judge Burger wrote:

> The seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, sub-rules, variations, and exceptions, which even the most sophisticated lawyers and judges are taxed to follow . . . . Guilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of articifial rules poorly conceived and often impossible of application.[92]

This attitude, as expressed in the Judge's speeches and opinions from the bench, seemed to match nicely with those of President Nixon. For this reason Judge Burger found himself being considered for the position of Chief Justice of the Supreme Court of the United States.

---

[90]James F. Simon, In His Own Image (New York: David McKay Company, 1973), p. 74.

[91]Moritz, p. 63.

[92]Ibid.

Yet, the future Chief Justice, in spite of his hard line on human rights in criminal matters, seemed to be an advocate of minority rights. In addition to his work back in St. Paul to end abusive treatment by city police of minority groups, he ruled in favor of minorities in cases before his bench. Most notable is a case which came before the Court of Appeals for the District of Columbia in which a Jackson, Mississippi, television station, WLBT, was charged with deliberate racial discrimination in its broadcasting policy. This came before his court twice and on each occasion Judge Burger ruled in favor of the plaintiff and against the government. This action was contrary to his usual tendency of siding with the government in cases which came before his court.

Judge Burger owed his conservative label to his rulings in criminal cases and to his adherence to the law and order theme in his lectures outside the courtroom.

> Warren's concern for the defendant, often at the expense of the government, branded the chief justice as a judicial liberal. On the other hand, Warren Burger's often articulated interest in society's rights, as opposed to the criminal suspect's, made him known as a judicial conservative.[93]

One of Judge Burger's dominant goals during the time that he served on the Court of Appeals was to get the United States criminal justice system back on track. This obsession continued when Judge Burger became Chief Justice Burger. To get

---

[93]Simon, p. 83 .

the criminal justice system back on track, he called for the courts to remember that the system exists for the purpose of protecting society from criminal behavior.[94] In order to effect the changes that would be necessary to accomplish this goal, Judge Burger recommended that the criminal justice system in the United States be modified to emulate as closely as possible the system being used in the Scandinavian countries.[95] This system spends very little time on the trial of criminals and a great deal of time and money on their rehabilitation. This goal was carried over into his work as Chief Justice. In speeches to the American Bar Association and in efforts to persuade Congress to establish a court of appeals beneath the Supreme Court, he continued this effort.

Following his appointment as Chief Justice of the Supreme Court of the United States on June 24, 1969, the new Chief Justice found a mixed reception from the media. The conservative U.S. News and World Report ran an article entitled, "Judge Burger: Champion of Law and Order," while the more liberal publication Nation stated, "We pray he will not be as inadequate as his record seems to predict."[96] Time magazine quoted civil rights lawyer Anthony Amsterdam in calling the new Chief Justice "a fine judge" and an "enlightened law-and-order man."[97]

---

[94]Ibid.

[95]Ibid., p. 84.

[96]Ibid., p. 92.

[97]Moritz, p. 63.

Shortly after being confirmed, the new Chief Justice served notice that his fight for administrative reform of the judicial system would be continued. Chief Justice Warren had shown very little interest in the administration of the federal judiciary.[98] Former Chief Justice Taft, however, had dedicated himself to the reform of an antiquated court system and is considered by some to be one of the greatest of Chief Justices, not because of his opinions, but because of the influence he had in getting the Judges' Bill of 1925 enacted.[99] Chief Justice Burger wasted little time in letting it be known that he, like Taft, would place a very high priority on the reform of the judiciary. In August of 1969 in an address to the American Bar Association, the new Chief Justice called for a sweeping program for reform of Court administration, legal education, and the correctional system.

The December 14, 1970, issue of U.S. News and World Report printed an interview with Chief Justice Burger which dealt with his philosophy and ideas as Chief Justice. When asked if the new judicial system that he was proposing might limit a person's right to appeal, he responded, "I suppose, when you talk about finality, that must carry with it a limit somewhere -

---

[98] Simon, pp. 92-93.

[99] Ibid., p. 93.

that there is a point at which proceedings of all kinds are terminated."[100] He carried this idea further, saying:

> There is a curious paradox relating back to your opening question: In spite of what seems to be a lessening of esteem for the courts, there is an attitude that the courts should resolve all problems. But that is not realistic: courts can serve only a limited function, and it should not be broadened any more than is absolutely necessary.[101]

The Chief Justice had supported efforts to form a new court which would be a court of appeals between the Supreme Court and the courts of appeals. This court of appeals would deny some review, decide some cases itself, and send on others to the Court.[102] Such a plan was rejected by Chief Justice Warren who felt that the Supreme Court was not being overworked. Yet the record shows the number of cases appealed to and reviewed by the Court has increased at a rapid pace during the last twenty years.

Chief Justice Burger's attitude that the courts should not be used to remedy every social evil has had an effect on the human rights movement in the schools.

---

[100]"Interview with Chief Justice Warren E. Burger," U.S. News and World Report, December 14, 1970, p. 35.

[101]Ibid.

[102]The Supreme Court: Justice and the Law, p. 32.

> Chief Justice Burger spoke out often to express his concern about the growing workload of federal courts. These two elements coalesced in a long line of rulings that dismissed the arguments of prisoners, environmentalists, taxpayers, and consumers by stating simply that they did not have a federal case.[103]

This attitude along with the idea that the National Court of Appeals should be established has led some to the conclusion that the civil liberties cause will no longer be heard by the Court.

> Besides the workload criticism, the Freund Committee's proposal would create the problem of the National Court of Appeals depriving many litigants of recourse to the Supreme Court as the ultimate arbiter of the Constitution. Symbolically, this could cause harm to the role of the Supreme Court while concretely depriving the Court of control over its docket. Former Justice Arthur Goldberg has expressed doubt that many of the key civil liberties cases like Brown v. Board of Education would have reached the Supreme Court under the proposed National Court of Appeals.[104]

As noted earlier, education was not mentioned in the federal Constitution and was therefore considered to be, as the Tenth Amendment provides, among those rights reserved by the states and the individual citizens. With education being an area which has no inherent federal question, it seems reasonable to assume that the Chief Justice's efforts to restrict the Court's role on social issues and to establish a national court of appeals might have the effect of making the Supreme

---

[103]William R. Thomas, The Burger Court and Civil Liberties (Brunswick, Ohio: King's Court Communication, Inc., 1976), p. 25.

[104]Ibid., p. 26.

Court much less of a factor in public education than it has become since the Brown decision.

The decisions of the Supreme Court under the leadership of Chief Justice Burger have been neither as conservative as some liberals had feared nor as liberal as those same liberals had come to expect from the Court under Chief Justice Warren.[105] The new Chief Justice initially joined a Court composed of holdovers from the Warren Court. However, by 1972 the Court had changed as a result of President Nixon's appointment of Justice Harry A. Blackmun in 1970, and Justices Lewis F. Powell, Jr. and William H. Rehnquist in 1972. All three of these men appeared to meet the strict constructionist and law-and-order criteria that the President had set when he appointed Chief Justice Burger. This situation left Chief Justice Burger in the position of leading a Court which included himself and three others who seemingly had a common philosophical position.

Although during his first term Chief Justice Burger led a Court dominated by the holdovers from the Warren Court, many Court observers felt the Court began to vote more conservatively than it had during the Warren Court tenure.[106] One Court observer commented, "Under Chief Justice Burger, the Supreme Court is more subdued in the tone of its rulings. It

---

[105]Robert J. Steamer, "Contemporary Supreme Court Directions in Civil Liberties," The Western Political Quarterly, 92:440-441, Fall, 1977.

[106]"The Burger Court - A New Tone," U.S. News and World Report, May 25, 1970, p. 36.

isn't making as many people angry with what it is saying and deciding."[107]

In the area of desegregation, the Chief Justice came out for a more flexible pace in the desegregation of public schools. Though he voted with the majority in a Court order which declared that Mississippi should desegregate its public schools immediately, he later argued that the Court should have heard arguments in the case before reversing the appeals court.[108]

This action by the new Chief Justice may have been an effort to establish rapport and to convince the associate justices that he was open to compromise. In view of the criteria established by President Nixon in selecting this strict constructionist, it was surprising that he voted in favor of this decision.[109]

During his first year in office, the new Chief Justice served notice that things were going to be different now that he was leading the Court. He started by changing the Court physically. He redecorated the conference room, moved his office into the large conference room where the justices discuss the cases, put new flowers in the private dining room, and replaced the justices' old water tumblers with silver

---

[107]Ibid.

[108]Ibid.

[109]Simon, p. 128.

goblets.[110] Many viewed this as an effort to fill the Court's social leadership role.[111]

It was evident in this first year that there was a deep philosophical difference between Chief Justice Warren and Chief Justice Burger.

> Chief Justice Warren's questions almost invariably focused on the fairness of the law; they were often instinctive probings into the moral position of government authorities. The technical queries Warren happily left to his colleagues. Chief Justice Burger spent almost no time on such moral questions. When he strayed from the technicalities of a case, it was usually to question the impact of the appellant's asserted right on the entire system. Concern for the underdog tended to be lost in Burger's judicial overview. There was none of the outrage, the righteous indignation that so often crept into an exchange between Chief Justice Warren and an attorney.[112]

In his speeches and opinions the new Chief Justice continually voiced his displeasure with the "activist" trend of the Court. He accused his colleagues of being unreasonable and irrational in the analysis of cases.[113] This attitude seemed to push the new Chief Justice into a more and more isolated position. Only one-third of the full-opinion cases were unanimous during Chief Justice Burger's first term.[114]

---

[110]Ibid., p. 133.

[111]Ibid.

[112]Ibid., p. 134.

[113]Ibid.

[114]Schubert,p. 165.

This is in contrast with the Warren Court's record of unanimous cases. During this time the Chief Justice dissented twenty-seven times. This failure to achieve unanimity seems to indicate that he lacked interest in massing the Court behind a single opinion.[115]

Being the first Chief Justice to be appointed from a lower court, it seems that Chief Justice Burger was less in awe of the High Court. He had won his appointment by his refusal to give in to the views of his more liberal judicial colleagues, and he seemed determined to continue this practice in spite of the lack of support from his colleagues.[116] Chief Justice Burger seemed to be willing to split the Court if that was necessary to get the Court back on the "proper course."[117]

During his first term the new Chief Justice had served notice that he was not going to agree with the Warren Court holdovers when their decisions failed to meet his strict constructionist philosophy. Yet the new Chief Justice did not have to contend with this block of associates for very long. With the appointment of Associate Justices Harry A. Blackmun in 1970, and Lewis F. Powell, Jr., and William H. Rehnquist in 1972, Chief Justice Burger had the basis of a conservative

---

[115]Ibid.

[116]Simon, p. 140

[117]Ibid.

bloc with which to work. These appointments changed the Burger Court, and it was expected that, along with the appointment of John P. Stevens in 1975 by President Gerald Ford, the new Burger Court would be a stark contrast to the Warren Court.

As Charles Warren noted, however, in 1926, "Nothing is more striking in the history of the Court than the manner in which the hopes of those who expect a judge to follow the political views of the president appointing him have been disappointed."[118] This certainly seems to be the case with Chief Justice Burger and his associates who were appointed by President Nixon.

The Burger Court has failed to maintain a conservative position under Chief Justice Burger even with the addition of four associates who seem to meet the "strict constructionist" criteria established by President Nixon. In the area of desegregation, an area that was of great concern to President Nixon, the Burger Court has quietly held the lines established by the Warren Court.[119] In a series of cases, the Court affirmed the Brown decision and advocated the use of busing to achieve desegregation. The Burger Court also expanded its interest in these cases. The Chief Justice and his Nixon appointed associates voted with the majority in some cases and dissented in others. They were not able to form a

---

[118]Hoyt Gimlin, ed., Editorial Research Reports, (Washington, D.C.: Congressional Quarterly, Inc., 1978), 2:683.

[119]Simon, p. 155.

consistently unified position under the leadership of their conservative Chief Justice.

The statistics on the Burger Court during its first nine years reveal a Court that seems to have no philosophical nucleus. This has resulted in a series of decisions which are confusing to many Court observers. Following the 1974 term, one observer noted that the Court:

> . . . tries to make potentially important cases stand for as little as possible; a Court whose theme song is the refrain "we only decide," a Court that loves to decide issues "in these particular circumstances," that performs contortions to avoid announcing new principles even when new principles are inescapably needed, and that pretends not to be announcing them even while it is announcing them . . . .[120]

Professor A. E. Dick Howard, University of Virginia Law School, by pointing to the Court's idiosyncratic nature in rulings, has suggested that the Court suffers from a "split personality." The Court has supported desegregation of schools while refusing to allow busing beyond city limits, and upheld a woman's right to abortion while ruling that women cannot receive disabilities benefits while pregnant.[121]

This "split personality" seems to be a result of strong ideological differences between the justices and Chief Justice Burger's lack of desire, or ability, to lead the Court toward

---

[120]Wasby, p. 9.

[121]"A Rudderless Court," Newsweek, July 23, 1979, p. 67.

a unified position. In the 1970-71 term one hundred twenty-five dissents were recorded, which may be an all-time record.[122] During the 1972 term the Nixon bloc of Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist voted together in one hundred of the one hundred seventy-seven cases that were heard by the full court.[123] These four were often joined by Justice White or Justice Stewart to form a majority. During this term of the Court, the conservative bloc seemed to be operating under the leadership of the Chief Justice, while the moderates, Justices White and Stewart, voted with either the conservatives or the liberal bloc which was composed of Justices Brennan, Douglas, and Marshall. This term seems to have held potential for the formation of a dominant conservative voting bloc under the leadership of the Chief Justice. In the 1973 term the domination of the conservatives continued while the minority liberal bloc relied on the writing of opinions to reduce the impact of the changes made by the conservatives.[124] The 1974 term was dominated by the illness of Justice Douglas. This term saw the Court split into three groups. The conservative voting bloc was composed of Chief Justice Burger, Justice

---

[122]Paul C. Bartholomew, "The Supreme Court of the United States, 1970-1971," Western Political Quarterly, 25:176, December, 1972.

[123]Paul C. Bartholomew, "The Supreme Court of the United States, 1972-1973," The Western Political Quarterly, 27:164, March, 1974.

[124]Roger B. Handberg, "The 1974 Term of the United States Supreme Court," Western Political Quarterly, 29:298, June, 1976.

Blackmun, and Justice Rehnquist. The moderates were Justices Stewart, White, and Powell. The liberals were Justices Douglas, Brennan, and Marshall.[125] This term produced a slight erosion in the conservative bloc with Justice Powell moving to the moderate or swing vote category. In the 1975 term Justice Douglas was replaced by John Paul Stevens. This left the liberal bloc at two, Justices Brennan and Marshall. During this term the Nixon-appointed justices voted together a majority of the time.

> The 1975 term showed greater stability in the Court and greater assuredness from the conservatives. The most common pattern in non-unamious cases remained the four Nixon appointees plus White and Stewart; the next most common involved those six justices plus Stevens, the Court's newest member. With Douglas gone, the most frequent dissenting pattern was the liberal pair of Brennan and Marshall, who voted alone as a pair 22 times; the two were joined five times each by White and Stevens. With almost 90 non-unamious cases, the "Nixon Four" was together in 50 cases, never in dissent (although they were in the minority on one order to allow certain persons to proceed in forma pauperis in the Court.) Three of the four Nixon appointees were together 79 times, only seven in dissent. High rates of agreement continued to be registered by the "Minnesota Twins" and by Burger and Rehnquist. White and Stewart also voted together frequently, but as might be expected of centrist judges, less frequently than the just noted conservative pairs or the liberal Brennan-Marshall pairing. Showing his mid-Court position, new Justice Stevens paired at roughly the same rates with Burger, Stewart, White, and Brennan.[126]

---

[125]Bruce E. Fein, Significant Decisions of the Supreme Court 1974-75 Term (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1976), p. 4.

[126]Wasby, p. 171.

The solidarity of the Nixon bloc underwent further erosion in the 1977 term . Following their record of voting together seventy percent of the time in their first full term together, seventy-five percent of the time in the 1973 term, and sixty-seven percent in the 1976 term, the Nixon bloc voted together in only thirty-six percent of the cases in the 1977 term.[127] This growing independence on the part of the Nixon-appointed justices was further revealed by the fact that Chief Justice Burger and Justice Blackmun, referred to as the "Minnesota Twins" early in their careers, split more than any other Nixon appointees in the 1977 term.[128] These splits revealed a decline in the influence of the Chief Justice over his fellow Nixon-appointed colleagues. In 1977-1978 Justice Blackmun voted contrary to the Chief Justice on 40 of 133 decisions, Justice Powell on 35, and Justice Rehnquist on 26—[129] twice as often as they had broken with the Chief Justice in the preceding two terms.[130]

Following the appointment of the Chief Justice in 1969, Presidents Nixon and Ford appointed four associate justices who seemed to meet the criteria of being strict constructionists in their judicial philosophies. Yet the 1977 term of the Supreme Court resulted in the splintering of what had looked to be the

---

[127] Editorial Research Reports, p. 688.

[128] Ibid.

[129] Ibid.

[130] Ibid.

relatively solid bloc of Nixon and Ford appointees. In explaining the reasons the Court did not establish a conservative philosophy under the strict constructionist Chief Justice, many Court observers have pointed to a lack of leadership on the part of Chief Justice Burger.

It is reported that some of the associate justices do not respect Chief Justice Burger's intelligence.[131] Scott Powe, professor of law at the University of Texas and former clerk for Justice Douglas, stated that the Chief Justice is not the intellectual equal of his associates on the Court.[132] A.E. Dick Howard, law professor at the University of Virginia, feels that the Chief Justice does not try to produce deeply philosophical opinions.[133] Others feel, however, that he does not have to be an intellectual. Leon Jaworski, former Special Watergate Prosecutor, feels that general judicial experience is preferable to intellect in a Chief Justice.[134] A former clerk for the Chief Justice, Stewart Jay, sees no lack of scholarship in Chief Justice Burger's opinions.[135]

Chief Justice Burger is also accused of being pompous and domineering. Critics mocked his efforts to redecorate the

---

[131]"Inside the Burger Court," Newsweek June 13, 1977 , p. 101.

[132]"The Chief Justice," Sixty Minutes Transcript March 25, 1979 , p. 15.

[133]"Inside the Burger Court," p. 101.

[134]"The Chief Justice," p. 15.

[135]Ibid.

Supreme Court building and the gold chain he uses to fasten his robes.[136] He has been accused of trying to bully the associate justices at the weekly conference and of playing favorites with his power to assign opinions.[137] Nina Totenberg, for the past ten years correspondent at the Supreme Court, notes that the Chief Justice is a man who came from very poor means. She feels that he is constantly overcompensating for the lack of stature in his background. Totenberg sees the Chief Justice as a man with an inferiority complex who is trying to compensate by making a fetish out of his taste for good wine and painting.[138] Mark Tushnet, former clerk for Justice Marshall, thinks Chief Justice Burger is not a nice person.[139] He says:

> He's got a pomposity about him that's very hard to penetrate. The best example that I know is a story his law clerks tell about their first meeting with him. They were sitting around talking when one of the messengers who works at the Court opened the door, came in, and said in a tone of voice that obviously implied they were all supposed to stand up, "Gentlemen, the Chief Justice of the United States."[140]

Some feel that his efforts to bring about national judicial reform have distracted him from his constitutional duties.[141]

---

[136]"Inside the Burger Court," p. 102.

[137]Ibid., p. 101.

[138]"The Chief Justice," p. 13.

[139]Ibid.

[140]Ibid.

[141]Ibid., p. 14.

Chief Justice Burger seems to feel that he is destined to reform the judicial system in the manner that Chief Justice Taft did in the 1920's. When criticized for spending time talking to the bar or Congress about judicial reform, he said, "How many opinions of Charles Hughes do people remember?"[142]

Chief Justice Burger's attempts to limit the work load of the Court have brought criticism. Justices White and Blackmun charged in December of 1978 that the Court had passed up so many seemingly important cases that they were no longer providing "effective monitoring of the nation's courts."[143]

> Access is a more sophisticated legal concept than criminal rights, but its impact can eventually touch more people. By establishing procedural roadblocks, such as "standing" and "comity," the Burger Court has simply thrown out of the Federal system a succession of public interest and civil rights plaintiffs.[144]

Chief Justice Burger seems to be a man who is aware of the opportunity the Chief Justice has for providing the Court with social leadership. In addition to his efforts to redecorate the Court, he attempted to ease the strain at heated conferences by calling coffee breaks. His concern for the ailing Justice Douglas was noted by many Court observers.[145] Yet some of his actions are misunderstood because of his

---

[142]"Inside the Burger Court," p. 101.

[143]Ibid.

[144]Ibid., p. 102.

[145]"The Chief Justice," p. 15.

unwillingness to share a personal confidence. A prime example of this can be found in criticism he received for buying a gold carpet to put behind the Justices' bench. Many of his critics accused him of imperiousness when in reality he had purchased the runner for thirty dollars in Georgetown while browsing in an antique shop, and he placed it on the bare floor because he feared Justice Black, who was infirm, and Justice Harlan, who was nearly blind, might fall.[146]

Chief Justice Burger is the first among equals in the collegial body which is the Supreme Court. He came to the Court with a mission. He had dedicated himself, as Professor Howard said, to "developing a present view of the proper place of the courts in dealing with social issues."[147] This "proper place" is one in which the courts are not asked to resolve every social conflict that arises and one which sees to it that criminals do not go free.

The position of Chief Justice carries the potential for leadership in the Court. This leadership potential has been classified into two categories, social and task, either or both of which the Chief Justice or another justice may fill. Reports by Court observers and the justices themsevles indicate that Chief Justice Burger has attempted, in his own way, to provide both social and task leadership. Most agree, however, that Chief Justice Burger has failed to provide either

---

[146]"Inside the Burger Court," p. 102.

[147]Ibid.

social or task leadership. The Court is composed of a majority appointed after the Chief Justice was, all of whom seemed to meet the strict constructionist criteria established for the Chief Justice. Yet, following a period in the mid-1970's when this bloc seemed to vote together under the Chief Justice's leadership, the Court has splintered into three factions. Two Warren Court holdovers, Justice Brennan and Justice Marshall, are considered to be the liberal bloc. The conservatives which once numbered four, now consist of Chief Justice Burger and Justice Rehnquist. The remaining five justices make up the "floating middle." This "floating middle" moves between the ideological poles and has caused many Court observers to call the Burger Court unpredictable.[148]

> . . . the Court's ability to chart a clear course in the cases it can review appears to many lawyers and legal scholars to be declining sharply. Hampered by the lack of a clear-cut majority philosophy, it frequently seems to be drifting one way, then the other.[149]

In comparison with former Chief Justice Warren, Chief Justice Burger seems to lack the leadership skills to unify the Court:

> Burger has been unable to lead the Court as some authorities believe Warren did. Warren was not his Court's leading intellectual - nor is Burger. But Burger seems to lack the skills to become a "strong unifying force," says a lawyer who knows both men.[150]

---

[148]"A Rudderless Court," p. 67.

[149]Ibid.

[150]Ibid.

It would seem that Chief Justice Burger has failed in his efforts to provide social leadership as is evidenced by the observation of Yale Law School Professor Geoffrey Hazard who sees the internal squabbling on the Court as a symptom of a "low degree of trust."[151] The lack of trust and squabbling, according to some Court observers, is a result of the lack of leadership being provided by the Chief Justice:

> During 10 years as Chief Justice, Burger had prodded his colleagues toward a policy of judicial restraint, favoring narrow readings of laws and the Constitution and deference to Congress and state legislatures. He prevailed for a time but has had growing trouble lining up support in the last few years. His critics see this as a failure of leadership. "Earl Warren had to deal with a diverse group, some with strongly held positions, but he managed to pull them together on the tough ones," says one Washington lawyer. "Burger can't seem to do that."[152]

Yet, the Chief Justice is defended by others who point to the increased complexity of cases in today's society. Professor Howard feels that the issues are more divisive and troublesome than they have been in the past.[153] He points to the difficulties in carrying out the Brown decision. A clerk for the Court during the 1977 term feels that the Court is composed of strong-willed people who do not bend. He states,

---

[151]David F. Pike, "Supreme Court Trials and Tribulation," U.S. News and World Report, March 26, 1979, p. 34.

[152]Ibid.

[153]Ibid.

"I don't know of any person, no matter how talented, who could bring that bunch together."[154]

The Decision-Making Process of the Court

The judicial system in the United States is more complex and confusing than systems found in almost any other country.[155] There are two separate court systems in existence simultaneously. The state court system is composed of the fifty separate state systems. Most of these state systems were set up using models and principles that originated in the eighteenth century.[156] The Federal court system has emerged following a long period of legislative adjustment. The Constitution makes provision for a federal court system saying, ". . . judicial power of the United States, shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish."[157]

The state court systems usually consist of lower courts and a state supreme court. Initially, these courts and the original federal courts were localistic as a result of the communication and transportation problems encountered in the

---

[154]Ibid.

[155]Murphy and Pritchett, p. 33.

[156]Ibid.

[157]United States Const., Art. I, Sec. 1.

TABLE III

SUPREME COURT MEMBERSHIP, 1969 - 1978

THE BURGER COURT

Name	Date of Birth	Nominated By	Date Confirmed	Resigned
Hugo L. Black	2/27/1886	Roosevelt	8/17/37	9/17/71
William O. Douglas	10/16/1898	Roosevelt	4/04/39	11/12/75
John M. Harlan	5/20/1899	Eisenhower	3/16/55	9/23/71
William J. Brennan, Jr.	4/25/1906	Eisenhower	3/19/57	
Potter Stewart	1/23/1915	Eisenhower	5/05/59	
Byron R. White	6/08/1917	Kennedy	4/11/62	
Thurgood Marshall	6/02/1908	Johnson	8/30/67	
Warren E. Burger	9/17/1907	Nixon	6/09/69	
Harry A. Blackmun, Jr.	11/12/1908	Nixon	5/12/70	
Lewis F. Powell, Jr.	9/19/1907	Nixon	12/06/71	
William W. Rehnquist	10/01/1924	Nixon	12/10/71	
John Paul Stevens	4/20/1920	Ford	12/17/75	

early years of the nation's history. As in the federal system, the state courts usually follow a course of appeal which takes a case from the lower state courts to the state supreme court.

The federal court system is composed of district courts, courts of appeals, specialized courts, and the Supreme Court. The district courts, one or more of which is located in every state, are the trial courts of the federal system. When a case falls within the jurisdictional bounds of the federal court system, it is first heard at the district court level unless it is heard by a specialized court.

The jurisdiction of the federal courts is defined by Article III of the Constitution. This Article provides that the federal courts will hear: (1) all cases in law and equity arising under the Constitution, (2)all cases in law and equity arising under the laws of the United States, (3) all cases in law and equity arising under treaties made under the authority of the United States, (4) all cases of admiralty and maritime jurisdiction, (5) cases in which the United States is a party, (6) cases between two or more states, (7) cases between a state and citizens of another state, (8) cases involving disputes between citizens of different states, (9) cases between states and its citizens, and foreign states or citizens, and (10) cases involving ambassadors.[158]

---

[158]Murphy and Pritchett, pp. 38-39.

Until abolished by statute in 1911, federal circuit courts were trial courts for some classes of federal cases.[159] In 1891 Congress created the courts of appeals which were known as circuit courts of appeals until 1948.[160] The courts of appeals receive appeals from the decisions of the district courts. There are eleven courts of appeals in the United States. The country and its administrative zones and possessions abroad have been divided into ten districts. Each of these ten districts has a court of appeals which is led by one of the Supreme Court justices who has been assigned to the district to provide judicial leadership. The eleventh district is the District of Columbia, which has its own court of appeals. In addition to the Supreme Court justice assigned to the district court, each court has from three to nine district judges and, normally, three judges sit in deciding a case.[161] The purpose of the court of appeals is to relieve the Supreme Court of the obligation of hearing all cases which are appeals from the district courts.[162]

At the apex of the federal judicial hierachy is the United States Supreme Court. The Supreme Court is a product

---

[159]Ibid., p. 36.

[160]Ibid.

[161]Ibid.

[162]Edward C. Bolmeier, Landmark Supreme Court Decisions on Public School Issues (Charlottesville, Virginia: The Michie Company, 1973), p. 2.

of the Constitution.[163] It is essentially an appellate court. The Constitution does, however, provide two categories of cases which the Court can hear as original jurisdiction. These cases are those in which a state is a party and those affecting ambassadors, public ministers, and consuls.

> Except in the limited classes of cases where there is an appeal to the Supreme Court as of right, review is sought by filing with the Court a petition for writ of certiorari from a state supreme court or federal court of appeals.[164]

These petitions are reviewed by all the justices and are granted on the affirmative vote of four justices. The majority of cases involving educational issues are related to the "human rights" provisions of the Constitution.[165] The states, however, were not originally restrained by the "human rights" provisions of the Constitution, as it applied only to federal judicial and legislative action. It was not until the Fourteenth Amendment was adopted in 1868 that the federal courts and Congress were able to challenge state action in the area of human rights.[166]

---

[163]United States Const., Art I, Sec. 1.

[164]Murphy and Pritchett, p. 31.

[165]Bolmeier, p. 2

[166]Bolmeier, p. 6.

> Article XIV, Section 1. All persons born or naturalized in these United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[167]

Any case, whether it involves educational issues or not, that is appealed to the Supreme Court must be based on charges that rights protected by the Constitution have been violated. A case appealed from a state supreme court may not be accepted by the Supreme Court of the United States because it lacks a substantial federal question.[168]

> The nature of complaints in educational matters has spanned the following alternatives:
> 1. Suit to compel action
>   a. Reinstatement of teachers or students;
>   b. Declaration of state law unconstitutional;
>   c. Declaration of local law unconstitutional.
> 2. Actions in equity
>   a. Reimbursement of court costs;
>   b. Punitive damages;
>   c. Specific performance.
> 3. Suits to enjoin action
>   a. Application of desegregation plan;
>   b. Allocation of funds to non-public schools;
>   c. Application of uniform dress codes.[169]

---

[167]United States Const., Amend. XIV, Sec. 1.

[168]Murphy and Pritchett, p. 38.

[169]George R. Deakin, "The Burger Court and the Public Schools" (Ed.D. dissertation, University of North Carolina - Greensboro, 1978), pp. 9-10.

These complaints follow a course which begins in a lower federal or state court, and by virtue of the appeals process, are argued before the Supreme Court.

The Supreme Court consists of nine men who serve life terms as Justices. The Justices who leave office only because of retirement or, as Section 1 of Article III of the Constitution specifies, "The absence of good behavior," are the focal points for all discussions on the Court and its rulings. By casting their votes the Justices make the decisions that have had such a devastating effect on public education. The values and attitudes of the Justices are important in the process which results in a Supreme Court ruling.

> No matter what pressures are placed upon the Court from outside political forces, be they narrow group interests or broader societal concerns, judicial policy making ultimately involves the resolution of these conflicting interests by nine justices . . . . once the hearing is over, the Court retires to conference where the internal dynamics of judicial decision making begin.[170]

Supreme Court cases are drawn from two major sources. The Court has original jurisdiction in some cases, and others may be brought before the Court on appeal from lower courts. The cases which come to the Court for review as original jurisdiction are placed on the Orginal Docket. The Court usually receives ten to twenty such cases each term.[171] The

---

[170]Thomas, pp. 35-36.

[171]David Rohde and Harold Spaeth, Supreme Court Decision Making (San Francisco: W. H. Freeman Company, 1976), p. 59.

Court receives the majority of its cases as appeals from lower courts. These cases may be brought before the Court on a writ of appeal or on a writ for certiorari.

> In 1925 Chief Justice William Howard Taft achieved a major administrative reform for the Supreme Court, the passage of a judiciary act containing the discretionary writ of certiorari. Since Congress controls the jurisdiction of the federal courts, it was necessary for Taft to lobby Congress for the passage of the Judiciary Act of 1925. This writ became the primary tool by which the Court could pick and choose its cases. It was also a clearcut recognition of the policy making nature of the Court. Although the technical right of appeal to the Court still exists, as a practical matter appeal and certiorari are treated in the same manner.[172]

All writs of appeal are placed on the Appellate Docket. Petitions for certiorari come in two forms and may be placed on either the Appellate or the Miscellaneous Docket. Petitions filed in forma pauperis (in the manner of pauper) are placed on the Miscellaneous Docket. These petitions are usually requests for review filed by indigent prison inmates. Petitions for certiorari filed by lawyers in accord with the strict format requirements of the Court are placed on the Appellate Docket.[173]

During the periodic conferences in which the justices discuss cases and other Court matters, the requests for decision are considered. The Chief Justice is able to exercise a great deal of influence in this process.

---

[172]Thomas, p. 24.

> In the process by which the Court decides whether or not to grant certiorari, the Chief Justice plays a particularly important role because, assisted by his law clerks, he carries out the initial sifting of the certiorari petitions and also makes the conference presentation of most cases. All members of the Court now get copies of the papers on all the petitions, but the Chief Justice prepares a "discuss list." Cases not on that list are not discussed unless another justice specifically requests it; if such a case is an "unpaid" one, the requesting justice makes the conference presentation about it. Cases not on the "discuss list" and not added to it are automatically denied review. Once the Chief Justice has sorted out and "special listed" cases, review is granted to as many as one-third of the cases remaining.[174]

Even when the Court decides to consider the merits of a case this does not mean it will necessarily be given a full-scale consideration. Some cases are so clear-cut that the Court decides to dispose of them summarily. During the 1975 term a number of cases were handled with summary dispositions including a case concerning the spanking of pupils in public schools.[175]

> Summary dispositions include a variety of brief orders and some per curiam (unsigned) rulings, although other per curiams are indistinguishable from full signed opinions in announcing substantive law except perhaps for their relative brevity. First used to indicate only cases where the substantive law was "indisputably clear," per curiam rulings came to cover orders in original jurisdiction cases, dismissals of appeals for want of a substantial federal question, and obviously moot cases. Now,

---

[174]Wasby, p. 147.

[175]Ibid.

> however, most cases not announcing new substantive law are placed with the Court's other orders (such as those granting and denying review), where they appear in such new categories as "affirmed on appeal" and "vacated and remanded on appeal."[176]

The importance of the Court's action in denying review often goes unnoticed by the public. Yet, this is an important function of the Court which has indicated Court policy in the past. In denying review the Court is in effect concurring with the lower court's decision.

> The Court's decisions denying review and its other summary actions are of generally low visibility. Moreover, the reasons underlying them are often intentionally well hidden. The sheer numbers of such decisions and the variety of factors potentially playing a part in any particular Court action further mask their meaning but do not decrease their extreme importance, which stems from the fact that such decisions account for the bulk of the Court's actions, far exceeding in number the Court's formal statements of policy. For the Court to make a decision not to hear a case may be as important - not only for the litigants but also for the (unaware) public - as for it to decide particular controversial questions explicitly. The patterns of the Court's actions, reinforced by statements by some of the justices, provide strong evidence that the Court's actions denying review have clear policy implications.
>
> The Supreme Court, as already noted, may pick and choose from among the cases people wish it to consider. The justices select for further consideration about half the appeals cases and a small and decreasing percentage of those brought up on certiorari. Although 17.5 percent of the certiorari cases were granted review in 1941, ten years later it was only somewhat more than 10 percent (11.1 percent), by 1961 it was 7.4 percent and by 1971 it had reached 5.8 percent with a continued subsequent slow decrease.[177]

---

[176]Ibid., p. 153.

[177]Ibid., p. 143.

The cases which are accepted for oral argument are heard from the beginning of the term, usually in October, through late March or early April. Cases accepted early in the term may not be heard until the next term. The Court hands down decisions in all argued cases, except those set for reargument, before the term ends.

The importance of oral argument in the disposition of cases is disputed by the justices and those who observe the Court. Justice John Harlan has stated that on "many occasions my judgment of a decision has turned on what happened."[178] Others feel the oral argument is little more than tradition which is tolerated while the briefs are what count in the conference.[179]

> Oral argument can provide judges with information to assist them in determining the Court's strategies, that is, how the Court should exercise its broader political role. Questions as to how many people might be affected by a decision and where the Court might be heading if it decided a case a certain way help elicit this type of information. As Leon Friedman has noted, "The Justices' purpose in oral argument is to force the lawyers to think out the political, social, and constitutional implications of their arguments." In so doing, "the Justices constantly seek to relate the immediate problem to analogous situations . . . and try to cut through the rhetoric of the lawyers to see the concrete result of any argument advanced."[180]

The conference is the key to all Supreme Court actions. It is here that the business of the Court is discussed and

---

[178]Ibid., p. 161.

[179]The Supreme Court: Views from Inside , p. 57.

[180]Wasby, p. 162.

that the decisions are made. The conference is not open to any person outside of the circle of nine justices.

> The judicial conference is held behind closed doors. It is so secret that the junior justice acts as a doorman when one of the justices wants something from a clerk on the outside. As such, little formal information is known regarding what takes place in conference. But what is known supports the view that the conference is where the justices develop and debate significant issues that trouble them. It is at this stage that the justices express differences of opinion and attempt to persuade their brethren to accept their point of view. Here individual justices with strongly held beliefs often resort to personal influence to persuade and bargain with justices who do not hold as strong an opinion on a subject. It is in conference that small group leadership plays an integral part, and the structure of the conference favors the Chief Justice in performing this role.[181]

Most scholars have rejected the "find the law" theory of judicial decision making and have accepted the fact that a judge's personal values affect his decisions.[182] Supreme Court decisions are affected by several factors. The setting for Court decision making, a conference where nine men exchange thoughts and make decisions by majority vote, makes the influence of the Chief Justice, potentially, one of the most important of these factors. When viewed in perspective the judicial decision-making process is a "choice between competing values by fallible, pragmatic, and at times nonrational men engaged in a highly complex process in a very human setting."[183] A process such as this can be influenced

---

[181]Thomas, pp. 35-36.

[182]Wasby, p. 164.

[183]Ibid.

by strong leadership. The Chief Justice may influence the Court through task or social leadership.[184] However, the degree to which a Chief Justice is able to influence the Court through his leadership depends upon his esteem, ability, and personality, and how he performs his many roles.[185]

The leadership of a Chief Justice is exercised in the conference, though he also presides in Court during argument. In the conference the Chief Justice is first to make his position known on a particular case. In so doing he has the opportunity to set the tenor for how the issues should be defined and resolved.[186] The Chief Justice who can present his views with force and clarity and can define them successfully can expect to be highly esteemed by his associates.[187] The Chief Justice will then be looked to when perplexing questions arise, and he will be in a position to give guidance. Holding the position of Chief Justice enables this member of the Court to control the conference by inviting suggestions and opinions, seeking compromise, and cutting off debate when it appears to be getting out of hand.[188]

> Court members frequently disagree in conference and argue their positions with enthusiasm, seeking to persuade their opponents and the undecided brethren.

---

[184]Murphy and Pritchett, p. 497.

[185]Ibid.

[186]Ibid., pp. 497-498.

[187]Ibid.

[188]Ibid.

> And always, when the discussions ends, the vote declares the victor. All of this gives rise to antagonism and tension, which, if allowed to get out of hand, would make intelligent, orderly decision of cases virtually impossible. However, the negative aspects of conference interaction are more or less counterbalanced by activity which relieves tension, shows solidarity, and makes for agreement. One Court member usually performs more such activity than the others. He invites opinions and suggestions. He attends to the emotional needs of his associates by affirming their value as individuals and as Court members, especially when their views are rejected by the majority. Ordinarily he is the best-liked member of the Court and emerges as its social leader. While the task leadership concentrates on the Court's decision, the social leader concentrates on keeping the Court socially cohesive. In terms of personality, he is apt to be warm, receptive, and responsive. Being liked by his associates is ordinarily quite important to him; he is also apt to dislike conflict.[189]

The Chief Justice can emerge as both task and social leader of the conference; however, this requires a rare combination of qualities which must be skillfully used.[190] The Chief Justice can extend his influence in the conference by virtue of his right to list cases which are considered for review, assign opinions to be written, and vote last.

As noted earlier, the Chief Justice prepares a "discuss list" which contains the cases, from all the cases that are filed with the Court, which he considers worthy of consideration. A Chief Justice who has established himself as task leader is in a position to have a great deal of influence over

---

[189]Ibid.

[190]Ibid.

the Court's docket. Though any justice can present a case, a strong Chief Justice, by virtue of leaving a case off the "discuss list," will limit its chances of receiving the required four votes for consideration.

> The Chief Justice's power to assign opinions is significant because his designation of the Court's spokesman may be instrumental in:
> 1. Determining the value of a decision as a precedent, for the grounds of a decision frequently depend upon the justice assigned the opinion.
> 2. Making a decision as acceptable as possible to the public.
> 3. Holding the Chief Justice's majority together when the conference vote is close.
> 4. Persuading dissenting associates to join in the Court's opinion.[191]

The Chief Justice is expected to assign the opinion in important cases to himself in order to lend the prestige of his office to the Court's decision. He may also use the opinion-assigning powers to affect the vote on certain decisions. Professor David J. Danelski suggests that the Chief Justice might use one of two rules to win dissenting justices to the majority opinion. This usage would strengthen the impact of the decision.

> Rule 1: Assign the case to the justice whose views are the closest to the dissenters on the ground that his opinion would take a middle approach upon which both majority and minority could agree.
>
> Rule 2: Where there are blocs on the Court and a bloc splits, assign the opinion to a majority

---

[191]Ibid., p. 503.

> member of the dissenters' bloc on the grounds that (a) he would take a middle approach upon which both majority and minority could agree and (b) the minority justices would be more likely to agree with him because of general mutuality of agreement.[192]

The job of unifying the Court falls to the Chief Justice. A unanimous decision, especially in important or controversial cases, carries much more weight than a split decision. It is important that the Chief Justice use his powers to obtain decisions which are as unified as possible.

The right to vote last affords the Chief Justice the opportunity to be the deciding factor in cases in which the associate justices split four and four. This power is somewhat limited in that a justice may change his vote later as the opinion is being written; however, the Chief Justice is in a position to know the votes of all the justices before he casts his vote. This affords him the opportunity to act as a unifying force and occasionally to be the deciding factor in a case.

---

[192]Ibid., p. 504.

CHAPTER III

RELIGION CASES

Introduction

The basic right of freedom of religion is granted by the First Amendment to the United States Constitution, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] It is significant to note that the First Amendment only enjoined the Federal Government in making laws that would affect individual religious beliefs and practices. Initially, the freedoms that the Amendments listed were not applicable to state action and only the states' judgment prevented abuse of these freedoms at the state level.

The passage of the Fourteenth Amendment placed restrictions on state action. This amendment did not, however, originally extend the protection of the Bill of Rights to individuals from state invasion.[2] Before 1940, the challenges to religious involvement in the public schools were made under the due process clause of the Fourteenth Amendment rather than under the religious clause of the First Amendment. After 1940,

---

[1]United States Const., Amend. I.

[2]H. C. Hudgins, The Warren Court and the Public Schools (Danville, Illinois: Interstate Printers and Publishers, 1970), p. 25.

state action in religious matters was restricted by the First Amendment. This change resulted from opinions of the Supreme Court that stated that the fundamental freedoms of the First Amendment were "incorporated in the due process clause of the Fourteenth Amendment as a protection against state action."[3] This new principle was first used in Cantwell v. Connecticut.[4]

The first challenge of government aid to parochial schools occurred early in the twentieth century. This initial challenge came in Quick Bear v. Leupp (1908) when Reuben Quick Bear and others sued to prevent tribal funds from being paid to the Bureau of Catholic Indian Missions for Indian instruction on the reservation.[5] In Quick Bear Chief Justice Melville W. Fuller stated that the Constitution precluded any law that would prohibit the free exercise of religion. Chief Justice Fuller stated:

> . . . we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof.[6]

This ruling allowed these Indians to use government funds which had been appropriated to them in treaties signed in 1868

---

[3]Ibid.

[4]Cantwell v. Connecticut, 310 U.S. 296 (1940).

[5]Quick Bear v. Leupp, 210 U.S. 50 (1908).

[6]Ibid.

and 1899 to pay for sectarian education in spite of an 1899 congressional act prohibiting the appropriation of funds for education in any sectarian school. This case has been cited to support legislation calling for the expenditure of public funds to support nonpublic schools.[7] Following the Quick Bear decision, the Court heard two cases which established that the state may not interfere with the constitutional rights of parents to guide the education of their children[8] and the legality of federal appropriations for any purpose.[9]

Pierce v. Society of Sisters (1925) tested the state of Oregon's right to pass a law requiring all children age eight to sixteen to attend a public school.[10] The law was challenged by the Society of Sisters, a parochial school, and Hill Military Academy, a private school. Citing the precedent established in Meyer v. Nebraska (1923), the Court found the state's action to be unconstitutional.[11] Speaking for the Court, Justice James C. McReynolds said:

> 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.[12]

---

[7]George R. Deakin, "The Burger Court and Public Education" (Ed.D. Dissertation, University of North Carolina at Greensboro, 1978), p. 22.

[8]Meyer v. Nebraska, 262 U.S. 390 (1923).

[9]Frothingham v. Mellon, 262 U.S. 447 (1923).

[10]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[11]Meyer v. Nebraska, 262 U.S. 390 (1923).

[12]Pierce v. Society of Sisters, p. 515.

This case is significant in that it established the right of parents to educate their children in private or parochial schools. As Professor E. C. Bolmeier notes: "In virtually all cases where legislation is in conflict with the due process of law clause of the Fourteenth Amendment, the legislation will be nullified."[13]

The next test for aid to parochial schools came in Cochran v. Louisiana (1930).[14] This case tested the constitutionality of a state statute which provided free textbooks from tax funds for children in nonpublic schools. In this case Chief Justice Charles E. Hughes wrote the unanimous opinion of the Court stating:

> One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. 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. True, these children attended some school, public or private, the latter, sectarian, or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries.[15]

---

[13]Edward C. Bolmeier, Landmark Supreme Court Decisions On Public School Issues (Charlottesville, Virginia: Michie Company, 1973), p. 26.

[14]Cochran v. Board, 281 U.S. 370 at 374 (1930).

[15]Ibid.

With this case the child benefit theory was created. As applied in this case, the theory states that state funds used directly or indirectly for a child's education is an aid to the child and not to the school. This theory has been criticized by those who think it can be used to unconstitutionally entangle state and church activities.[16]

The issue of requiring students to participate in a flag salute exercise was brought to the Court in Minersville v. Gobitis.[17] In this case the Jehovah's Witnesses, a religious group, challenged a requirement that students in the Minersville School District be commanded to salute the flag at the beginning of the school day. The challenge was based on the Witnesses' belief that saluting the flag was bowing before a graven image. This practice is forbidden by the Bible and contrary to the Witnesses' beliefs. Justice Felix Frankfurter spoke for an eight to one majority in holding the requirement to be valid, saying:

> . . . the process may be utilized so long as men's right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are fully respected.[18]

Justice Harlan F. Stone cast the lone dissenting vote in the Gobitis case and stated:

---

[16]Bolmeier, p. 31.

[17]Minersville School District v. Gobitis, 310 U.S. 586 (1940).

[18]Ibid.

> If these (Constitutional) guarantees are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.[19]

This dissent is significant because three years later, in West Virginia v. Barnette (1943), the Court reversed itself for the first time in a public school case.[20] The six-to-three decision against a West Virginia statute requiring flag saluting resulted from the change in attitude of three justices and the addition of a new justice who replaced Justice James F. Byrnes.[21] Since this decision, no case dealing with similar issues has been brought before the Court.[22] In giving the majority opinion, Justice Robert H. Jackson, said:

> 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 is the purpose of the First Amendment to our Constitution to reserve from all official control.[23]

In Everson v. Board of Education (1947) the child benefit theory was enlarged.[24] In a five-to-four decision the Court ruled that a local school district could reimburse parents of

---

[19]Ibid.

[20]West Virginia v. Barnette, 319 U.S. 624 (1943).

[21]Hudgins, p. 11.

[22]Deakin , p. 26.

[23]West Virginia v. Barnette, p. 631.

[24]Everson v. Board, 330 U.S. 1 (1947).

children attending parochial schools for certain school-related expenditures. This case is important in that it clearly speaks to parochial schools. Acting under a New Jersey statute, the Ewing Township School District allowed parents to be reimbursed for bus service to private schools. This practice was challenged in Everson on the grounds of deprivation of property without due process of the law under the Fourteenth Amendment and establishment of religion under the First Amendment. In speaking for the majority, Justice Hugo L. Black clarified the meaning of the First Amendment and found that Ewing Township had not violated the First Amendment. The four justices voting against Ewing Township action wrote dissenting opinions.

In McCollum v. Board (1948), the Court was asked to rule on the constitutionality of the teaching of religion in the public schools for the first time.[25] The case arose as a result of a Champaign, Illinois, school district plan for teaching religion in the public schools. The plan called for religious instruction to be given by the Council on Religious Education at no charge to the schools. Vashti McCollum contended that the practice violated the due process clause of the First Amendment. The Court, in an eight-to-one decision, declared the practice to be unconstitutional. Justice Hugo L. Black gave the Court's decision, saying:

---

[25]McCollum v. Board, 333 U.S. 203 at 205 (1948).

> The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.[26]

In evaluating the impact of the McCollum decision, Professor Bolmeier stated: "In this case, however, the Court was adamant in abiding strictly by the separation of church and state principle. It left no doubt in its upholding the wall of separation."[27]

The constitutionality of dismissed time for religious instruction was questioned in a case that arose four years later. In Zorach v. Clauson (1952) a challenge was made to a New York City plan under which students were dismissed to go to religious centers for sectarian instruction.[28] The Court upheld the practice by a six-to-three vote. Justice William O. Douglas gave the Court's decision, saying:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting

---

[26]Ibid.

[27]Bolmeier, p. 71.

[28]Zorach v. Clauson, 343 U.S. 306 (1952).

> the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.[29]

In 1952 a case was appealed to the Court which tested the validity of a New Jersey statute requiring Bible reading in the public school classroom. Doremus v. Board (1952) was rendered moot by the graduation of the only person who was complaining.[30]

Engel v. Vitale was the first public school religion case to be heard by the Warren Court.[31] The constitutionality of the use in the public schools of New York of a prayer that had been composed by the Board of Regents was tested. The prayer stated: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country."[32] The Supreme Court reversed the New York Court of Appeals on certiorari, and in an eight-to-one decision, ruled that the recitation of the Regents' prayer was unconstitutional. Justice Black wrote the Court's opinion, stating:

> It is neither sacriligious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely

---

[29]Ibid.

[30]Doremus v. Board, 342 U.S. 429 (1952).

[31]Engel v. Vitale, 370 U.S. 421 (1962).

[32]Hudgins, p. 27.

> religious function to the people themselves and to those the people choose to look to for religious guidance.[33]

The following year the Court ruled on the constitutionality of reading the Bible and reciting the Lord's Prayer in Abington Township v. Schempp (1963).[34] In this case the Court affirmed the judgment of the District Court for the Eastern District of Pennsylvania which had decided for the plaintiffs. This case is important in that it affected possibly forty percent of the nation's school children.[35]

In Murray v. Curlett (1963) the Court ruled that a Baltimore ordinance requiring that a chapter of the Bible be read and/or the Lord's Prayer be recited daily abridged the establishment clause of the First Amendment.[36] In rendering this decision, the Court specified tests by which future cases could be decided:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibitation of religion, then the enactment exceeds the scope of legislative powers as circumscribed by the Constitution. That is to say that to withstand the strictures of the establishment clause, there must be a secular purpose and a primary effect that neither advances or inhibits religion.[37]

---

[33]Engel, p. 429.

[34]Abington Township v. Schempp, 374 U.S. 203 (1963).

[35]Hudgins, p. 29.

[36]Murray v. Curlett, 179 A 2d. (1962).

[37]Ibid.

Chamberlin v. Dade County (1964) was a Florida case which appeared on the Court's docket twice.[38] This case challenged five practices:

(1) reading Bible verses in assembly and in the classroom;

(2) reciting the Lord's Prayer and other sectarian prayers;

(3) holding baccalaureate services;

(4) conducting a religious test as a qualification for teacher employment;

(5) conducting a religious census among pupils.[39]

When this case first appeared on the Court's docket, it was remanded to the Florida Supreme Court for further consideration in light of the Schempp decision. On its second appearance before the Court, a brief per curium opinion was issued stating that devotional Bible reading and the recitation of prayers required by the statute was unconstitutional as established in Schempp. The justices dismissed the other three issues for lack of a federal question.

In Stein v. Oshimshy (1965) the Court refused to grant certiorari in a case in which the principal of a New York City school refused to allow the recitation of voluntary prayers.[40] The principal had issued the ban in September, 1962, because of the Schempp decision.[41]

---

[38]Chamberlin v. Dade County, 143 So. 2d 21 (1962).

[39]Ibid.

[40]Stein v. Oshimshy, 382 U.S. 959 (1965).

[41]Hudgins, p. 37.

In 1968 the Court handed down two decisions that related to the relationship of church and state in the context of public education. Board v. Allen (1968) was a challenge to a New York statute that required local school officials to lend textbooks at no cost to students enrolled both in public and nonpublic schools in grades seven through twelve.[42] The Court held this practice to be constitutional in a six-to-three decision. Justice Byron R. White relied on the precedents established in previous decisions and especially on the Everson decision in giving the Court's opinion.[43]

In his dissent Justice Hugo Black warned of the future involvement which might occur saying:

> It makes but a small inroad and does not amount to complete establishment of religion. But that is no excuse for upholding it. It requires no prophet to forsee that on the argument used to support this law others could be upheld providing for state or federal funds, to erect religious buildings or to erect the building themselves, to pay the salaries of the religious school teachers, and finally to have sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the government to pick up all the bills for the religious schools.[44]

In the second opinion to be handed down in 1968, the Court altered the doctrine that a federal taxpayer lacks

---

[42]Board v. Allen, 392 U.S. 236 (1968).

[43]Hudgins, p. 38.

[44]Allen, p. 236.

standing to challenge the expenditure of federal funds. Flast v. Cohen (1968) tested the complaints of taxpayers who were in opposition to expenditures of federal tax funds under Titles II and III of the Elementary and Secondary Education Act for the financing of instruction in reading, arithmetic, and other subjects in parochial schools.[45]

In Epperson v. Arkansas (1968) the Court struck down an Arkansas statute which forbade the teaching of evolution.[46] In striking the anti-evolution law, the Court ruled that it was an abridgement of the establishment-of-religion clause of the First Amendment. Justice Abe Fortas stated:

> There is and can be no doubt that the First Amendment does not permit the states to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.[47]

These cases just reviewed represent the precedents which had been established by the Court prior to the tenure of Chief Justice Burger. Direct aid to parochial schools was ruled unconstitutional; however, aid was allowed, under the child benefit theory, for children attending parochial schools. The Court ruled that children cannot be required to attend public school, salute the flag, pray, read the Bible, or receive religious instruction in school. Tests were developed which

---

[45]Flast v. Cohen, 392 U.S. 83 (1968).

[46]Epperson v. Arkansas, 393 U.S. 97 (1968).

[47]Ibid.

would serve to guide the courts in religious cases in the future. Following the Court's rulings in the Everson and Allen cases, which allowed the use of public funds for some support of private school costs, many advocates of state aid would give private schools more aid.[48]

The Cases

Lemon v. Kurtzman (1971) was joined with two cases, Earley v. DiCenso and Robinson v. DiCenso, and questioned the constitutionality of statutes in Pennsylvania and Rhode Island which called for the spending of state funds to supplement teacher salaries and to provide other benefits to nonpublic schools.[49] Chief Justice Burger, speaking for the seven-to-one majority, found the statutes allowing these actions to be unconstitutional. Justice White recorded the lone dissent in the case.

The Chief Justice said, "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over the years."[50] The majority opinion was based upon the three tests which the Chief Justice gleaned from the Court's previous decisions. The test questions were the following:

1. The statute must have a secular legislative purpose;

---

[48]Deakin, p. 52.

[49]Lemon v. Kurtzman, 403 U.S. 602 (1971).

[50]Ibid., p. 612.

2. Its principle or primary effect must be one that neither advances nor inhibits religion;
3. The statute must not foster "an excessive government entanglement with religion."[51]

The Chief Justice was careful to note that church and state cannot be separated by a wall. The state's responsibility to its citizens necessitates fire inspections and other activities which must extend into the domain of the church. According to the Chief Justice, church and state are separated by a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[52]

The Chief Justice, in drawing distinctions between this case and the Everson and Allen cases, noted that teachers were under religious control and discipline. This teacher involvement issue posed a problem in the separation of religion from the secular aspects of education which had not been encountered in the use of tax money for textbooks, transportation, and lunches.[53] Chief Justice Burger stated:

> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.[54]

The Chief Justice felt that "comprehensive, discriminating, and continuing state surveillance" would be essential if the

---

[51]Ibid.

[52]Ibid., p. 614.

[53]Ibid., p. 617.

[54]Ibid., p. 619.

restrictions of the First Amendment were to be enforced.[55] This would violate the third of the tests that the Court had established as guides.

The aspirations of those who hoped the Burger Court would expand the trend toward more tax aid for parochial schools were seemingly dashed by Chief Justice Burger. In his opinion the Chief Justice stated that what some had feared was the verge of entangling church and state relations now seemed to indicate that there would be no further erosion of the wall of separation between church and state.

Justice Douglas wrote a concurring opinion in this case. He was joined by Justice Black in all three cases and by Justice Marshall, who did not participate in the Lemon case, in the Earley and Robinson opinions. This concurring opinion is only slightly shorter than the majority opinion written by the Chief Justice. Justice Douglas stated that the state should never get involved in financing sectarian education. A long history of Court cases in which the Court attempted to avoid such an entanglement was quoted. Justice Douglas felt that the statutes in this case were sophisticated attempts to avoid the Constitution and, as such, were as invalid as simple-minded ones.[57]

Justice Brennan dissented in the Lemon case and filed an opinion which served to express his feelings that not only were

---

[55]Ibid., p. 619.

[56]Ibid., p. 624.

[57]Ibid., p. 641.

these statutes unconstitutional, but so, too, was the Federal Higher Education Act of 1963 which allowed federal grants to go to sectarian institutions of higher education.

Justice White dissented in the Earley and Robinson cases while concurring in the majority opinion in the Lemon case stating:

> Where a state program seeks to ensue the proper education of its young, in private as well as public schools, free exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice.[58]

Justice White also noted the seeming inconsistencies of the Court in striking the Pennsylvania and Rhode Island statutes while allowing the Federal Higher Education Act of 1963 to perform essentially the same function.[59]

Tilton v. Richardson was decided on the same day as Lemon.[60] This case tested the constitutionality of the Higher Education Facilities Act of 1963. Taxpayers and residents of Connecticut instituted action against federal officials and certain church-related institutions of higher education in Connecticut, challenging the constitutionality of the federal aid the defendant institutions were receiving. The Act provided grants to these institutions for the purpose of constructing buildings that would house secular activities. Under

---

[58]Ibid., p. 665.

[59]Ibid., p. 671.

[60]Tilton v. Richardson, 403 U.S. 672 (1971).

the Act, the institutions would agree to use the buildings for only secular activities for twenty years. If this agreement was not honored, the United States would be entitled to recover a proportion of the original grant. A three-judge district court ruled that the Act did not violate the Constitution.

The Supreme Court vacated and remanded for entry of an appropriate judgment. The Court did not agree on an opinion; however, five Justices, Chief Justice Burger, and Justices Harlan, Stewart, Blackmun and White, agreed that the religion clause of the First Amendment was not violated as far as the authorization of construction grants was concerned. Eight members of the Court agreed that the First Amendment was violated by the Act's provisions limiting the government's interest to twenty years.

Chief Justice Burger announced the judgment of the Court, joined by Justices Harlan, Stewart, and Blackmun. The majority noted that the Congress was reacting to a "strong nationwide demand" for the expansion of facilities at institutions of higher education when it passed the Act. The Act was administered by the United States Commissioner of Education, and the majority found his procedures to be sufficient to guard against unconstitutional uses of the money for religious purposes.[61]

---

[61]Ibid., p. 675.

Chief Justice Burger reviewed the Act from the perspective of the four tests which the Court had established in previous church and state cases.[62]

> First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?[63]

The Chief Justice answered the appellant's complaint that the institutions of higher education were "an integral part of the religious mission of the Catholic Church" by noting that the skepticism of the college student, the internal discipline of college-level courses, and academic freedom tend to limit any effort to indoctrinate students with religious instruction as may be done in precollege schools.[64] In finding that the Act passed all the Court's tests, the Chief Justice stated, ". . . the evidence shows institutions with admittedly religious functions, but whose predominant higher education mission is to provide their students with a secular education."[65]

A dissenting opinion was written by Justice Douglas with Justice Black and Justice Marshall joining. This opinion called attention to the inconsistencies between the majority opinion in this case and the majority opinion in the Lemon case.

---

[62]Ibid., p. 678.

[63]Ibid., p. 686.

[64]Ibid.,

[65]Ibid., p. 687.

> The plurality's distinction is in effect that small violations of the First Amendment over a small period of years are unconstitutional (see Lemon and DiCenso) while a huge violation occurring only once is de minimis.[66]

Justice Douglas' feelings were summarized when he stated:

> . . . a parochial school is a unitary institution with subtle blending of sectarian and secular instruction. Thus the practices of religious schools are in no way affected by the minimal requirements that the government financed facility may not "be used for sectarian instruction or as a place for religious worship." Money saved from one item in the budget is free to be used elsewhere.[67]

Lemon v. Kurtzman (1973) resulted from the efforts of the plaintiffs in Lemon I (1971) to enjoin payments of state funds for services which were found unconstitutional but performed before the date of the Court's decision in Lemon I.[68] This case, being a sequel to the first Lemon v. Kurtzman, is known as Lemon II. Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, announced the judgment of the Court. Justice White concurred in the judgment and Justices Douglas, Brennan, and Stewart dissented. Justice Marshall did not participate in the decision.

In affirming the district court's decision, the Chief Justice noted that the plaintiffs had not taken any action

---

[66]Ibid., p. 693.

[67]Ibid.

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

to enjoin the payment of funds to the schools prior to the date that contracts were entered into for the 1970-1971 school year. The Court found that the denial of reimbursement to church-related schools "would impose upon them a substantial burden which would be difficult for them to meet."[69] Chief Justice Burger stated that the Court viewed Lemon I as an issue "whose resolution was not clearly foreshowed."[70] The Court concluded that the state officials who continued to act under the provisions of the Act in the period before the Court's initial decision were acting in good faith. Although not agreeing on an opinion, the Court agreed that the judgment of the federal district court should be affirmed.

Justice Douglas dissented, joined by Justices Brennan and Stewart, saying, "There is as much a violation of the Establishment Clause of the First Amendment whether the payment from public funds to sectarian schools involves last year, the current year, or next year."[71]

Justice Douglas did not agree with the Chief Justice and the majority in their contention that there was no warning in previous Court decisions that the subsidies were unconstitutional. The dissenting justices felt that no consideration

---

[69]Ibid., p. 204.

[70]Ibid., p. 206.

[71]Ibid., p. 209.

of situation should have been made other than the consideration that the Court had established its position in Lemon I.

Committee for Public Education and Religious Liberty v. Nyquist (1973) tested the constitutionality of a New York statute which would have provided state money for maintenance and repair of nonpublic school facilities and equipment, for tuition reimbursement to parents of children attending nonpublic elementary and secondary schools, and for tax relief for parents of nonpublic school children.[72] The Court was divided in its opinion in this case.

Justice Powell wrote the majority opinion. Seven members of the Court joined in his opinion that the maintenance and repair provisions of the statute were invalid because they had the primary effect of advancing religion, since no attempt was made to restrict payments to the upkeep of facilities used exclusively for secular purposes. Five members of the Court joined Justice Powell in his opinion that the tuition reimbursement provisions were invalid based on essentially the same reasons stated in the rejection of the maintenance and repair funding. The tax-relief provisions for parents of nonpublic school children were found to be insufficiently restricted to assure that they would not have the effect of advancing the sectarian activities of religious schools.

---

[72]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

In stating the Court's opinion in this case, Justice Powell again asked the three test questions which had evolved from previous decisions. The statute was judged to have a secular legislative purpose.[73] The Court, however, found the statute was not restrictive and would have the impermissible effect of advancing the sectarian activities of the religious schools.[74] The majority found it unnecessary to consider whether the statute would result in entanglement of the state with religion, since it had already judged it to be unconstitutional.

Chief Justice Burger, joined by Justice Rehnquist and in part by Justice White, concurred in part and dissented in part. The Chief Justice joined in the part of the Court's opinion which found the maintenance and repair provisions unconstitutional, but he disagreed with the Court's decision to strike down New York and Pennsylvania tuition-grant programs and the New York tax-relief provisions.[75] The Chief Justice based his dissent upon previous Court rulings which, in his opinion, separated government aid to individuals from direct aid to religious institutions. Chief Justice Burger stated, "The tuition grant and tax relief programs now before us are, in

---

[73]Ibid., p. 773.

[74]Ibid., p. 794.

[75]Sloan v. Lemon, 413 U.S. 825 (1973).

my view, indistinguishable in principle, purpose, and effect from the statutes in Everson and Allen."[76]

Sloan v. Lemon (1973) tested the constitutionality of the Pennsylvania Parent Reimbursement Act for Nonpublic Education.[77] This Act provided funds to reimburse parents for part of tuition expense incurred in sending their children to nonpublic schools.

Justice Powell, joined by five members of the Court, stated the Court's opinion in this case. The Court found the Act to be in violation of the Establishment Clause of the Constitution for generally the same reasons as stated in Nyquist. Chief Justice Burger, Justices White, and Rehnquist dissented on the grounds that aid to individuals is permissible under the Constitution and the Court's previous rulings.

Levitt v. Committee for Public Education and Religious Liberty (1973) tested the constitutionality of a New York statute which provided for state reimbursement of private schools for certain testing and record-keeping costs which were required by the state.[78] Chief Justice Burger, expressing the views of five members of the Court, held that the statute was an unconstitutional aid to religion. In differentiating this act from acts which the Court had found to be constitutional, the Chief Justice stated:

---

[76]Committee v. Nyquist, 413 U.S. 803 (1973).

[77]Sloan v. Lemon, 413 U.S. 825 (1973).

[78]Levitt v. Committee, 413 U.S. 472 (1973).

> The statute now before us, as written and as applied by the Commissioner of Education, contains some of the same constitutional flaws that led the Court to its decision in Nyquist. We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church.[79]

Justice Douglas, Brennan, and Marshall, though not joining in the opinion written by the Chief Justice, were of the view that the Act was unconstitutional because of the Court's decisions in Nyquist. Justice White dissented without opinion.

Hunt v. McNair tested the constitutionality of the South Carolina Educational Facilities Act insofar as it authorized a proposed financing transaction involving the state-created Educational Facilities Authority's issuance of revenue bonds that would benefit the Baptist College of Charleston.[80] The Act provided for bond proceeds to be used to finance a project which the college would convey to the Authority. The Authority would lease it back to the college, and upon full repayment of the bonds, the college would assume ownership.

Justice Powell, expressing the views of six members of the Court, held that the Act did not violate the First Amendment's establishment clause. In applying the Court's three-part test, Justice Powell found that the statute had a secular purpose, would not advance or inhibit religion, and would not

---

[79]Ibid., p. 480.

[80]Hunt v. McNair, 413 U.S. 734 (1973).

entangle the state in religion. In this opinion Justice Powell quoted Chief Justice Burger's opinion in previous cases on several occasions.[81]

Justice Brennan, joined by Justices Douglas and Marshall, dissented, noting that the Act aided religious institutions by allowing the College to "avail itself of the state's unique ability to borrow money at low interest rates."[82]

Norwood v. Harrison tested the constitutionality of a Mississippi program to loan state-owned textbooks to children attending racially segregated private schools.[83] Chief Justice Burger, expressing the views of seven members of the Court, held that the state's loaning of textbooks to students attending racially discriminatory private schools was unconstitutional.

The Chief Justice stated that though the Constitution may compel toleration of private discrimination in some situations, it "does not mean that it requires state support for such discrimination."[84] The Court ruled that the program was unconstitutional because it aided sectarian education in segregated schools. The Court remanded the case to the district court and recommended that a screening program be established which

---

[81]Ibid.,pp. 743, 745, and 746.

[82]Ibid., p. 755.

[83]Norwood v. Harrison, 413 U.S. 455 (1973).

[84]Ibid., p. 463.

would screen schools applying for textbook aid. Justices Douglas and Brennan, though not joining in the opinion of the Chief Justice, concurred.

Wheeler v. Barrera (1974) tested the constitutionality of using federal funds under Title I of the Elementary and Secondary Education Act of 1965 to fund special programs for educationally deprived children in private parochial schools.[85] In this case parochial school students brought suit to force state public school authorities to provide adequate Title I programs that were comparable to programs provided for public schools.

Justice Blackmun delivered the majority opinion, joined by five members of the Court, including the Chief Justice. The Court found that the Title I programs provided for non-public schools in Missouri were substantially inferior to those provided for public schools.[86] The Court outlined three methods bywhich the state could provide funding for nonpublic schools and fulfill the intent of the legislation. First, the state could approve plans that measure up to the requirements of comparability without using on-the-premises teachers. Second, it could develop a plan that eliminates the use of on-the-premises instruction in both public and private schools. Third, it could become a nonparticipant in the Title I program.

---

[85]Wheeler v. Barrera, 417 U.S. 402 (1974).

[86]Ibid., p. 410.

The Court refused to render an opinion on the issue of whether Title I legislation violated the First Amendment, since no specific plan was put before the Court.

Meek v. Pittenger (1975) challenged the constitutionality of Pennsylvania Acts 194 and 195.[87] These Acts, in an effort to assure every student an opportunity to share in the benefits of auxiliary services, textbooks, and instructional materials, authorized the Commonwealth to provide counseling; testing and psychological services; speech and hearing therapy; teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged; and textbooks for students in nonpublic elementary and secondary schools. Act 195 also authorized the Secretary of Education to lend periodicals, phonographs, maps, charts, sound recordings, films, and other printed or published materials directly to the nonpublic schools upon their requests.

Justice Stewart announced the judgment of the Court and was joined in his opinion by Justices Blackmun and Powell. Justice Stewart noted that the District Court had applied the three-part test that had been established by the Court in its considering of the constitutionality of the Act. The District Court found the textbook loan provisions of Act 195 to be identical to the program the Court considered in Allen. The Court agreed with this portion of the District Court's decision.

---

[87]Meek v. Pittenger, 421 U.S. 349 (1975).

The Court refused, however, to accept the District Court's findings that the other provisions of the Acts were constitutional.

Justice Stewart noted that the amount of aid, twelve million dollars in 1972-1973, had the effect of advancing religion. The Court concluded that this was sufficient to find unconstitutional the provisions of the Acts which gave the nonpublic schools materials. With regard to the provisions of the Acts which provided teacher services to the schools, the Court noted that "Whether the subject is 'remedial reading,' 'advanced reading,' or simple 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."[88]

Justice Brennan was joined by Justices Douglas and Marshall in concurring and dissenting. Justice Brennan joined in the reversal of the District Court's judgment in upholding the constitutionality of Act 194 and Act 195, but dissented from the majority opinion in upholding the constitutionality of the textbook loan provision. This dissent notes that the Court established a fourth test to be applied in cases where church and state issues arose in the funding of nonpublic schools. This was the test for the potentially devisive

---

[88]Ibid., p. 370.

political effects of an aid program. Justice Brennan, who joined the Court's decision in Allen which found a similar textbook loan program to be constitutional, stated that the Allen case was decided before the Kurtzman test was established and the Court should not overlook this fourth test simply because it was not a part of the Allen decision.[89] This dissent also notes that the books are loaned to the nonpublic schools and not to the students.

Justices Powell, White, and Marshall concurred in the judgment of the Court. Justice Douglas filed a dissenting opinion.

Roemer v. Maryland Public Works (1976) challenged the Maryland statute which provided aid to private, including parochial, colleges.[90] This statute provided for annual noncategorical grants to state-accredited private colleges requiring only that none of the state funds be used for sectarian purposes and that the institutions award not only seminarian or theological degrees. The Court was unable to agree on an opinion; however, five members of the Court agreed that the statute did not violate the establishment clause of the First Amendment.

Justice Blackmun announced the judgment of the Court, joined by Chief Justice Burger and Justices Powell and Blackmun

---

[89]Ibid., p. 378.

[90]Roemer v. Board of Public Works, 426 U.S. 736 (1976).

found that the Maryland statute passed the Court's three-part test and did not violate the establishment clause of the First Amendment.

In a concurring opinion Justice White, joined by Justice Rehnquist, expressed the view that the three-fold test was superfluous and it was not necessary to consider whether there was "excessive entanglement" of church and state when the other tests proved to be negative.[91]

Justice Brennan, joined by Justice Marshall, dissented; Justice Stewart dissented; and Justice Stevens dissented.

Wolman v. Walter (1977) tested the constitutionality of all but one of the provisions of Ohio Revenue Code 3317.06, which authorized various forms of aid to nonpublic, including parochial, schools.[92] The Ohio plan called for funding to non-public school children for textbooks; tests and test scoring; speech, hearing, and psychological diagnostic services; theraputic, guidance, and remedial services for students needing specialized attention; instructional materials and equipment; and field trip transportation.

The Court ruled that the parts of the Ohio statute authorizing the state to provide nonpublic school students with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services were constitutional.

---

[91]Ibid., p. 749.

[92]Wolman v. Walter, 433 U.S. 229 (1977).

The parts of the statute authorizing funds for instructional materials and equipment and for field trips were found to be unconstitutional.

The Court was split in this case. Four concurring and dissenting opinions were filed and one dissenting opinion was filed. Justice Blackmun announced the judgment of the Court joined in part by Chief Justice Burger and Justices Stewart, Brennan, Marshall, Powell, and Stevens. Justices Brennan, Marshall, Powell, and Stevens filed statements concurring in part and dissenting in part. Chief Justice Burger dissented from two parts of the Court's opinion. Justice White and Rehnquist concurred in part and dissented in part.

In New York v. Cathedral Academy (1977) the constitutionality of a New York statute by which the state would reimburse nonpublic schools for the cost of certain state-required testing and recordkeeping was tested.[93] The Court ruled, in a six-to-three decision, that the statute was unconstitutional because "it will of necessity either have the primary effect of aiding religion, or will result in excessive state involvement in religious affairs."[94]

Justice Stewart delivered the opinion of the Court. Chief Justice Burger and Justice Rehnquist dissented, stating that they would have affirmed the judgment of the Court of Appeals

---

[93]New York v. Cathedral Academy, 434 U.S. 125 (1977).

[94]Ibid., p. 133.

of New York which had found the statute to be constitutional.[95] Justice White dissented, stating that he believed the Court had misconstrued the First Amendment in a manner that was "contrary to the fundamental educational needs of the country."[96]

In summary action the Court affirmed an Appellate Court decision that a Connecticut act authorizing state reimbursement to private schools for a part of the expense of texts and teachers' salaries incurred in teaching secular subjects was unconstitutional.[97] The Court denied an application for a stay of the order of a district court which had found an Ohio tuition-reimbursement plan for parents of students in nonpublic schools to be unconstitutional.[98] Chief Justice Burger, Justices White, and Rehnquist dissented in this case and would have granted the stay.

Marburger v. Public Funds (1974) was a memorandum decision in which the Court upheld the decision of a Federal District Court in which a New Jersey statute providing funds for reimbursement of parents of nonpublic school students for textbooks, instructional materials, and supply expenditures

---

[95]Ibid., p. 134.

[96]Ibid.

[97]Johnson v. Sanders, 403 U.S. 955 (1971).

[98]Essex v. Wolman, 92 S. Ct. 1761 (1972).

was found to be unconstitutional.[99] In this case Chief Justice Burger, and Justices White and Rehnquist stated that they noted probable jurisdiction and would have set the case for oral argument.

In two summary judgments issued on October 21, 1974, the Court affirmed lower court decisions which prevented nonpublic students from getting tax funded bus transportation,[100] and struck down a California statute which would have given a state income-tax reduction to taxpayers sending their children to nonpublic schools.[101] In both of these cases, Justice White dissented, joined by the Chief Justice.

Analysis of Chief Justice Burger's Influence

Chief Justice Burger's attitude toward the proper involvement of the state in nonpublic, including sectarian, schools is revealed in his opinions in the cases which the Court has considered. In each of these cases the Chief Justice has consistently rejected any attempt to directly finance religious instruction; however, he has been equally as consistent in his efforts to get the Court to expand its rulings so thatmore state aid could be given directly to nonpublic school students and their parents,under the "child benefit theory."

---

[99]Marburger v. Public Funds, 417 U.S. 961 (1974).

[100]Luetkemeyer v. Kaufmann, 419 U.S. 888 (1974).

[101]Tax Board v. United Americans, 419 U.S. 890 (1974).

The justices use their opinions to express their feelings and attitudes about the issues which come before the Court. When a justice writes an opinion for the majority, he must be concerned with developing a statement that will be acceptable to the entire Court. This responsibility often forces a justice to make compromises that disguise his true feelings. When a justice writes a dissenting opinion, however, he is free to express his true feelings. The dissenting justice is making an appeal to a future care in which the Court may again consider a similar issue.[102] For this reason the dissenting opinion gives a much more accurate indication of the true attitude of a justice.

Chief Justice Burger has dissented often in education cases dealing with the involvement of church and state. In these dissents his support for the use of state funds to aid nonpublic school students and their parents is well documented. The Chief Justice's dissent in Committee v. Nyquist illustrates this point:

> While there is no straight line running through our decisions interpreting the Establishment and Free Exercise clauses of the First Amendment, our cases do, it seems to me, lay down one solid, basic principle: that the Establishment Clause does not forbid governments, state or federal, to enact a program of general welfare under which benefits are distributed to private individuals, even though many of these individuals may elect to use those benefits in ways that "aid" religious institutions of worship.[103]

---

[102]The Supreme Court: Views from Inside (New York: W.W. Norton Co., 1960), p. 26.

[103]Committee v. Nyquist, p. 799.

A second factor which must be considered is the attitudes of the associate justices. The dissenting opinions and voting patterns of the associate justices serve to indicate their attitudes in education cases dealing with the involvement of church and state.

Justices Black and Harlan served on the Burger Court from 1969 until September of 1971. During this time they participated in four education cases which dealt with the involvement of church and state. In all four cases they voted the same way the Chief Justice did. Because of the relatively small number of cases in which these two justices participated, no further analysis of their attitudes seems warranted.

Two justices seem to share the Chief Justice's desire to expand the range of permissable state aid to nonpublic schools. Justice White, who has served on the Burger Court since 1969, and Justice Rehnquist, who has served since December of 1971, have voted with the Chief Justice in overninety percent of the education cases dealing with church and state involvement. These three justices often join in dissenting opinions in church and state cases which do not allow the use of state funds. This group, Chief Justice Burger, Justice White, and Justice Rehnquist, meets Sprague's criteria for identification as a voting bloc in education cases dealing with church and state involvement.[104]

---

[104]Walter F. Murphy and Joseph Tannenhaus, The Study of Public Law (New York: Random House, 1972), pp. 163-165.

Justice Douglas, who served on the Burger Court from 1969 to November 1975, joined by Justices Brennan and Marshall, who have served on the Burger Court since 1969, made up the bloc which most often found itself in opposition to the Burger, White, and Rehnquist bloc. This bloc of Douglas, Brennan, and Marshall, also met Sprague's criteria for identification as a voting bloc in education cases dealing with church and state involvement. The members of this group agreed in eighty-eight percent of these cases. These three justices agreed with Chief Justice Burger in only thirty-eight percent of these cases.

Justice Douglas, being the senior-most justice following Justice Black's retirement in 1971, could be considered the leader of his bloc and attempted to attract nonaligned justices to his bloc's position through the assignment of the opinion writing duty. The position of Justice Douglas and the members of his bloc is directly opposed to the position of Chief Justice Burger and the members of his bloc. This fact is seen in Justice Douglas' dissent in Tilton v. Richardson:

> . . . a parochial school is a unitary institution with subtle blending of sectarian and secular instruction. Thus the practices of religious schools are in no way affected by the minimal requirements that the government-financed facility may not "be used for sectarian instruction or as a place for religious worship." Money saved from one item in the budget is free to be used elsewhere.[105]

---

[105]Tilton v. Richardson, p. 693.

The justices who were not in the Burger, White, and Rehnquist bloc or the Douglas, Brennan, and Marshall bloc were referred to as the swing vote justices. This title derived from their tendency to swing between the two voting blocs. The swing vote justices are Justices Stewart, Blackmun, Powell, and Stevens. Justice Stewart has voted with Chief Justice Burger in forty-eight percent of the education church and state cases. His support has been fairly well divided between the two voting blocs. Being one of only four justices who has written a majority opinion in the education church and state cases leads to the conclusion that Professor David J. Danelski's rules for winning justices to a majority opinion, as noted in Chapter II, may have been utilized in assigning opinions to this justice.[106] The other swing vote justices are Justice Blackmun, having voted with Chief Justice Burger sixty-three percent of the time, and Justice Powell, having voted with the Chief Justice sixty-one percent of the time, Like Justice Stewart, these two have also written majority opinions and the assumption concerning Danelski's rules for assigning opinions to uncommitted justices seems to hold for them as well.

The last justice to be appointed, Justice Stevens, has had only limited opportunity to vote in educational church and state issues. Having replaced Justice Douglas on the Court, his twenty-nine percent agreement rate with the Chief Justice may indicate that he may replace Justice Douglas in his voting bloc.

---

[106]Walter Murphy and Herman Pritchett, Courts, Judges, and Politics (New York: Random House, 1961), p. 504.

During the tenure of Chief Justice Burger up to the end of the October 1978 term, the Chief Justice had written five of the Court's opinions, thirty-three percent, in education church and state questions. This percentage compares with twenty-three percent of the remaining opinions having been written by Justice Powell, another twenty-three percent by Justice Blackmun, and sixteen percent by Justice Stewart. In sixty-two percent of the education church and state cases the Chief Justice concurred with the majority. In thirty-eight percent of these cases, the Chief Justice dissented, at least in part. In summary decisions, the Chief Justice dissented in four of the five cases considered.

An analysis of the eighteen cases which were decided by the Court during this period shows that six, or one-third, of the education church and state decisions could be considered to be sympathetic to the concept of state aid for nonpublic schools. A case-by-case analysis reveals the role the Chief Justice played in the formation of decisions.

The education church and state cases which were decided by the Burger Court must be viewed within the context of previous Court decisions. The Warren Court had considered a number of education church and state questions which had encouraged both separationists, those who advocate no state aid for religious institutions, and accommodationists, those who advocate state aid for religious institutions. In Everson and Allen the Court handed down decisions which were favorable to accommodationists who wanted increased state aid for religiously

affiliated schools. As a result of these decisions and the continuing increase in the cost of education at nonpublic schools, several state legislatures enacted statutes which allowed state aid to provide support to these schools.[107] Before these new statutes could be tested by the Court, Chief Justice Warren retired, and Chief Justice Burger assumed his position.

The first church and state case to be considered by the Burger Court did not directly concern education. The opinion in Walz v. Tax Commission (1970) was written by Chief Justice Burger.[108] This opinion, which was joined by all members of the Court except Justice Douglas, stated that property tax exemptions for church properties were permissable under the First Amendment. Following this decision, however, the Court had still not established a clear-cut position on church and state involvement.[109]

The Tilton and Lemon I decisions, both reported on June 28, 1971, were the first education church and state decisions delivered by the Burger Court. In Lemon I the Court rejected Pennsylvania and Rhode Island statutes which provided state funds for supplementing nonpublic school teachers' salaries. The Chief Justice wrote the majority opinion in both these

---

[107]Philip Kurland (ed.) Church and State (Chicago: University of Chicago Press, 1975), p. 238.

[108]Walz v. Tax Commission, 397 U.S. 664 (1970).

[109]Kurland, pp. 240-241.

cases. By controlling the opinion-writing duty and assigning it to himself, the Chief Justice was able to establish the criteria by which future education church and state questions would be resolved. The criteria developed by the Chief Justice consisted of three test questions which were consolidated from previous Court decisions. These three questions asked:

(1) Does the statute have a secular legislative purpose?

(2) Does it have the primary effect of advancing or inhibiting religion?

(3) Does it foster an excessive government entanglement with religion?

In addition to these tests, the Chief Justice was able to include in this majority opinion a statement expressing the attitude that the line of separation between church and state was not a wall but rather a "blurred, indistinct, and variable barrier."[110] The voluminous concurring opinions in this case indicate that a number of the associate justices did not feel comfortable with the Chief Justice's majority opinion. The Court had rejected an attempt by two states to aid nonpublic schools. Yet the Chief Justice, by controlling the writing of the majority opinion, had been able to soften this defeat for the accommodationists and leave the door open for Court approval of future state-aid programs. Justice Douglas' concurring opinion in this case serves to show how wary the associated justices were. This concurring opinion was written to counter

---

[110]Lemon v. Kurtzman, p. 602.

Chief Justice Burger's claim that the line separating church and state was less than a wall. In this case it would seem that Chief Justice Burger was able to exert his influence in a manner that established a precedent which would in the future allow state funding which he felt was constitutional.

In Tilton the Chief Justice was able to play a much more decisive role. The decision approved the use of federal construction grants at sectarian colleges. The Chief Justice cast the deciding fifth vote in this five-to-four decision. The majority was composed of consistent accommodationist supporters Justices White and Harlan joined by swing Justices Blackmun and Stewart. The role played by Chief Justice Burger in attracting these two swing votes is impossible to determine, but it seems reasonable to assume that he played some part in the discussions which may have affected their votes. There is no doubt, however, that he, as the Chief Justice who votes last, was the deciding factor in this case.

The dissenting opinions in Tilton give an indication of the philosophical split between the bloc of justices with separationist sympathies and those with accommodationist sympathies. This conflict and the resulting fight for votes from swing justices would be repeated in later decisions.

Two years after Lemon I the litigants returned to the Court to argue the issue of whether religious schools could get the funds contracted for before the Court's decisions in Lemon I. This case, known as Lemon II, again tested the Chief Justice's ability to obtain a favorable accommodationist

decision. In this decision the Chief Justice had to rely on newly appointed Nixon justices plus Justice White in order to obtain the five votes required to control the decision. The Warren Court justices still in the Court,with the exception of Justice White, had given an indication of their separationist bent in previous cases.[111] Again, it is impossible to determine the degree to which Chief Justice Burger was able to persuade Justices Blackmun and Powell, the two swing votes, during the discussion of this case. Based on their voting record in all cases, it would seem that Justices White and Rehnquist needed no persuasion to vote in favor of the accommodationist view. Justice Stewart was lost from the accommodationist majority in this case after being one of the essential votes in Tilton. In this case the Chief Justice was again able to cast the deciding and critical fifth vote for the accommodationist position.

The Chief Justice was the Court spokesman in the first three education church and state decisions; however, the next case to come before the Court, Nyquist, ended his domination. In Nyquist, the accommodationist bloc of Chief Justice Burger, Justice White, and Justice Rehnquist stood alone in a six-to-three decision which barred a tuition reimbursement and tax-relief plan for parents of nonpublic school students. This bloc was unable to attract any justices from the swing vote

---

[111]Kurland, p. 246.

group. Any attempts at influencing, on the part of the Chief Justice in this case, seem to have been fruitless.

David Danelski has suggested, as noted in Chapter II, that the assignment of the opinion-writing duty may be used to attract undecided justices to a voting bloc's point of view. The Nyquist decision may be a result of this kind of action on the part of Justice Douglas. As the senior justice voting with the majority in a case in which the Chief Justice dissented, Justice Douglas had the opportunity to assign the majority opinion-writing duty. Justice Douglas had written a concurring or dissenting opinion in the three previous education church and state cases. To assign the opinion-writing duty to another justice seems to be inconsistent with Justice Douglas' previous actions, unless assigning the opinion to Justice Powell was done to attract the votes of other justices who might not be able to agree with an opinion written by the strict separationist Douglas. Regardless of what leadership might have been exerted by Justice Douglas, however, it seems obvious that the Chief Justice had very little impact in this case.

In a companion case, Sloan v. Lemon (1973) (decided the same day as Nyquist), Justice Powell delivered an opinion in which the Court found a tuition-reimbursement plan that was similar to the one reviewed in Nyquist to be unconstitutional. The voting pattern in this case was identical to the pattern in Nyquist. It seems logical to assume that the strategy used in the analysis of Nyquist would also apply to Sloan.

In Levitt v. Committee (1973) the Court was asked to rule on the constitutionality of a New York plan that allowed public funding of nonpublic schools for certain testing and record-keeping costs. This plan seems to have violated the demands of separation between church and state that the Chief Justice had set for himself. In writing the majority opinion in this case, the Chief Justice noted the potential for sectarian teachers to use state-funded teacher-made tests to incorporate "some aspect of faith or morals in secular subjects."[112] Even though the Chief Justice was among the majority and wrote the opinion in this case, there seems little doubt that, based on previous voting records, he had practically no meaningful influence on the voting in this case. Justice White continued his support for accommodation by dissenting, and Justice Rehnquist agreed with the Chief Justice's opinion, but the remainder of the Court voted in a manner that was consistent with their prior records.

In Hunt v. McNair (1973) the Chief Justice may have acted in accordance with Danelski's theory by assigning the majority opinion-writing duty to a justice who could attract uncommitted votes. Justice Douglas had assigned the opinion to Justice Powell in Nyquist in what was an apparent attempt at attracting uncommitted votes. Now Chief Justice Burger appointed Justice Powell as opinion writer in what was perhaps another attempt to attract some of Justice Powell's swing-vote associates. In this

---

[112]Levitt v. Committee, p. 481.

case the majority consisted of the accommodationist bloc, Burger, White, and Rehnquist, plus swing Justices Blackmun and Powell. The separationists voting against the majority included Justices Douglas, Brennan, and Stewart. Justice Marshall, usually a member of the separationist bloc, voted with the Chief Justice in this case. The information available in this case does not support the conclusion that Chief Justice Burger was solely responsible for the pro-accommodationist decision; however, knowledge of prior voting records and the fact that Chief Justice Burger assigned the opinion to someone other than himself in an education church and state case for the first time indicates that he was at least one of the factors in the decision.

In Wheeler v. Barrera (1974) the Court again decided a case in a manner that was favorable to accommodationist interests. This time the Court was asked to direct Missouri to equalize the programs provided for nonpublic and public schools under Title I of the Elementary and Secondary Education Act of 1965 funding. In an opinion by Justice Blackmun, the Court did just that. Missouri school officials were given three alternatives which would obtain the balance the Court required. Since the Court was not ruling on a plan already in operation, the Court concerned itself with the federal government's right to extend Title I to nonpublic schools.

This case was decided by an eight-to-one vote. Only Justice Douglas from the separationist bloc dissented. Again the Chief Justice chose to assign the opinion writing to a

swing-vote justice. The vote in this case seems to indicate that the Court was well united behind this accommodationist decision. Yet the concurring opinion of Justice Powell, in which he states his reservations about the decision, indicated that the Court was not nearly as united as the margin seems to indicate. Chief Justice Burger seems to have again used a justice who could attract uncommitteed members of the Court for the opinion-writing duty. There is little doubt that the accommodationists were active during the conference, trying to win their colleagues to their point of view. The precise role played by Chief Justice Burger cannot be determined; however, his decision to appoint a justice not associated with the accommodationist bloc seems to have been important in view of the reservations expressed by Justice Powell.

Following their success in Wheeler, the accommodationists were faced with a case in which Pennsylvania statutes authoizing a series of benefits for nonpublic schools were being tested. In Meek v. Pittenger, the accommodationist majority that seemed solid in Wheeler evaporated. Of the provisions in Pennsylvania Acts 194 and 195, this Court left intact only the textbook loans in Allen, and this decision must be considered a defeat for the accommodationists.

In Meek the swing votes were critical. The accommodationist bloc of Burger, White, and Rehnquist was supported by the swing votes of Stewart, Blackmun, and Powell in approving the textbook loan program, but they could not hold this alliance to obtain approval for the auxiliary services,

equipment, and materials provisions. The separatist bloc remained united in their dissent on the textbook provisions and in their support for the Court's ruling on the other provisions. The Chief Justice seems to have been unsuccessful in any attempts he might have made in trying to win approval of the auxiliary services, equipment, and materials provisions in this case.

The split in the Court which played a role in the Meek decision was again a factor in Roemer v. Public Works (1976). In this case a Maryland statute which provided state aid to religiously affiliated colleges was challenged. Being badly split, the Court was unable to agree on an opinion. The accommodationists were able to solicit the cooperation of two swing Justices, Blackmun and Powell, and produce an opinion which stated the Court's belief that the statute did not violate the establishment clause of the First Amendment.

This five-to-four decision was the result of the accommodationists being joined by two swing justices. The Chief Justice was able to cast the fifth and deciding vote in the case, but his use of the right to assign the opinion may have been equally important. In finding it impossible to agree on an opinion, the Court was more divided in this case than in any other education church and state case to date. The fact that only the Chief Justice and Justice Powell joined in Justice Blackmun's decision is evidence of the deep split in the Court. Even traditional accommodationists White and Rehnquist felt that it was necessary to write a concurring

opinion, apparently believing the Court's opinion was too restricted. This case, possibly above all previous cases, demonstrates Chief Justice Burger's ability to obtain a decision which is agreeable with his philosophy by means of skillful management of opinion assignment and the ability to cast a deciding fifth vote.

In Wolman v. Walter (1977) the Court was again divided in a case which questioned the constitutionality of state aid to religious schools. In this case an Ohio statute which authorized the expenditure of public funds for textbooks, testing, diagnostic testing services, remedial services, materials, equipment, and field trips for nonpublic schools was challenged. The Court affirmed the part of the lower court ruling which allowed state funding for textbooks, standardized testing and scoring services, diagnostic services, and therapeutic and remedial services. The Court reversed the lower court's approval of state funding for instructional materials and equipment and field trips.

Though dissenting in part, Chief Justice Burger seems to have played a role in the expansion of the Court's view of how much state aid should be given nonpublic schools. Since Allen the Court had found textbook loan programs to be constitutional; however, this case expanded the range of permissible aid to include standardized testing, diagnostic services, therapeutic services, and remedial services. Again the Chief Justice seems to have chosen a writer for the majority opinion who could attract the required number of swing votes to insure approval

of the expanded list of nonpublic school tax-supported aids. The Wolman decision was accompanied by a large number of dissenting and concurring opinions, as was Meek; however, once again the accommodationists were able to influence the Court and obtain an expansion of previously approved state-aid programs. Giving Chief Justice Burger credit for controlling all of these actions cannot be justified, but, considering his attitude in church and state matters, it is not difficult to assume that he played a major part in the formation of the decision through the powers he controls as Chief Justice.

The separationists asserted themselves following the Meek and Wolman decisions, and in a six-to-three decision struck down a New York statute which called for state payments of fixed amounts to nonpublic schools for testing and record keeping. In this case the accommodationist bloc stood alone in dissent. The Chief Justice made use of a dissenting opinion to express his displeaure with the Court's opinion. Any attempts he might have made to influence the decision in this case seem to have been fruitless.

In the Court's summary decisions in education church and state cases, the Chief Justice was ineffectual. The Court issued summary decisions in five education church and state cases. In these five cases the Chief Justice dissented in the Court's handling of four of the five cases. In each of the cases in which the Chief Justice dissented, the Court refused to consider lower court rejections of programs giving state aid to nonpublic schools.

The alignment of justices in separationist, accommodationist, and swing-vote blocs has had the effect of producing decisions in education church and state cases which are neither consistently favorable nor antagonistic toward the use of state aid in nonpublic schools. Chief Justice Burger, as a member of the accommodationist bloc, seems to have been able to exert some influence in obtaining decisions sympathetic to his philosophy. Though the assumptions about Chief Justice Burger's use of his opinion assignment duty to gain swing votes are speculative, there is no doubt that he was the deciding factor in cases where he, voting last, cast the fifth and deciding vote. Chief Justice Burger has not been able to unite a divided Court as Chief Justice Warren did; however, he has been able to exert a significant amount of influence in education church and state cases.

TABLE IV

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972	J. John P. Stevens 1975

Voting Record in Relation to the Majority Opinion

Lemon v. Kurtzman, 403 U.S. 602 (1971)
Pennsylvania salary reimbursement plan held unconstitutional.

C*	C	C	C	D	C	C	N	C	X	X	X

Early v. DiCenso, 403 U.S. 602 (1971)
Rhode Island salary supplement plan held unconstitutional.

C*	C	C	C	C	C	D	C	C	X	X	X

Robinson v. DiCenso, 403 U.S. 602 (1971)
Rhode Island salary supplement plan held unconstitutional.

C*	C	C	C	C	C	D	C	C	X	X	X

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

TABLE V

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Tilton v. Richardson, 403 U.S. 602 (1971)
Federal construction grants for colleges held constitutional.

C*	D	D	C	D	C	C	D	C	X	X	X

Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II)
Payment for educational services performed before Lemon I.

C*	X	D	X	D	D	C	N	C	C	C	X

Hunt v. McNair, 413 U.S. 734 (1973)
Bond plan for sectarian college held constitutional.

C	X	D	X	D	D	C	C	C	C*	C	X

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

TABLE VI

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967-	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)

1. State grants for maintenance and repair held unconstitutional.

C	X	C	X	C	C	C	C	C	C*	C	X

2. Tuition reimbursement plan held unconstitutional.

D	X	C	X	C	C	D	C	C	C*	D	X

3. Tax relief for parents held unconstitutional.

D	X	C	X	C	C	D	C	C	C*	D	X

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

TABLE VII

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Sloan v. Lemon, 413 U.S. 825 (1973)
Pennsylvania tuition reimbursement plan held unconstitutional.

D	X	C	X	C	C	D	C	C	C*	D	X

Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973)
New York reimbursement plan for testing and record keeping held unconstitutional.

C*	X	C	X	C	C	D	C	C	C	C	X

Norwood v. Harrison, 413 U.S. 455 (1973)
Textbook loan plan for racially discriminatory non-public school held unconstitutional.

C*	X	C	X	C	C	C	C	C	C	C	X

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

TABLE VIII

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975

Voting Record in Relation to the Majority Opinion

Meek v. Pittenger, 421 U.S. 349 (1975)

1. Pennsylvania Act authorizing auxiliary services held unconstitutional.

D	X	C	X	C	C*	D	C	C	C	D	X

2. Pennsylvania Act authorizing materials and equipment held unconstitutional.

D	X	C	X	C	C*	D	C	C	C	D	X

3. Pennsylvania Act authorizing textbook loan held constitutional.

C	X	D	X	D	C*	C	D	C	C	C	X

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

TABLE IX

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Wheeler v. Barrera, 417 U.S. 402 (1974)
Use of Title I funds at non-public schools held constitutional.

C	X	D	X	C	C	C	C	C*	C	C	X

Roemer v. Board of Public Works, 426 U.S. 736 (1976)
Maryland program for aiding sectarian colleges held constitutional.

C	X	X	X	D	D	C	D	C*	C	C	D

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

TABLE X

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Wolman v. Walter, 433 U.S. 229 (1977)

1. Textbook loan and standardized test programs held constitutional.

C	X	X	X	D	C	C	D	C*	C	C	D

2. Speech, hearing, and diagnostic services held constitutional.

C	X	X	X	D	C	C	C	C*	C	C	C

3. Therapeutic, guidance, and remedial services held constitutional.

C	X	X	X	D	C	C	D	C*	C	C	C

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

TABLE X
(Continued)

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Wolman v. Walter, 433 U.S. 229 (1977) (Continued)

4. Instructional materials and equipment programs held unconstitutional.

D	X	X	X	C	C	D	C	C*	D	D	C

5. Transportation program for field trips held unconstitutional.

D	X	X	X	C	C	D	C	C*	D	D	C

New York v. Academy, 434 U.S. 125 (1977)
New York plan for reimbursement for testing and record keeping held unconstitutional.

D	X	X	X	C	C	D	C	C	C	D	C*

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

CHAPTER IV

DESEGREGATION CASES

Introduction

The Fourteenth Amendment makes no mention of schools or education. However, the Amendment does state:

> 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 law.[1]

This Amendment has been the basis for the challenges in many segregation cases and, in particular, many cases dealing with the separation of whites and Negroes in public schools.[2] The history of school segregation has been described as follows:

> Segregation in the schools has undergone three legal phases: that resulting from the Plessy decision of 1896, the higher education cases beginning in the 1930's, and the public school cases beginning with the Brown decision of 1954.[3]

The Plessy v. Ferguson (1896) decision is a part of the legal background which must be understood in order to place

---

[1]H. C. Hudgins, The Warren Court and the Public Schools (Danville, Illinois: Interstate Printers and Publishers, 1970), p. 73.

[2]Ibid.

[3]Ibid.

subsequent segregation decisions in the proper perspective.[4] This case concerned the constitutionality of segregation of the races in public transportation facilities. In 1890 the Louisiana legislature passed a statute which established segregated railroad coaches. Homer Adolph Plessy, seven-eighths white and one-eighth Negro, challenged the statute on the grounds that it violated his Thirteenth and Fourteenth Amendment rights. The Supreme Court, with Justice Henry B. Brown writing the opinion, ruled that the statute was reasonable and consistent with customs and traditions, saying:

> The object of the Amendment [Fourteenth] was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[5]

The Plessy case set the tone for subsequent segregation cases. Separate but equal became the accepted doctrine of the day; however, there is nothing in the Plessy opinion stating that segregation shall be permitted when facilities are equal.[6] This case seems to indicate that the government

---

[4]Plessy v. Ferguson, 163 U.S. 537 (1896).

[5]Ibid.

[6]Hudgins, p. 16.

did not want to get involved in segregation cases.

Three years after the Plessy decision the Court heard another segregation case. This case, Cumming v. Richmond County Board of Education (1899), directly involved the public schools.[7] The justices were asked to decide the constitutionality of an injunction which would close a white high school until a similar, separate school was provided for Negroes. The Court found the following:

> The facts of the case showed that in Richmond County, Georgia, the only Negro high school, enrolling sixty students, was discontinued to permit the building to be converted into an elementary school to house three hundred pupils.[8]

The Negroes alleged that the injunction was constitutional on the grounds that inequality resulted from the county's failure to provide a high school for Negroes when the whites had a high school. The Negroes had three private schools within the county that charged the same tuition fee charged by the public school. H. C. Hudgins reports that:

> In the oral argument the attorneys for the plaintiffs argued that separate schools were unconstitutional; however, the justices held in the opinion that such an allegation was given too late in the proceedings for the Court to act upon.[9]

---

[7]Cumming v. Richmond County Board of Education, 175 U.S. 528 (1899).

[8]Hudgins, p. 16.

[9]Ibid.

In giving the Court's unanimous decision, Justice John M. Harlan noted that the justices could find no evidence of racial discrimination. He stated that closing the white schools would not remedy the wrong suffered by the Negroes, and that the plaintiffs would have had a stronger case had they requested a mandamus to compel the opening of the Negro schools.

The Cumming decision shows that the Court recognized the authority of the state over education.[10] In Cumming the Court stated:

> We may add that while all admit the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by the state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.[11]

The separate but equal doctrine remained unchallenged in the nation's highest court until Martha Lum, who was Chinese, objected to the placement of her daughter in a Negro school. In Gong Lum v. Rice (1927) the Court ruled that the school board's action was proper.[12] Chief Justice William H. Taft,

---

[10]Ibid.

[11]Cumming, p. 528.

[12]Gong Lum v. Rice, 275 U.S. 78 (1927).

writing for the majority, reminded the plaintiff that separate but equal was still the doctrine under which the Court was operating.[13]

The Court heard cases in the period between the Lum decision and the Brown decision which concerned racial segregation in colleges and universities. These cases concerned admission and treatment of Negro students in white institutions of higher learning. A Negro student gained admission to a white university in Gaines v. Canada (1938).[14] In Sipuel v. Board of Regents (1948), a Negro student won admission to the University of Oklahoma Law School.[15] In Sweatt v. Painter (1950), the quality of a separate Negro law school was questioned.[16] In McLaurin v. Oklahoma (1950), segregation of classes within white institutions was struck down.[17] Hudgins notes the importance of these cases saying:

> The significance of the four university cases is manifest as one sees the gradual erosion of the separation doctrine. Both Gaines and Sipuel opened the way for Negroes to attend white institutions. McLaurin held that, once a school has been desegregated its facilities must be made available to all alike, its students must be accorded similar treatment.

---

[13]Hudgins, p. 17.

[14]Gaines v. Canada, 305 U.S. 337 (1938).

[15]Sipuel v. Board of Regents, 332 U.S. 631 (1948).

[16]Sweatt v. Painter, 339 U.S. 629 (1950).

[17]McLaurin v. Oklahoma, 339 U.S. 637 (1950).

> Sweatt expanded the holding in showing a segregated school to be unequal and in pointing out intangible factors as measurements of potential success. It was these cases which actually provided the springboard for an attack on segregation in the public elementary and secondary schools in a case to be heard by the Warren Court.[18]

In 1952 four cases were joined for appeal before the Court which questioned the constitutionality of racial segregation in the public schools of the United States. These cases are commonly known as Brown v. Board of Education (1952).[19] The case was actually a combination of the Brown case and cases from South Carolina, Virginia, and Delaware which challenged segregation on the same constitutional grounds. These cases were class action suits brought by minor Negro plaintiffs seeking admission to public schools on a nonsegregated basis. The counsel for the complainants was Thurgood Marshall, who became the first Negro justice in 1967 and is a member of the Burger Court. During the time the case was being considered, Chief Justice Fred M. Vinson died, and Earl Warren was appointed Chief Justice by President Dwight D. Eisehnower.

In his opinion Chief Justice Warren addressed the separate but equal doctrine. The Chief Justice pointed out that there had been six cases in public education involving the concept and then noted that equal facilities were not the question in

---

[18]Hudgins, p. 19.

[19]Brown v. Board, 347 U.S. 483 at 483 (1954).

this case. Chief Justice Warren said: "We must look instead to the effect of segregation itself on public education."[20] The Chief Justice then asked:

> 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 educational opportunity?[21]

This was then answered in a manner that left no doubt about the future of segregated public schools when the Chief Justice stated:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[22]

Bolling v. Sharpe (1954) considered the constitutionality of public school segregation in the District of Columbia.[23] It was not considered with the other cases in Brown because it did not challenge state action under the Fourteenth Amendment. Both Brown and Bolling were restored to docket for further argument regarding formation of decrees.

---

[20]Ibid., p. 492.

[21]Ibid., p. 493.

[22]Ibid., p. 495.

[23]Bolling v. Sharpe, 347 U.S. 497 (1954).

In 1955 the Brown case was reargued with the parties involved in the first Brown argument joined by the United States, Arkansas, Florida, North Carolina, Oklahoma, Maryland, and Texas as participants.[24] This case was heard for the purpose of implementing the first Brown decision. In its decision the Court gave the local school officials and the District Court the responsibility for implementation of the Brown decision. Again Chief Justice Warren spoke for the Court following the argument, saying:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.[25]

In Pennsylvania v. Board (1957) the Court extended the Brown ruling to cover private schools where states were involved.[26] The case was disposed in a brief per curiam opinion, saying:

---

[24]Brown v. Board, 349 U.S. 294 at 300-1 (1955).

[25]Ibid.

[26]Pennsylvania v. Board, 353 U.S. 230 (1957).

> Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment . . . .[27]

The litigation which has come before the Court since this case has concerned implementation of the Brown decision. The implementation of this decision in Little Rock, Arkansas, provided the Court with its first challenge to the Brown decision. The Governor and State Legislature in Arkansas had acted to prevent the desegregation of Little Rock's Central High School by despatching the National Guard to the school to oppose integration. The violence that resulted caused the school board to request a postponement of the desegregation program. The District Court granted relief, but the Appeals Court reversed on appeal. The Supreme Court met in special session on August 28, 1958, to hear argument in the case.

In this case, Cooper v. Aaron (1958), the Court again issued a unanimous decision.[28] In speaking for the Court, the Chief Justice noted that the school officials had acted in good faith and that the educational progress of all students had suffered. He laid the blame for these conditions on the state legislature and executive officials, saying: "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon

---

[27]Ibid.

[28]Cooper v. Aaron, 358 U.S. 1 (1958).

the actions of the Governor and the Legislature."[29]

In Goss v. Board (1963) the Court ruled a transfer plan being used in Knoxville City Schools was unconstitutional.[30] The Court noted that the plan would perpetuate de facto segregation.

In McNeese v. Board (1963) the Court ruled that state aid could not be withheld from districts which complied with state rules affecting such aid.[31] This case established that state remedies do not have to be exhausted before a plaintiff can seek relief from a federal court under the federal Civil Rights Act. This was the first desegregation case since the Brown decision in which there was a dissenting vote.[32]

In 1964 the Court heard a case that tested the constitutionality of closing public schools in defiance of desegregation mandates issued in the Brown decision. Griffin v. School Board (1964) was a suit against Prince Edward County, Virginia, brought to compel the reopening of the public schools.[33] In 1956 the board of supervisors had stopped levying taxes and appropriating funds for integrated public schools. The Prince Edward School Foundation was formed to operate schools for

---

[29]Ibid.

[30]Goss v. Board, 373 U.S. 683 (1963).

[31]McNeese v. Board, 373 U.S. 668 (1963).

[32]Justice John M. Harlan dissented.

[33]Griffin v. School Board, 377 U.S. 218 (1964).

white students, and state financial assistance was obtained. Justice Black spoke for the Court, saying:

> For reasons to be stated, we agree with the District Court that, under the circumstances here, closing the Prince Edward County Schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment.[34]

In Rogers v. Paul (1965) the court was asked to rule on the adequacy of a desegregation plan which called for the integration of one grade per year.[35] A per curiam opinion was handed down which directed the school officials to allow for immediate transfer to the high school for any student who was assigned to another school on the basis of race. In this case four justices dissented on the grounds that the case should have been set for argument and plenary consideration.

In 1968 three cases were appealed to the court which asked the justices to overturn freedom-of-choise assignments. Unlike the Brown decision in which several similar cases were joined, the justices decided to hand down three separate opinions. In each case Justice Brennan, speaking for the Court, overruled the freedom-of-choice plans.

In Green v. Board (1968) a new Kent County, Virginia, freedom-of-choice plan was attacked.[36] Under the plan no

---

[34]Ibid.

[35]Rogers v. Paul, 383 U.S. 198 (1965).

[36]Green v. County School Board, 391 U.S. 430 (1968).

white child had elected to attend the Negro school, and approximately eighty-five percent of the Negro students still attended the Negro school.[37] The Court struck down the plan, but Justice Brennan, speaking for the majority, noted that the Court did not overrule all freedom-of-choice plans.

The two remaining freedom-of-choice cases were Raney v. Board (1968)[38] and Monroe v. Board (1968)[39]. In each of these cases the Court found the freedom-of-choice plans to be unacceptable, yet the Court continued to maintain that all freedom-of-choice plans were not unacceptable.

In the last desegregation case to be brought before the Warren Court, United States v. Board of Education (1969), the desegregation of a Montgomery County, Alabama, high school faculty was questioned.[40] In ordering that the decision of the District Court would stand, Justice Black, speaking for the Court, stated that the Court was not "argue/ing/ here that racially balanced faculties are constitutionally or legally required."[41]

These cases just reviewed represent the precedents which had been established by the Court prior to the tenure of Chief Justice Burger. The Brown decision established that the Court

---

[37]Hudgins, p. 91.

[38]Raney v. Board of Education, 391 U.S. 443 (1968).

[39]Monroe v. Board of Commissioners, 391 U.S. 450 (1968).

[40]United States v. Board of Education, 395 U.S. 225 (1969).

[41]Ibid., p. 236.

would not allow racial segregation of public education facilities. The Court under Chief Justice Warren Burger had begun the implementation of this ruling. The Burger Court was now responsible for the continuation of this process, and the cases which were heard represent the Court's efforts in actualizing the Brown decision.

The Cases

Swann v. Board (1971) followed a series of per curiam rulings in which the Court sought to clarify the means by which racial segregation was to be eliminated from public schools.[42] The Burger Court attempted to define its position on school desegregation in the five cases which were decided between 1969 and 1971. In Alexander v. Board (1968), the Court ruled, in an unsigned per curiam opinion, that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible."[43] In Carter v. Board (1969), the Court granted the petitioner's application for a temporary injunction which stopped the implementation of an order by the Appeals Court which would have delayed desegregation of Louisiana schools from February 1970 to September 1970.[44] This injunction was granted pending the Court's consideration of a petition for certiorari in the case. In Dowell v. Board (1969) the Court

---

[42]Swann v. Board, 402 U.S. 1 (1971).

[43]Alexander v. Board, 396 U.S. 19 (1969).

[44]Carter v. Board, 396 U.S. 226 (1969).

vacated the District Court order to desegregate Oklahoma schools.[45] The Supreme Court unanimously ruled that the desegregation plan should have been implemented pending the decision of the appeal.

In Carter v. Board (1970) the Court stated in a per curiam decision that the Court of Appeals had misconstrued the intent of the Alexander decision by authorizing the postponement of student desegregation beyond February.[46]

In this case Justice Harlan, joined by Justice White, stated his understanding of the procedure required by the Court in desegregation "since the Court has not seen fit to do so."[47] Justices Black, Douglas, Brennan, and Marshall expressed their disagreement with the opinion of Justice Harlan. In a memorandum, Chief Justice Burger and Justice Stewart expressed their view that the Court of Appeals was "far more familiar than we with the various situations of these several school districts . . . ."[48] The Chief Justice stated:

> To say peremptorily that the Court of Appeals erred in its application of the Alexander doctrine to these cases, and to direct summary reversal without argument and without opportunity for exploration of the varying problems of individual school districts, seems unsound to us.[49]

---

[45]Dowell v. Board, 396 U.S. 269 (1969).

[46]Carter v. Board, 296 U.S. 290 (1970).

[47]Ibid.

[48]Ibid., p. 294.

[49]Ibid.

In Northcross v. Board (1970) the Court, on certiorari, affirmed the Appeals Court order of remand to the District Court where the question of desegregation of Memphis City schools was to be considered "promptly" and consistently with the Alexander case.[50] The Chief Justice concurred in the Court's opinion, stating that he would grant the petition for certiorari and set the case for argument if it were not for the fact that only seven justices could hear the case. He stated:

> From what is now before us in this case it is not clear what issues might be raised or developed on argument. As soon as possible, however, we ought to resolve some of the basic practical problems when they are appropriately presented . . . .[51]

The "practical problems" were "appropriately presented" in Board v. Swann (1971).[52] The Chief Justice delivered the unanimous opinion of the Court in the case, saying:

> We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action.[53]

Chief Justice Burger noted that the issue in this case was the

---

[50]Northcross v. Board, 397 U.S. 232 (1970).

[51]Ibid., p. 237.

[52]Board v. Swann, 402 U.S. 1 (1971).

[53]Ibid., p. 5.

"implementation of the basic constitutional requirement that the state not discriminate between public school children on the basis of their race."[54] The effort to desegregate the Charlotte-Mecklenburg, North Carolina, school system had resulted in the development of several plans for desegregation and a number of appeals to the courts, in addition to Swann. In this case the Court attempted to help the District Court and Appeals Court by trying to "amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts."[55]

The Chief Justice noted that judicial authority could be invoked when school authorities failed in their duty to take affirmative action to convert to a unitary school system.[56] In that event a district court has broad power to fashion a remedy that will assure a unitary school system.[57] According to Chief Justice Burger, the courts have the power to consider the following when designing desegregation plans:

1. construction and abandonment of school facilities;
2. the use of ratios for pupil assignment;
3. a majority-to-minority transfer program;

---

[54]Ibid., p. 13.

[55]Ibid., p. 14.

[56]Ibid., p. 15.

[57]Ibid., p. 16.

4. the pairing and grouping of noncontiguous school zones;

5. the use of busing.[58]

The Chief Justice noted that the Court could not lay down rigid rules because conditions and situations waried widely.[59]

The Swann decision was followed by four additional decisions, all reported on the same day as the Swann decision, which applied the guidelines established in Swann. The first of these cases was Davis v. Board (1971).[60] In this case the unanimous Court, speaking through Chief Justice Burger, found that the Court of Appeals had erred in treating the eastern part of metropolitan Mobile, Alabama, as an isolated area within the school system. The Court reversed the Appeals Court decision with regard to pupil assignment and directed the Court to disregard neighborhood school zoning if it stood in the way of achieving a unitary school system.[61]

In the second case McDaniel v. Barresi (1971), the Court, in an unanimous decision delivered by the Chief Justice, reversed the decision of the Georgia State Supreme Court.[62] The Georgia Supreme Court had ruled that a desegregation plan for Clarke County, Georgia, violated the equal protection clause

---

[58]Ibid., pp. 21-31.

[59]Ibid., p. 29.

[60]Davis v. Board, 402 U.S. 33 (1971).

[61]Ibid., p. 37.

[62]McDaniel v. Barresi, 402 U.S. 39 (1971).

by treating students differently and violated the Civil Rights Act of 1964 by using busing to achieve a racial balance.[63]

In the third case, Board v. Swann (1971), the Court unanimously affirmed the decision of the District Court.[64] This court had found a North Carolina statute, General Statute 115-176.1, which prohibited the assignment of students on account of race and the use of busing to achieve racial balance, to be unconstitutional. Chief Justice Burger, speaking for the Court, stated:

> . . . bus transportation has long been an integral part of all public education systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it.[65]

In the fourth case, Moore v. Board (1971), the Court, in a per curiam opinion, dismissed an appeal of the decision from the United States District Court for the Western District of North Carolina.[66] The District Court had declared the anti-busing statute passed by the North Carolina legislature to be unconstitutional.

Having established that desegregation was to be accomplished now and that the federal courts had certain powers in the development of desegregation plans, the Court was faced

---

[63]Ibid.

[64]Board v. Swann, 402 U.S. 43 (1971).

[65]Ibid., p. 46.

[66]Moore v. Board, 402 U.S. 43 (1971).

with the issue of how the establishment of new school districts would affect such plans. In the first of two cases, Wright v. Council (1972), the Court ruled that the establishment of a separate school district for the town of Emporia within the school district of Greenville County, Virginia, would impede the dismantling of the existing dual school system.[67] The Court, with Justice Stewart expressing the views of five associates, stated that the District Court was correct in focusing upon the effect of the separation and that the new school district would impede the dismantling of the dual system.[68]

Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, dissented. The Chief Justice noted that the creation of a separate school system would not result in more than a "minor statistical difference" in racial ratios in both systems.[69] Chief Justice Burger stated: "It is quite true that the racial ratios of the two school systems would differ, but the elimination of such disparities is not the mission of desegregation."[70] The Chief Justice called efforts to obtain a racial balance pointless.[71] Efforts to "reproduce in each classroom a microcosmic reflection" of racial

---

[67]Wright v. Council, 407 U.S. 451 (1972).

[68]Ibid., p. 470.

[69]Ibid., p. 474.

[70]Ibid., p. 473.

[71]Ibid.

population patterns were described by the Chief Justice as no more effective or constitutional than efforts which produce no such condition.[72] According to the Chief Justice, such balancing efforts were not constitutionally mandated.[73]

In United States v. Board (1972) the Court again was asked to rule on the constitutionality of dividing a school district.[74] The United States Department of Justice had obtained an agreement whereby Halifax County, North Carolina, schools attempted to desegregate a dual, racially segregated system consisting of twenty-two percent white students and seventy-seven percent Negro students. Following this action the City of Scotland Neck was authorized by the state legislature to create a separate school district within the county. This action would have resulted in a formerly all-white school in the city retaining a white majority and a formerly all-Negro school just outside the city remaining ninety-one percent Negro. Justice Stewart concluded that the state statute would have the effect of impeding the disestablishment of the dual school system.[75]

Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, concurred. The Chief Justice noted that the

---

[72]Ibid., p. 474.

[73]Ibid.

[74]United States v. Board, 407 U.S. 484 (1972).

[75]Ibid., p. 490.

situation in this case was significantly different from the situation in Wright. According to the Chief Justice, the creation of a separate school system would "preclude meaningful desegregation."[76] In distinguishing the two cases, the Chief Justice further noted that this attempt at creating a new school system did not seem to be the fulfillment of destiny and the motivation seemed to be the desire to create a predominately white system.[77]

In School Board of the City of Richmond v. State Board (1973) the Court upheld an Appeals Court decision that ruled that the District Court could not compel Richmond, Virginia, to join into a busing arrangement with two joining school systems for the purpose of integrating their public schools.[78] The Court was split evenly in this case with Justice Powell not participating because he had served on both the State and Richmond school boards. The Court does not report how individual justices vote when the Court has a split decision.[79]

The Court was asked to review an Appeals Court decision which concerned the desegregation of Denver, Colorado, city schools in Keyes v. Board (1973).[80] The Appeals Court ruled

---

[76]Ibid., p. 491.

[77]Ibid., p. 492.

[78]School Board of the City of Richmond v. State Board, 412 U.S. 92 (1973).

[79]David Rohde and Harold Spaith, Supreme Court Decision Making, (San Francisco: W. H. Freeman, 1976), p. 153.)

[80]Keyes v. Board, 413 U.S. 189 (1973).

that the Park Hill area of Denver, an area of Denver that had been deliberately segregated, be desegregated, and the District Court's order for a remediation plan aimed at achieving equality for Denver's core city schools was reversed.

The Supreme Court modified the Court of Appeals ruling by vacating instead of reserving the District Court's ruling. The case was remanded to the District Court so that it could be determined if Park Hill should be treated as isolated from the rest of the district and so that appropriate rulings could be made relative to the findings. Justice Brennan, expressing the views of five members of the Court, stated the Court's opinion in this case. Chief Justice Burger concurred in the result without written opinion. Justice Douglas joined the opinion of the Court, stating that he felt there was "no difference between de facto and de jure segregation."[81] Justice Powell concurred in part and dissented in part, noting that this was the "first school desegregation case to reach the Court that involved a major city outside the South."[82] Justice Powell expressed the view that a standard should be set for integration of all public school systems. Justice Rehnquist dissented on the grounds that unconstitutional segregation in the Park Hill area did not indicate segregation in the entire district.[83]

---

[81]Ibid., p. 215.

[82]Ibid., p. 217.

[83]Ibid., pp. 254-265.

In Bradley v. Board (1974), Justice Blackmun, speaking for a unanimous Court, ruled that a district court may allow plaintiffs in a desegregation litigation a reasonable attorney's fee.[84] Justice Marshall and Justice Powell took no part in the consideration or discussion of this case.

On November 19, 1973, the Court granted certiorari in a case which would determine whether a federal court could impose a multidistrict, areawide remedy to a single school district segregation problem.[85] When this case was argued before the Court, it was joined with two other similar cases, and those three cases were argued as Milliken v. Bradley (1974).[86]

In this case Chief Justice Burger, joined by four members of the Court, delivered the Court's opinion. The Chief Justice found that the District Court and the Appeals Court had dictated a metropolitan plan because they had concluded that a Detroit-only plan would not achieve a meaningful racial balance.[87] The Chief Justice referred to the Court's decision in Swann, a decision he wrote, in stating that desegregation does not require any particular racial balance.[88] The Chief Justice contradicted the District Court's contention that school district boundary lines are "arbitrary lines on a map drawn for political

---

[84]Bradley v. Board, 416 U.S. 696 (1974).

[85]Bradley v. Milliken, 414 U.S. 1038 (1973).

[86]Milliken v. Bradley, 418 U.S. 717 (1974).

[87]Ibid., p. 735.

[88]Ibid., p. 740.

convenience" by noting that such an attitude was "contrary to the history of public education in the United States."[89] The disruption, transportation problems, financing problems, and the loss in local control which would result from the inter-district remedy were also noted.[90]

The Chief Justice, in finding the desegregation plan to be unjustified, based his opinion upon the principle that "the scope of the remedy is determined by the nature and extent of the constitutional violation."[91] According to the Chief Justice, the record in this case showed no evidence of segregation outside of the Detroit schools. This finding meant that a remedy involving outlying districts would be impermissible based on standards set by the Court in Brown I and its subsequent holdings.[92] In reference to the dissent of Justices White and Marshall, the Chief Justice stated that any interpretation of prior Court decisions which would allow a cross-district remedy would be supported "only by drastic expansion of the Constitutional right itself."[93]

In Board v. Spangler (1976), the Court considered the question of whether a District Court could require a school district to rearrange its attendance zones annually in order

---

[90]Ibid., p. 743.

[91]Ibid., p. 744.

[92]Ibid., p. 746.

[93]Ibid., p. 747.

to insure a perpetually desirable racial mix in its schools.[94] Justice Rehnquist, as Circuit Justice, had granted a stay of the District Court's order in this case pending the Court's decision on a petition for certiorari.[95] When the Court granted the petition for certiorari and heard the case, Justice Rehnquist, joined by six members of the Court, expressed the view that having established a racially neutral system in 1970 by its order, the District Court "exceeded its authority" by requiring annual readjustments to insure that "there would not be a majority of any minority in any Pasadena public schools."[96] Justice Marshall, joined by Justice Brennan, dissented on the grounds that "racial discrimination through official action" had not been eliminated from the Pasadena system.[97] Justice Stevens did not participate in this case.

Milliken v. Bradley appeared on the Court's docket a second time following remand to the District Court.[98] The District Court ruled that remedial programs for students who had been subjected to past acts of de jure segregation be impelmented and that local and state officials, responsible for the unconstitutional actions, bear the costs of the programs. This case is known as Milliken II.

---

[94]Board v. Spangler, 437 U.S. 424 (1976).

[95]Board v. Spangler, 423 U.S. 1335 (1975).

[96]Board v. Spangler, 427 U.S. 424 (1976).

[97]Ibid., p. 441.

[98]Milliken v. Bradley, 433 U.S. 267 (1977).

Chief Justice Burger, joined by Justices Brennan, White, Stewart, Marshall, Blackmun, Rehnquist, and Stevens, delivered the opinion of the Court. The Chief Justice noted that the Court had established the principle by which this decision was made in previous opinions.[99] In reviewing the District Court's action, the Court found no violation of these principals in the judgment to authorize remediation and compensatory programs as a part of the desegregation program for Detroit public schools. Further, the Court found no merit in petitioner's claim that the plan "violates the Tenth Amendment and general principles of federation."[100]

In Austin v. United States (1976) the Court heard an appeal of the desegregation plan for Austin, Texas, public schools.[101] In a seven-to-two decision, the Supreme Court vacated the lower-court judgment. In a memorandum decision, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, stated:

> I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation . . . .[102]

---

[99]Ibid., p. 280.

[100]Ibid., p. 291.

[101]Austin v. United States, 429 U.S. 990 (1976), 50 L. ED. 2d at 604.

[102]Ibid., p. 605.

In Board v. Brinkman (1977) the Court was asked to review a desegregation plan that had been approved by the Court of Appeals.[103] This plan called for districtwide racial distribution of students in schools so that each would be brought to within fifteen percent of the black-white population ratio of Dayton, Ohio. Justice Rehnquist, joined by Chief Justice Burger, and Justices Stewart, White, Blackmun, Powell, and Stevens, delivered the Court's opinion, stating:

> . . . the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles.[104]

The Court found that the pupil population in some Dayton schools not being homogeneous was not a violation of the Fourteenth Amendment in the absence of evidence showing segregative intent on the part of the board.[105] The Court concluded that "the Court of Appeals had no warrant in our cases for imposing the systemwide remedy which it did."[106] The case was remanded to the District Court for specific findings and judgment consistent with this opinion.

Upon reviewing the record, the District Court dismissed the complaint on the grounds that the plaintiffs had failed to prove that acts of intentional segregation over twenty years

---

[103]Board v. Brinkman, 433 U.S. 406 (1977).

[104]Ibid., p. 410.

[105]Ibid., p. 413.

[106]Ibid., p. 417.

old had caused any present segregative effects.[107] The Court of Appeals then reversed this decision on the grounds that the Dayton Board of Education was operating a dual school system in 1954 when the Supreme Court had ordered the desegregation of public schools and that they had failed to disestablish that dual system.[108]

This case was then returned to the Court on a petition for certiorari.[109] In an opinion by Justice White, joined by Justices Brennan, Marshall, Blackmun, and Stevens, the Court ruled that the reversal of the District Court was proper on the grounds that the Dayton Board of Education was operating a dual school system.

Justices Powell and Rehnquist dissented. Justice Stewart, joined by the Chief Justice, dissented. These dissents revealed a split in the Court over the issue of how far the courts should go in trying to desegregate schools. In his opinion, Justice Stewart stated his feelings about the importance of the federal district courts in desegregation controversies, noting that District Court judges are "uniquely situated" to appraise the societal forces at work.[110] This opinion also noted Justice Stewart's disagreement with the

---

[107]Board v. Brinkman, 466 F. Supp. 1232 (1978).

[108]Board v. Brinkman, 583 F. 2d 243 (1978).

[109]Board v. Brinkman, _____ U.S. _____ (1979).

[110]Ibid.

Court's willingness to consider the fact that a dual school system existed in 1954. Justice Stewart contended that the burden of proof had been shifted to the school board by this consideration and "when the factual issues are as elusive as these, who bears the burden of proof can easily determine who prevails in the litigation."[111]

In Brennan v. Armstrong (1977) the Court vacated and remanded an Appeals Court ruling which called for the desegregation of Milwaukee, Wisconsin, schools.[112] This opinion, which expressed the views of Chief Justice Burger and Justices Stewart, White, Blackmun, Powell, and Rehnquist, directed the lower court to review the case in light of the Court's ruling in Arlington Heights v. Housing Development (1976) and the Brinkman decision.[113] In Arlington Heights the Court ruled that in the absence of discriminating intent, official action is not unconstitutional solely because it results in a racially disporportionate impact.[114] Justice Steven's dissent, joined by Justices Brennan and Marshall, stated that the Court of Appeals was "free to re-enter its original judgment."[115]

In Omaha v. United States (1977) the Court again vacated and remanded a case for reconsideration in light of Arlington

---

[111]Ibid.

[112]Brennan v. Armstrong, 433 U.S. 672 (1977).

[113]Arlington Heights v. Housing Development, 429 U.S. 252 (1976).

[114]Ibid.

[115]Ibid., p. 675.

Heights and Brinkman.[116] This case concerned the court-ordered desegregation of Omaha, Nebraska, schools. Again the per curiam opinion expressed the view of Chief Justice Burger and Justices Stewart, White, Blackmun, Powell, and Rehnquist with Justices Brennan, Marshall, and Stevens dissenting.

A number of rulings were made by justices acting as surrogates for the entire Court in Appeals Court cases. These rulings had an effect on the Court's desegregation policy and are reviewed for that reason.

In Edgar v. United States (1971) Justice Black refused to grant a stay of a District Court order which would have forced the withholding of funds and accreditation for school districts failing to meet desegregation requirements.[117] Justice Black was again asked to rule on a desegregation plan in Corpus Christi v. Cisneros (1971).[118] In this case the stay was granted so that the confusion resulting from two District Court orders could be reconciled.

In Winston-Salem v. Scott (1971) Chief Justice Burger was asked to stay a desegregation plan pending the Court's review of a petition for certiorari from Winston-Salem/Forsyth County,

---

[116]Omaha v. United States, 433 U.S. 667 (1977).

[117]Edgar v. United States, 404 U.S. 1206 (1971).

[118]Corpus Christi v. Cisneros, 404 U.S. 1211 (1971).

North Carolina, schools.[119] The Chief Justice received the petition seven days before the school year was to begin and this fact alone probably predisposed him to refuse to grant the application.[120] In his memorandum on this case, the Chief Justice intimated that the District Court and Board of Education had done more than was legally required to create a unitary system.[121] This threw the school system into chaos and led some to think the Court might modify the racial ratio system that had been prescribed by the lower courts.[122]

In Gomperts v. Chase (1971) Justice Douglas denied an application for a preliminary injunction against a school board's plan for voluntary integration of certain California schools.[123] In Drummond v. Acree (1972) Justice Powell denied the application for a stay of the desegregation order for Augusta, Georgia, public schools.[124] Justice Rehnquist granted a stay of an Appeals Court order for the desegregation of Columbus, Ohio, schools in Board v. Penick (1978).[125] The remaining applications for stays of desegregation orders

---

[119]Winston-Salem v. Scott, 404 U.S. 1221 (1971).

[120]Howard Kalodner and James J. Fishnam, eds., Limits of Justice (Cambridge, Mass.: Ballinger Publishers, 1978), p. 543.

[121]Ibid., p. 547.

[122]Ibid., p. 546.

[123]Gomperts v. Chase, 404 U.S. 1237 (1971).

[124]Drummond v. Acree, 409 U.S. 1228 (1972).

[125]Board v. Penick, _____ U.S. _____ (1978).

received by individual justices in the 1978-1979 term were denied.[126]

Analysis

In order to analyze Chief Justice Burger's influence in desegregation cases, it is necessary to ascertain his philosophical position with regard to school desegregation litigation. This task was made more difficult by the fact that the Court acted with more unity in desegregation cases than it did in church and state cases. In fourteen of the twenty school desegregation cases, the Court delivered unanimous decisions. The Chief Justice was joined concurring or dissenting by the associate justices more frequently in desegregation decisions than in church and state cases. The Chief Justice was joined in desegregation cases one hundred percent by Justices Black and Harlan, eighty-five percent by Justice Douglas, eighty percent by Justice Brennan, ninety-five percent by Justice Stewart, eighty-four percent by Justice White, eighty-two percent by Justice Marshall, ninety-three percent by Justice Blackmun, eighty-nine percent by Justice Powell, seventy-eight percent by Justice Rehnquist, and seventy-five percent by Justice Stevens. The Chief Justice voted with the majority in

---

[126]Board v. Brinkman, _____ U.S. _____ (1978); Buchanan v. Evans, _____ U.S. _____ (1978); School District v. Evans, _____ U.S. _____ (1978); Bishop v. Board, _____ U.S. _____ (1978).

eighteen of twenty, or ninety percent, of the cases and dominated the majority opinion writing by writing six of fourteen majority opinions. No other justice wrote more than two majority opinions.

This situation makes it more difficult to ascertain the Chief Justice's position because his majority opinion may have reflected Court-conscious rather than his personal views. Chief Justice Burger did, however, write several concurring and dissenting opinions which serve to illuminate his feelings.

In Carter v. Board the Chief Justice, in a memorandum, noted that the Court's summary reversal of a lower court desegregation decision with "opportunity for exploration" seemed "unsound."[127] The lower court's familiarity with the situation was noted, and the Chief Justice, joined by Justice Stewart, seemed to be more sympathetic than his colleagues toward "situations" which might make desegregation more difficult. In Northcross v. Board the Chief Justice again expressed his desire to give a desegregation case a full hearing but retreated from that position due to the fact that only seven justices could have participated in the decision.

In Swann v. Board the opportunity to give the full hearing advocated by the Chief Justice presented itself. This case was decided by a unanimous Court, and the Chief Justice wrote the majority opinion. This case is interesting because it is the

---

[127]Carter v. Board, 396 U.S. 294 (1970).

first desegregation case to receive a full hearing by the Burger Court. President Nixon had appointed Chief Justice Burger, and many had expected the Chief Justice to advocate a conservative judicial stance similar to that advocated by the President.[128] In the first desegregation case to come before the Court, Alexander v. Board, the "all deliberate speed" standard was replaced by "desegregation now."[129] This unsigned summary decision disappointed many conservatives who had hoped Chief Justice Burger could lead the Court away from the Warren Court's stand on desegregation.[130] Now the Court would be giving full consideration to a case which would, as the Chief Justice stated:

> . . . review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action.[131]

The unanimous opinion in Swann was written by the Chief Justice and served to advise the lower courts that they could use a variety of methods, including busing, to end segregation of public schools. James Simon noted that this opinion placed the responsibility of deciding the means by which desegregation was to be achieved in the hands of the lower courts and

---

[128]James F. Simon, In His Own Image (New York: David McKay Co., 1973), p. 128.

[129]Alexander, p. 19.

[130]Simon, p. 128.

[131]Board v. Swann, 402 U.S. 5 (1971).

and that the Chief Justice intended only to "maintain the status quo."[132] This case, however, started a political storm over its implications for Northern schools and the President's stand against busing. According to James Simon, Chief Justice Burger was "chagrined" by the controversy which developed over the Swann decision, but he was helpless to do anything as the lower courts seemed to hand down one busing order after another as if on direct order from the Supreme Court.[133] The Chief Justice, however, in subsequent cases, did make clear his position on busing: the Court did not require busing to achieve a particular racial balance in every school.

There is some evidence that Chief Justice Burger failed to influence the Court in this case. Nina Totenberg, reporter for the Washington Post, reported that six members of the Court had supported a decision against busing in the initial conference on the Swann case.[134] There is some question about the validity of this information, since the conference is held in secret; however, if the information is correct, it would indicate a lack of ability on the part of the Chief Justice to influence the Court. The Chief Justice made it clear in subsequent decisions that he believed busing had a very limited role in desegregation orders.

---

[132]Simon, p. 154.

[133]Ibid.

[134]William R. Thomas, The Burger Court and Civil Liberties (Brunswick, Ohio: King's Court Communication, Inc., 1976), p. 147.

In the other four desegregation cases reported with Swann, the Court, speaking through the Chief Justice in three of the four, affirmed its intent to desegregate public schools in the South through whatever means necessary. These cases do little to illuminate the Chief Justice's attitude or influence.

In his denial of the application for a stay of the desegregation order for the Winston-Salem/Forsyth school system, Chief Justice Burger intimated that a dual system might not be in operation and that the court-ordered desegregation plan might have gone beyond its constitutional bounds.[135] This attitude on the part of Chief Justice Burger demonstrated his desire to have the Court act with restraint in desegregation cases. As will be demonstrated in later cases, the Chief Justice did not want the Court to extend its rulings in desegregation cases past the standards set in Brown. In the memorandum in this case, Chief Justice Burger stated: "Under Swann and related cases of April 20, 1971, as in earlier cases, judicial power can be invoked only on a showing of discrimination violative of the constitutional standards declared in Brown."[136]

In Wright v. Council the Chief Justice filed his first dissent in a school desegregation case. This case reveals the

---

[135]Kalodner and Fishnam, eds., p. 544.

[136]Winston-Salem/Forsyth v. Scott, 404 U.S. at 1231.

difference between the Chief Justice and the justices voting with the majority. In his dissent the Chief Justice stated that he would unhesitatingly join the majority if the division of Greenville County Schools would perpetuate a dual school system.[137] The record, according to the Chief Justice, did not support such a conclusion. He pointed to the fact that a division of this school system would produce a slight imbalance in the racial ratio of city and county students, but this imbalance would not prevent the existence of a unitary system.[138] The Chief Justice stated:

> Obsession with such minor statistical differences reflects the gravely mistaken view that a plan providing more consistent racial ratios is somehow more unitary than one which tolerates a lack of racial balance.[139]

The majority opinion, written by Justice Stewart, conceded that racial ratios should not be the sole determinant in desegregation cases. In finding the separation of the system to be invalid, the Court pointed to several factors. First, the Court noted that the potential for white flight to private academies and to the city schools as tuition students could make the projected racial ratios invalid.[140] Second, the Court noted the disparity between the school facilities located in the city and in the county. The city school

---

[137]Wright, p. 470.

[138]Ibid., p. 472.

[139]Ibid., p. 474.

[140]Ibid., p. 464.

buildings were significantly better than the county school buildings.[141] Third, the Court noted that the timing of the request which came after the District Court had ruled that the system be integrated.[142]

The difference between the majority composed of Justices Stewart, Douglas, Brennan, White, and Marshall and the dissenting minority composed of the Chief Justice and Justices Blackmun, Powell, and Rehnquist seems to be their respective attitudes toward the degree to which the Court should get involved in the implementation of the Brown decision. For Chief Justice Burger and those joining his dissenting opinion, desegregation efforts in public schools were adequate when a dual school system was dismantled.[143] No concern was expressed for racial balance, the potential for white flight, equality of facilities, or other factors which concerned the majority. The Chief Justice seemed to be saying that he supported the desegregation of public schools but only as far as ending dual system. This attitude would have carried the Court toward a nonactivist role in desegregation cases and would have left the lower courts with the responsibility to see that unitary school systems were achieved.

In a similar case, United States v. Board, decided the same day as Wright, the Chief Justice concurred in the Court's

---

[141] Ibid.

[142] Ibid.

[143] Ibid., p. 474.

decision to bar the creation of a new school district. The Chief Justice noted that this division of Halifax County, North Carolina, schools would have resulted in a predominately white Scotland Neck city system. The fact that Scotland Neck was obviously trying to avoid desegregation efforts and create a predominately white system was also noted. This case serves to illustrate the Chief Justice's thinking. The Wright decision was rejected by the Chief Justice because it went too far in expanding the desegregation order issued in Brown, while the decision in this case was accepted because it prevented an obvious discriminatory act.

In supporting an Appeals Court ruling that prevented the District Court from forcing the consolidation of Richmond, Virginia, schools with two joining systems, the Court split evenly. Since the Court does not report individual votes in tied decision, it is impossible to determine how the justices voted in this case. From the voting record in Wright and the attitudes expressed by the Chief Justice in other cases, it seems logical to assume that Chief Justice Burger was one of the justices voting in favor of the Appeals Court ruling. This conclusion is substantiated by other Court observers.[144] This action would be consistent with Chief Justice Burger's belief that desegregation decisions should not exceed the standards set in Brown.

---

[144]Rhode and Spaeth, p. 153.

In Keyes the Court remanded the first desegregation suit outside of the South back to the District Court to determine if Park Hill should be considered as isolated from the rest of the Denver school system. In this case the Chief Justice concurred without written opinion. The division and indecisiveness of the Court in this case is verified by the tone of the majority opinion and the number and diversity of the concurring and dissenting opinions. Chief Justice Burger may have worked for and been successful in obtaining this decision because it did not expand the standard set in Brown; however, it seems more likely that the Court was too divided to take a strong stand in this case and that the Chief Justice was unwilling or unable to influence the Court.

In Milliken v. Bradley the Court was faced with the question of whether cross-district busing could be used outside the South to integrate a city school system. Chief Justice Burger seems to have played a critical role in this decision as he cast the fifth and deciding vote in the five-to-four decision and wrote the majority opinion.

In writing the majority opinion in this case, the Chief Justice argued that since the record showed de jure segregation only in Detroit schools, the remedy was limited to the Detroit schools. The Chief Justice quoted from his majority opinion in Swann in pointing out the fact that no particular racial balance in schools, grades, or classrooms was required as evidence of successful integration. The administrative and legislative difficulties associated with mixing school

districts were also noted by the Chief Justice. In short, this majority opinion appears to be the very argument that was used in conference against the dissenters in this case. The Chief Justice even mentions the dissenting opinions in his majority opinion and attacks their logic, calling their effort to gain approval for the lower court decision an attempt to drastically expand the Constitution. The fact that the Chief Justice wrote the majority opinion in this five-to-four decision seems to indicate that there was no need to select a more neutral justice to write the opinion for the purpose of attracting other moderate justices.

If the majority opinion written by Chief Justice Burger was indeed essentially the same argument he used in conference, it would indicate that he was a major influencing factor in this case. The justices voting with the Chief Justice in this case included Justices Rehnquist, Blackmun, Stewart, and Powell. Justice Rehnquist had dissented in Keyes, stating that he did not believe that segregation in one part of the Denver school system proved the entire district to be segregated. On the basis of his position in Keyes and his concurrence with the Chief Justice's dissent in Wright, it would appear logical to assume that Justice Rehnquist supported the Milliken I decision with no need of being influenced. Justices Blackmun and Powell also seem to have needed little persuasion based on their concurrence with Chief Justice Burger's dissent in Wright. Chief Justice Burger's dissent in the Wright

decision is significant to this case because it was in that dissent that he stated that adjustments in school racial balances to achieve specific ratios was not constitutionally required. This racial-balance issue was the rationale used by the lower courts to justify their order for cross-district busing in the Milliken I decision. The conclusion then follows that justices joining Chief Justice Burger's Wright dissent would be inclined to agree with this same reasoning as expressed in Milliken I. Justice Stewart, the author of the majority opinion in Wright, appears to be the justice who was influenced to join the already established opinions of the other four. The assumption that Chief Justice Burger was solely responsible for influencing Justice Stewart can not be substantiated; however, it would seem logical to assume that the Chief Justice, with whom the other justices had joined dissenting in Wright and with whom they now joined in a majority in Milliken I, was one of the most influential factors in this case.

In an opinion by Justice Rehnquist, the Court, in Board v. Spangler, ruled that the District Court could not require annual readjustments to balance majority and minority enrollments to maintain specific racial ratios in Pasadena city schools. This six-to-two decision seems to be an extenuation of the Court's reluctance to go further than the standards established in Brown. This decision seems to be in harmony with the Chief Justice's attitude concerning desegregation.

Drawing conclusions concerning Chief Justice Burger's influence in this case is difficult; some significance can be attributed to the fact that he voted with the majority and assigned the opinion to Justice Rehnquist who had consistently joined him in desegregation decisions. This decision may have resulted from more initial concurrence on the part of the justices than existed in previous cases, and this situation would have relieved the need for much of an effort to influence on the part of Chief Justice Burger.

The Court unanimously approved a lower court ruling in Milliken II which called for the state to fund remediation programs designed to compensate for past segregation for Detroit city schools. Chief Justice Burger took this opportunity to write the majority opinion in which he once again affirmed the standards for desegregation which had been established in his previous opinions. In reviewing these standards, he relied heavily upon his majority opinion in Swann. By writing the majority opinion in unanimous decision, the Chief Justice was able to control the content of the opinion, and in addition to giving the decision the added weight of his position, he was able to set a tone which might be repeated in later decisions and potentially influence them. This seems to be the situation with the Milliken II decision.

Austin v. United States resulted in the Court issuing a memorandum decision (in which the Chief Justice joined) that emphasized that the remedy in a desegregation settlement was limited by the extent of the constitutional violation. The

hand of the Chief Justice can be seen in this case as the Court again refused to exceed the standards established in Brown.

Board v. Brinkman was a case in which the Court again refused to step beyond the standards established in Brown. In this case the lack of specific findings showing segregative intent on the part of school authorities caused the Court to remand the case to the lower court. This decision, in which there were no dissenting opinions, demonstrates that the Court was following a path that the Chief Justice had advocated in earlier cases.

When Board v. Brinkman returned to the Court following District and Appeals Court action, the Court delivered a decision approving the Appeals Court decision. Brinkman I was remanded to the lower court for the purpose of finding proof that a segregated system existed. The District Court could find no such evidence and dismissed the case. On appeal, however, the Court of Appeals ruled that a desegregation order was justified because a dual system existed in 1954 and this system had not been disestablished. When this case was presented to the Supreme Court for the second time, the Chief Justice was unable to maintain the restricted view of desegregation that the Court had had in past cases. The influencing efforts which may have been exerted in this case seem to have produced little in the way of results. Chief Justice Burger joined in the dissent written by Justice Stewart. This dissent

stated that the Court had shifted the burden of proof to the school authorities by considering the system's segregation status in 1954 as relevant to the present case. The situation, according to Justice Stewart, was critical because the party bearing the burden of proof was likely to determine who would prevail in the litigation. This attitude was consistent with the Chief Justice's unwillingness to expand the standards established in Brown. This five-to-four decision indicates a break in the trend which seemed to be developing in the Court's attitude in desegregation decision. This decision indicates that the Chief Justice was unable to influence the Court as he seemed to have been able to do in past cases. The justice who is most conspicuous in his absence from the group joining the Chief Justice in this case is Justice Blackmun. The defection of this justice from the group of justices that had consistently joined the Chief Justice in desegregation cases would have a significant impact on future cases. Such a defection would indicate a weakening in the Chief Justice's influencing powers.

The Chief Justice seems to have had considerable influence over the Court in school desegregation cases. In his majority opinion in Swann, he established the fact that the Court would only maintain the status quo in school desegregation cases, and though the lower courts misinterpreted his intent, he was able to reorient them through later decisions. The Chief Justice seemed to have had the Court acting in

accordance with his desires until the Brinkman decision was reviewed for the second time. This decision may have been a signal that the Chief Justice's influence in desegregation cases had weakened. Such a conclusion, however, must await additional school desegregation decisions to be verified. In the final analysis, Chief Justice Burger still falls short of the standards set by Chief Justice Warren in influencing the Court in desegregation decisions. Chief Justice Warren was able to mold an evenly divided Court into a united force behind the Brown decision. Chief Justice Burger has led a Court in which indecisiveness and dissent seem to be the rule rather than the exception.

TABLE XI

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Alexander v. Holmes, 396 U.S. 19 (1969). per curiam
Ordered immediate desegregation of Mississippi schools.

C	C	C	C	C	C	C	C	X	X	X	X

Carter v. Board, 396 U.S. 226 (1969). per curiam
Appeals court temporary injunction of desegregation plan overturned.

C	C	C	C	C	C	C	C	X	X	X	X

Dowell v. Board, 396 U.S. 269 (1969). per curiam
Ordered implementation of desegregation plan pending appeal.

C	C	C	C	C	C	C	C	X	X	X	X

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

TABLE XII

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Carter v. Board, 396 U.S. 290 (1970). per curiam
Ordered immediate desegregation of Louisiana schools.

C	C	C	C	C	C	C	C	X	X	X	X

North Cross v. Board, 397 U.S. 232 (1970). per curiam
Modified desegregation plan for Memphis City schools remanded.

C	C	X	C	C	C	C	N	X	X	X	X

Swann v. Board, 402 U.S. 1 (1971)
Established guidelines for lower courts in desegregation cases.

C*	C	C	C	C	C	C	C	C	X	X	X

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

TABLE XIII

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Davis v. Board, 402 U.S. 33 (1971)
Directed lower court to disregard zoning that interfered with desegregation.

C*	C	C	C	C	C	C	C	C	X	X	X

McDaniel v. Barresi, 402 U.S. 39 (1971)
State Supreme Court decision which interfered with desegregation reversed.

C*	C	C	C	C	C	C	C	C	X	X	X

Board v. Swann, 402 U.S. 43 (1971)
State statute barring quotas and busing held unconstitutional.

C*	C	C	C	C	C	C	C	C	X	X	X

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

TABLE XIV

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Moore v. Board, 402 U.S. 43 (1971). per curiam
Remanded case for lack of controversy.

C	C	C	C	C	C	C	C	C	X	X	X

Wright v. Council, 407 U.S. 451 (1972)
Barred creation of city school district that would impede desegregation.

D	X	C	X	C	C*	C	C	D	D	D	X

United States v. Board, 407 U.S. 484 (1972)
Barred creation of city school district that would impede desegregation.

C	X	C	X	C	C*	C	C	C	C	C	X

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

TABLE XV

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Keyes v. School District, 413 U.S. 189 (1973)
Desegregation plan for Denver City Schools remanded.

C	X	C	X	C*	C	N	C	C	C	D	X

Bradley v. School Board, 416 U.S. 646 (1974)
Successful plaintiffs in desegregation suit awarded reasonable attorney fee.

C	X	C	X	C	C	C	N	C*	N	C	X

Milliken v. Bradley, 418 U.S. 717 (1974). Milliken I
Interdistrict desegregation plan ruled to be beyond courts authority.

C*	X	D	X	D	C	D	D	C	C	C	X

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

TABLE XVI

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Board v. Spaugler, 427 U.S. 424 (1976)
Annual adjustments to maintain racial quotas unnecessary.

C	X	X	X	D	C	C	D	C	C	C*	N

Milliken v. Bradley, 433 U.S. 267 (1977). Milliken II
State must help bear the cost of remedial education.

C*	X	X	X	C	C	C	C	C	C	C	C

Board v. Brinkman, 433 U.S. 406 (1977)
Busing to correct racial balance disapproved.

C	X	X	X	C	C	C	N	C	C	C*	C

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

TABLE XVII

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Board v. Brinkman, _____ U.S. _____ (1979)
Desegregation plan for Dayton City Schools upheld.

D	X	X	X	C	D	C*	C	C	D	D	C

Board v. Denick, _____ U.S. _____ (1979)
Desegregation plan for Columbus, Ohio, approved.

C	X	X	X	C	C	C*	C	C	D	D	C

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

CHAPTER V

CONSTITUTIONALLY GUARANTEED FREEDOMS CASES

Introduction

The public education cases which have been brought before the Supreme Court questioning constitutionally guaranteed freedoms are of recent origin with most having been litigated in the post-World War II era. Academic freedom cases first came to the Court as a result of challenges to laws designed to keep undesirable persons out of public employment and to insure the loyalty of those already employed.[1]

In Garner v. Los Angeles (1951) the Court was asked to rule on the constitutionality of a Los Angeles city ordinance which required all public employees, including teachers, to sign a loyalty oath stating whether he had ever been or was a member of the Communist Party.[2] In a five-to-four decision the Court ruled that the ordinance was constitutional and that dismissal from employment in public service was not punishment. Justice Tom C. Clark, writing the majority opinion, said:

---

[1]H. C. Hudgins, The Warren Court and the Public Schools (Danville, Illinois: Interstate Printers and Publishers, 1970), p. 19.

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

> Past conduct may well relate to present fitness. Past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are now less relevant in public employment.[3]

In Adler v. Board of Education (1952) a New York City Civil Service Law, the Feinberg Law, was challenged.[4] The Feinberg Law was designed to keep subversives out of the school system.[5] In a six-to-three decision, the Court ruled that the oath was constitutional. Justice Sherman Minton, writing for the Court, said:

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitudes of young minds towards the society in which they live. In this, the state has a vital concern. It must protect the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, can not be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty.[6]

Justice William Douglas dissented, saying:

> So long as she is a law-abiding citizen, so long as her performance within the public school system meets professional standards, her

---

[3]Ibid., p. 720.

[4]Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952).

[5]New York, Civil Service Law, Article 7, Title C Section 105.

[6]Ibid., p. 493.

> private life, her political philosophy, her social creed should not be cause of reprisals against her.[7]

An Oklahoma loyalty-oath law was overturned by the Court in Weiman v. Updegraff (1952).[8] Wieman and twelve other employees of Oklahoma State Agricultural and Mechanical College tested the oath law by refusing to take it. They alleged that the oath law should be overturned on the grounds that it was a bill of attainder and an ex post facto law. In a unanimous decision, the Court found this oath law to be unconstitutional. Justice Tom Clark wrote the Court's opinion. He stated that the law violated the Fourteenth Amendment. The Court felt that a distinction should be drawn between membership in an organization and active participation in it. The Court considered the possibility that one might join an organization that had been innocent when it started, only to turn subversive at a later date.

The Supreme Court heard two cases concerning college teachers that had implications for public school teachers. In Slochower v. Board (1956) the Court held that the summary discharge of a teacher because he invoked the Fifth Amendment before an investigating committee of the United States Senate

---

[7]Ibid., p. 511.

[8]Wieman v. Updegraff, 344 U.S. 183 (1952).

was a denial of his due process rights.[9] In this case the Court, without indicating the proper components of a hearing, stated that a teacher must have a hearing before being dismissed.

The second case, Sweezy v. New Hampshire (1957), concerned the power of the State to compel a teacher to disclose the contents of a lecture and to delve into his political associations.[10] The Court, with Chief Justice Warren giving the opinion, ruled that a teacher's constitutional rights can not be violated by a legislative investigation. However, the Court was careful to point out that teachers are not free of all investigatory actions simply because education is involved.[11]

In Beilan v. Board (1958) the Court was asked to rule on the dismissal of a teacher who had refused to answer the superintendent's questions concerning his affiliation with the Communist Party.[12] The superintendent made it clear that Beilan's loyalty was not an issue in his termination. The Court in a five-to-four decision upheld the dismissal. Writing for the majority, Justice Harold Burton said:

> The question asked of petitioner by his Superintendent was relevant to the issue of

---

[9]Slochower v. Board of Higher Education of the City of New York, 350 U.S. 485 (1956).

[10]Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[11]Hudgins, p. 125.

[12]Beilan v. Board of Public Education, 357 U.S. 399 (1958).

> petitioner's fitness and suitability to serve as a teacher . . . . We find no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining fitness.[13]

In giving the Court's opinion Justice Burton noted that Slochower and Beilan were different because in the Beilan case no inference was taken from the teacher's refusal to answer.

In Barenblatt v. United States (1959) the right of Congressional inquiry into alleged Communist infiltration into educational institutions was established.[14] Speaking for the Court, Justice John Harlan said:

> An educational institution is not a constitutional sanctuary from inquiries into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.[15]

An Arkansas statute requiring a teacher to list annually all organizations to which he had belonged during the past five years was tested in Shelton v. Tucker (1960).[16] The Court in a five-to-four decision ruled that the statute restricted the teacher's rights of association and unconstitutionally deprived him of his right to academic freedom which was protected by the due process clause of the Fourteenth Amendment. Justice Potter Stewart, writing for the majority said:

---

[13]Ibid., p. 405-406.

[14]Barenblatt v. United States, 360 U.S. 109 (1959).

[15]Ibid., p. 112.

[16]Shelton et al. v. Tucker et al., 364 U.S. 479 (1960).

> It requires him to list, without number, every conceivable kind of associational tie - social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.[17]

During the 1960's, the Court considered several other cases in which teacher loyalty oaths were being challenged.[18]

On certiorari, the Supreme Court accepted a case, Pickering v. Board (1968), in which a teacher had been dismissed for publishing an article that was critical of the Board of Education in a local paper.[19] Justice Thurgood Marshall, speaking for the Court, said:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[20]

In 1968 the Court denied certiorari in a case which concerned the right of a student to wear his hair at any length desired.[21] Justice William Douglas dissented in the case, saying:

---

[17]Ibid., p. 488.

[18]Camp v. Board of Public Instruction of Orange County, 368 U.S. 278 (1961). Baggett v. Bullitt, 377 U.S. 360 (1964). Elfbrandt v. Russell, 384 U.S. 11 (1966).

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

[20]Ibid., p. 572.

[21]Ferrell v. Dallas Independent School District, 393 U.S. 856 (1968).

> It comes as a surprise that in a country where the States are restrained by an Equal Protection Clause, a person can be denied education in a public school because of the length of his hair.[22]

In Tinker v. Des Moines (1969) the Court was asked to rule on the constitutionality of the suspension of students for wearing black armbands as a protest against the Vietnam War.[23] The lower courts had upheld the school's disciplinary action. In a seven-to-two opinion the Court held that the wearing of armbands was protected by the First Amendment right of free speech. Justice Abe Fortas, writing for the majority, said:

> 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 either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[24]

In his dissenting opinion Justice Hugo Black warned of the possible consequences of the Tinker decision, saying:

> The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the "elected officials of the state supported public schools" in the United States is in ultimate effect transferred to the Supreme Court.[25]

These cases represent the collective precedents for the Burger Court in the area of constitutionally guaranteed rights

---

[22]Ibid.

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

[24]Ibid., p. 506.

[25]Ibid., p. 515.

in education. These cases established that a teacher is protected by the constitution and may not be terminated because he has belonged to a particular organization, because he has invoked the Fifth Amendment, or because he has refused to take an unconstitutional oath. The Court also ruled that students do not lose their constitutional rights when they enter the schoolhouse gate.

The Cases

In Connell v. Higginbotham (1971) the constitutionality of a Florida loyalty oath required of all public employees was tested.[26] A three-judge District Court had declared three of the five clauses contained in the oath to be unconstitutional. The Supreme Court's per curiam opinion expressed the views of five members of the Court.

The Supreme Court rejected the portion of the oath stating: "I do not believe in the overthrow of the Government of the United States or the State of Florida by force or violence."[27] The Court reasoned that this clause violated the employee's right to a hearing or inquiry prior to dismissal, a right which is guaranteed by the due process clause of the Fourteenth Amendment. Justice Marshall joined by Justices Douglas and Brennan, concurred in the result, but reasoned that

---

[26]Connell v. Higginbotham, 403 U.S. 207 (1971).

[27]Ibid., p. 208.

the "overthrow" clause should be struck on the grounds that "belief as such cannot be the predicate of government action."[28] Justice Stewart would have remanded the case to the lower court to determine if the "overthrow" clause embraced the teacher's philosophical or political beliefs.

In Wisconsin v. Yoder (1972) the Court, speaking through Chief Justice Burger, affirmed the judgment of the Supreme Court of Wisconsin.[29] The state court had ruled that Amish children could not be required to attend school upon reaching the age of fourteen since their religious beliefs prohibited such action. The Court found the Wisconsin statute which required school attendance by Amish children until the age of sixteen to be "undeniably at odds with fundamental tenets of thier beliefs."[30]

Justice Stewart, joined by Justice Brennan, concurred in the decision of the Court, noting that the record did not justify the "interesting and important issue" discussed in Justice Douglas's dissent.[31] Justice White, joined by Justices Brennan and Stewart, concurred, stating:

> I join the opinion of and judgment of the Court because I cannot say that the State's interest in requiring two more years of compulsory education in the ninth and tenth grades

---

[28]Ibid., p. 210.

[29]Wisconsin v. Yoder, 406 U.S. 205 (1972).

[30]Ibid., p. 218.

[31]Ibid., p. 237.

> outweighs the importance of the concededly sincere Amish religious practice to the survival of that sect.[32]

Justice Douglas dissented on the grounds that the Court had not considered the constitutional rights of the child. In his dissent, Justice Douglas stated:

> It is the student's judgment, not his parent's, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the rights of students to be masters of their own destiny.[33]

In Board v. Roth (1972), the Court ruled that an assistant professor hired on a one-year contract was not deprived of constitutional rights when terminated without a hearing.[34] This ruling reversed the lower-court decision. The case holds significance for public education even though it deals specifically with a teacher at the university level because the opinion of Justice Stewart spoke of the rights afforded employees hired by the state. The decision, therefore, has significance for public school teachers who are hired by the state. On the record presented in this case the Court ruled that the respondent had not shown that he was deprived of any interest in liberty or property protected by the Fourteenth Amendment.

Chief Justice Burger emphasized in his concurring opinion that the relationship between a state institution and one of

---

[32]Ibid., pp. 238-239.

[33]Ibid., p. 245.

[34]Board v. Roth, 408 U.S. 564 (1972).

its teachers is essentially a matter of state concern and state law. Justices Douglas, Brennan, and Marshall dissented in this case, with each justice expressing the view that the Court should have granted some form of hearing to the respondent.

In Perry v. Sindermann (1972) the Court again considered a case dealing with the termination of a nontenured college teacher's contract.[35] In this case the Court ruled in favor of the respondent teacher. The significant difference between this case and Roth may be found in the fact that this teacher had taught in the state college system for ten years.

Justice Stewart, expressing the views of five members of the Court, delivered the Court's opinion in which he stated that the teacher should be granted a hearing by the college board. The teacher would then have the option of coming before the courts if he felt the board had not treated him justly. Chief Justice Burger, in a concurring opinion, expressed the view that the relationship between a state institution and one of its teachers is essentially a matter of state law and state concern. In this concurring opinion which was written for both the Roth and Perry decisions, the Chief Justice made his feelings clear as he stated:

> Because the availability of the Fourteenth Amendment right to a prior administrative hearing

---

[35]Perry v. Sindermann, 408 U.S. 593 (1972).

> turns in each case on a question of state law, the issue of absention will arise in future cases contesting whether a particular teacher is entitled to a hearing prior to non-renewal of his contract. If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law.[36]

In Johnson v. New York State Education Department (1972), the Court was asked to rule on the constitutionality of New York education laws which required local school districts to furnish free textbooks to students in grades seven through twelve, but which provided free textbooks in grades ones through six only upon the vote of a majority of eligible voters to assess a tax for textbooks.[37] The Court, in a per curiam opinion, remanded the case to the District Court. The voters had elected a tax for the purchase of textbooks in grades one through six, and the Court directed the District Court to determine whether the case had become moot.

The Court was asked to rule on the constitutionality of a university's disciplinary action following the publication of what the university considered to be an obscene article. In this case, Papish v. Board of Curators (1973), the Court issued a per curiam opinion stating that the university had

---

[36]Ibid., p. 604.

[37]Johnson v. New York Education Department, 409 U.S. 75 (1972).

violated the student's constitutional rights.[38] Chief Justice Burger dissented, stating that he felt the Court's ruling was a "bizarre" extension of prior Court decisions. By saying that the university was impotent to deal with the conduct of its students, Chief Justice Burger felt the Court had erred in its judgment. Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun, dissented on the grounds that the Court had not made a prior ruling regarding the obscenity of the specific words in question.

The Court was brought into the controversy over the financing of public education in San Antonio v. Rodriguez(1973).[39] In an opinion by Justice Powell, expressing the views of five members of the Court, the Texas school finance system was called a practical and workable attempt to provide educational services for the children of Texas. The Court noted that the evidence did not show that any definable category of poor persons was discriminated against, that the Texas finance system furthered a legitimate state purpose, and that it did not violate the equal protection clause. Justices Douglas, Brennan, White, and Marshall dissented in this case with each noting that parents and children were being discriminated

---

[38]Papish v. Board of Curators, 410 U.S. 667 (1973).

[39]San Antonio v. Rodriquez, 411 U.S. 1 (1973).

against because they had no means to supplement minimum state funds to the same degree as more affluent districts.

In Board v. LaFleur (1974) the Court ruled that a Cleveland, Ohio, Board of Education and Chesterfield County, Virginia, Board of Education rule requiring a pregnant school teacher to take unpaid maternity leave five months before the expected childbirth to be unconstitutional.[40] Justice Stewart, joined by Justices Brennan, White, Marshall, and Blackmun, delivered the opinion of the Court, stating:

> We conclude, therefore, that neither the necessity for continuity of instruction nor the state interest in keeping physically unfit teachers out of the classroom can justify the sweeping mandatory leave regulations that the Cleveland and Chesterfield County School Boards have adopted. While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.[41]

Chief Justice Burger joined the dissent of Justice Rehnquist in this case. Justice Rehnquist, in referring to the majority opinion, states, "My Brother Stewart thereby enlists the Court in another quixotic engagement in his apparently unending war on irrebuttable presumptions."[42] Chief Justice Burger's dissent in Vlandis v. Kline (1973) was quoted

---

[40]Board v. LaFleur, 414 U.S. 632 (1974).

[41]Ibid., p. 647.

[42]Ibid., p. 657.

by Justice Rehnquist as he noted that legislatures create thousands of statutes which might be improved if the Courts were to rule on each individually.[43]

An Ohio statute which allowed public school students to be suspended for up to ten days or expelled without a hearing at which they could challenge the suspension or expulsion, was tested in Goss v. Lopez (1975).[44] The Court, speaking through Justice White, in a five-to-four decision found the statute to be a violation of the due process clause of the Fourteenth Amendment. The majority opinion written by Justice White was joined by Justices Douglas, Brennan, Stewart, and Marshall. In this opinion Justice White noted the importance of suspension as a "necessary tool to maintain order."[45] The opinion further stated, however, that the requirements established in regard to a student's right to have a hearing were "less than a fair-minded school principal would impose upon himself."[46] The Court held that the student must "be given oral or written notice of the charges against him" and the opportunity to present his side of the story if he denies the charges.[47]

---

[43]Vlandis v. Kline, 412 U.S. 441 (1973).

[44]Goss v. Lopez, 419 U.S. 565 (1975).

[45]Ibid., p. 580.

[46]Ibid., p. 582.

[47]Ibid., p. 581.

Justice Powell's dissent in Goss was joined by the Chief Justice and Justices Blackmun and Rehnquist. In this opinion Justice Powell stated:

> The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools. It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension.[48]

In Board v. Jacobs (1975) the Court was asked to rule on the constitutionality of regulations affecting the publication and distribution of a student newspaper.[49] Due to the graduation of the students who had been plaintiffs in the case, the Court vacated the judgment of the Appeals Court and remanded the case with instructions to the District Court to dismiss the case. Justice Douglas dissented from this per curiam opinion, stating:

> Any student who desires to express his views in a manner which may be offensive to school authorities is now put on notice that he faces not only a threat of immediate suppression of his ideas, but also the prospect of a long and arduous court battle if he is to vindicate his rights of free expression.[50]

---

[48]Ibid., p. 585.

[49]Board v. Jacobs, 420 U.S. 128 (1975).

[50]Ibid., p. 134.

In Wood v. Strickland (1975) the Court ruled that school board members were not immune from liability for damage if they knew or could have known that their actions in carrying out their official responsibilities would violate the constitutional rights of a student.[51] Justice White, joined by Justices Douglas, Brennan, Stewart, and Marshall, delivered the opinion of the Court. The majority opinion stated:

> 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 action cannot reasonably be characterized as being in good faith.[52]

Chief Justice Burger, accompanied by Justices Blackmun and Rehnquist, joined in the dissent written by Justice Powell in this case. In this dissenting opinion Justice Powell stated:

> The Court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights. These officials will now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken and hence actionable.[53]

The claim that teachers who had been terminated should be guaranteed the right of review by a body other than the school

---

[51]Wood v. Strickland, 420 U.S. 308 (1975).

[52]Ibid., p. 322.

[53]Ibid., p. 329.

board was rejected by the Court in School District v. Hortonville Education Association (1976).[54] Chief Justice Burger delivered the opinion of the Court in this case, saying:

> The sole issue in this case is whether the Due Process Clause of the Fourteenth Amendment prohibits this School Board from making the decision to dismiss teachers admittedly engaged in a strike and persistently refusing to return to their duties.[55]

The Chief Justice justified the decision to allow the School Board to have the sole decision-making power by stating:

> Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law.[56]

Justice Stewart, joined by Justices Brennan and Marshall, dissented, saying:

> I believe that there is a constitutionally unacceptable danger of bias where school board members are required to assess the reasonableness of their own actions during heated contract negotiations that have culminated in a teacher's strike.[57]

In School District v. Wisconsin (1976) the Court ruled that a nonunion teacher had a right guaranteed by the First

---

[54]School District v. Hortonville Education Association, 426 U.S. 482 (1976).

[55]Ibid., p. 488.

[56]Ibid., p. 488.

[57]Ibid., p. 499.

Amendment to speak at an open board meeting concerning a union proposal pending before the Board.[58] Chief Justice Burger, joined by Justices White, Blackmun, Powell, Rehnquist, and Stevens, delivered the Court's opinion in the case. The Chief Justice dismissed the contention that nonunion teachers be barred from speaking to the board by saying:

> Teachers not only constitute the overwhelming bulk of employees of the school system, but they are the very core of that system; restraining teachers' expressions to the board on matters involving the operation of the schools would seriously impair the board's ability to govern the district.[59]

Justice Brennan, joined by Justice Marshall, dissented in this case stating:

> The Wisconsin Supreme Court was correct in stating that there is nothing unconstitutional about legislation commanding that in closed bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees.[60]

In Mt. Healthy v. Doyle (1977) the Court was asked to rule in a case involving the termination of a teacher following charges that he was unprofessional because he had communicated the substance of his principal's memorandum on teacher dress to a local radio station and made an obscene gesture to a female student.[61] Justice Rehnquist delivered the unanimous

---

[58]School District v. Wisconsin, 429 U.S. 167 (1976).

[59]Ibid., p. 176.

[60]Ibid., p. 178.

[61]Mt. Healthy v. Doyle, 429 U.S. 274 (1977).

decision of the Court noting that: (1) the school board was not immune from suit; (2) the teacher was entitled to constitutionally guaranteed rights even though he had not received tenure; (3) the teacher was not entitled to remedial action if the board would have reached the decision to terminate in any event; (4) the District Court erred in not finding whether the teacher would have been terminated in the absence of the constitutionally protected conduct; (5) the case was remanded to the lower court so that it could determine the proper action consistent with this opinion.

In Ingraham v. Wright (1977) the Court ruled that corporal punishment in public schools did not constitute cruel and unusual punishment in violation of the Eighth Amendment.[62] This five-to-four decision was delivered by Justice Powell, joined by Chief Justice and Justices Stewart, Blackmun, and Rehnquist. In rejecting the petitioners' claim that corporal punishment violated their Eighth Amendment rights, Justice Powell stated:

> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.[63]

Petitioner's claims that corporal punishment deprived them of due process rights were rejected by Justice Powell who stated:

---

[62]Ingraham v. Wright, 430 U.S. 651 (1977).

[63]Ibid., p. 670.

> In view of the low incidence of abuse, the openness of our schools, and the common-law safeguards that already exist, the risk of error that may result in violation of a schoolchild's substantive rights can only be regarded as minimal.[64]

Justice White, joined by Justices Brennan, Marshall, and Stevens, dissented in this case. This dissent noted that corporal punishment should be administered only after an informal hearing in which the student could plead his case before a neutral party.

In Board v. White (1978) the Court considered the constitutionality of a school board policy requiring employees to take unpaid leaves of absence while they campaigned for elective office.[65] This policy had been adopted by the Board of Education of Dougherty County, Georgia, shortly after a Negro employee had announced his candidacy for the state legislature. In an opinion written by Justice Marshall, joined by Justices Brennan, White, Blackmun, and Stevens, the Court found the Board's action to be in violation of the Voting Rights Act of 1965. The judgment of the District Court, which held that the Board's rule should have been submitted for federal approval under the requirements of the Voting Rights Act, was affirmed. The enforcement of the rule was enjoined pending compliance with the clearance required.

---

[64]Ibid., p. 682.

[65]Board v. White, _____ U.S. _____ (1978).

Chief Justice Burger joined in a dissent written by Justice Powell stating:

> The Court's ruling in this case is without support in the language of legislative history of the Act. Moreover, although prior decisions of the Court have taken liberties with this language and history, today's decision is without precedent.[66]

Justice Powell further stated:

> But the notion that a State or locality imposes a "qualification" on candidates by refusing to support their campaigns with public funds is without support in reason or precedent.[67]

In Carey v. Piplus (1978) the Court heard a case in which students claimed they had been suspended from school without procedural due process.[68] Justice Powell wrote the Court's opinion in this unanimous case, stating that: (1) the principle of compensation should govern the amount of damage awards; (2) rules governing compensation for injuries should be tailored to interests protected by the particular right in question; (3) awards for mental and emotional distress should be granted only upon proof of such injury; (4) if the suspensions were justified, petitioners would nevertheless be entitled to recover nominal damages not to exceed one dollar.[69]

In Ambach v. Norwick (1979) the Court was asked to rule on the constitutionality of a New York statute which forbade

---

[66]Ibid., p. 284.

[67]Ibid., p. 286.

[68]Carey v. Pipus, _____ U.S. _____ (1978).

[69]Ibid.

the certification of any person who was not a citizen of the United States as a public school teacher unless that person had manifested intentions to apply for citizenship.[70] Justice Powell, expressing the views of Chief Justice Burger and Justices Stewart, White, and Rehnquist, reported the Court's decision. The statute was judged not to be in violation of the equal protection clause of the Fourteenth Amendment. Justice Powell stated:

> The restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship.[71]

Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented. These justices expressed the view that a state may not constitutionally deny teaching employment to resident aliens.

In Givhan v. School District (1979) the Court was asked to rule on whether a teacher's criticism of school policy was subject to the protection of the First Amendment.[72] In a unanimous decision announced by Justice Rehnquist, the Court ruled that the teacher was protected by the First Amendment when she criticized the school district policies to her principal. The judgment of the Court of Appeals was vacated, and

---

[70]Ambach v. Norwick, _____ U.S. _____ (1979).

[71]Ibid.

[72]Givhan v. School District, _____ U.S. _____ (1979).

the case was remanded for further proceedings consistent with the Court's opinion in this case and in Mt. Healthy v. Doyle.[73]

In summary action the Court denied certorari in three cases dealing with due process rights in public education.[74] The Court also dodged the issue of homosexual rights in the context of public education by denying certorari in Gaylord v. Tacoma School District (1977).[75] The Court denied a request to review a lower court ruling which had upheld a school board decision to deny students the right to distribute a questionaire surveying the sexual activities of high school students.[76]

Analysis of Chief Justice Burger's Influence

The Burger Court had an interagreement rate of seventy-one percent in public education cases which dealt with constitutionally guaranteed freedoms. The Court was moderately divided in these cases, recording only three unanimous decisions while six of the cases were decided by five-to-four votes and three were decided by six-to-three votes. Chief Justice Burger dissented in five, or one-third, of the fifteen decisions in which votes were recorded. Chief Justice Burger's agreement with his associates ranged from a rate of zero in nine decisions with Justice Douglas, to five in seventeen with Justices Marshall and

---

[73]Mt. Healthy v. Doyle, 429 U.S. 274 (1977).

[74]Staton v. Mayes 46 U.S.L.W. 3262 (1977). Ferguson v. Board, 46 U.S.L.W. 3303 (1977). Barthuli v. Board, 46 U.S.L.W. 3433 (1978).

[75]Gaylord v. Tacoma School District, 46 U.S.L.W. 3320 (1977).

[76]Trachtman v. Anker, 563 F. 2d 512 (1977).

Brennan, to ten in seventeen with Justice White, to five in seventeen with Justice Stevens, to eleven in seventeen with Justice Stewart, to thirteen in sixteen with Justice Blackmun, to twelve in fourteen with Justice Powell, and, finally, to sixteen in sixteen with Justice Rehnquist.

The majority opinion writing duty was much more widely distributed in these cases than in the church and state or desegregation cases just reviewed. Six different justices delivered majority opinions with Justice Powell delivering four, Chief Justice Burger and Justice Stewart delivering three, Justices White and Rehnquist delivering two, and Justice Marshall delivering one.

Three justices agreed with each other in these cases at a rate high enough to meet Sprague's criteria for identification as members of a bloc.[77] The members of this bloc were Justice Powell, who agreed with both Chief Justice Burger and Justice Rehnquist in eighty-six percent of the cases; Justice Rehnquist, who agreed with Chief Justice Burger in one hundred percent of the cases; and Chief Justice Burger. This bloc consistently supported opinions that restricted the Court's involvement in cases in which school board policies were challenged, and dissented from opinions which extended the Court's involvement in constitutional protections.

A second voting bloc which also met Spraque's criteria consisted of Justices Brennan and Marshall who agreed in all

---

[77]Walter F. Murphy and Joseph Tanenhaus, The Study of Public Law, (New York: Random House, 1972), pp. 163-165.

seventeen of these cases. This bloc usually supported opinions that extended the range of constitutionally guaranteed rights granted to teachers and students. These two blocs usually took opposing positions as is indicated by their interagreement rate of only thirty percent.

The remaining justices, with the exception of Justices Douglas and Blackmun, fall into the category of swing justices by virtue of their swings from support of one bloc to support for the other. Justice Blackmun agreed with the Burger-Powell-Rehnquist bloc only slightly less than enough to qualify as a bloc member. Justice Douglas almost qualifies as a member of the Brennan-Marshall bloc, having agreed with these justices in seventy-eight percent of the cases.

Chief Justice Burger's opinions reveal his desire to restrict the Court's involvement in cases where challenges were made to school policy on the grounds that constitutionally guaranteed rights were violated. The Chief Justice consistently advocated that the state courts were the proper courts to hear these cases, since they dealt with state laws. This attitude on the part of the Chief Justice can be clearly seen in his concurring opinions written for both the Roth and Perry decisions, in which he expressed his belief that the lower federal courts should reject appeals of this nature and force the state courts to take the responsibility for seeing that the state law was not violated. This attitude that the Supreme Court should restrict its involvement in public education cases

was evident in most of Chief Justice Burger's opinions and in the opinions in which he joined. A restrictionist attitude is also a characteristic of the Burger-Powell-Rehnquist bloc.

The Yoder decision offers little evidence of the Chief Justice's influence or the lack of it. The decision was made by means of a six-to-one vote with two justices taking no part in the decision. The Chief Justice was among the majority in the case, and he did reserve the majority opinion for himself. Based on these two facts, it seems logical to assume that the Court supported the decision initially and that the Chief Justice had no need to attempt to influence his associates, since their initial thinking in the case was compatible with his thinking. This assumption can be justified on the grounds that the Chief Justice voted with the majority indicating his agreement with the decision, and he evidently felt that the majority was built upon a strong conviction on the part of each majority justice so that he could write the majority opinion himself rather than assigning it to a justice who could attract undecided votes.

The Roth and Perry decisions seem to be consistent with Chief Justice Burger's restrictionist attitude. Both of these decisions limited the relief extended through the Federal court system to college teachers whose contracts were not renewed. In each of these cases the Court reached its decision by means of five-to-three votes. The Chief Justice, voting last, cast the deciding vote in each of these cases. Chief Justice Burger

may have also influenced these two cases by his assignment of the majority opinion. Justices White and Stewart both voted with the majority in these cases. The affiliation of these two swing justices with the Burger-Powell-Rehnquist bloc to form the majority may be the result of Chief Justice Burger's assignment of the majority opinion to Justice Stewart. As has been noted in the analysis of other cases, the assignment of the majority opinion can be used to attract support for a position if the assignment is given to one of the uncommitted justices who writes an opinion which is acceptable to other uncommitted members of the Court.[78] This seems to have been Chief Justice Burger's intent in these two cases, since he opted to assign the majority opinion to Justice Stewart and to write a concurring opinion rather than to write the majority opinion himself which would have given his ideas more weight.

The Chief Justice seems to have failed in any attempts he may have made to influence the Court in Papish. The Court's per curiam opinion stated that the university's disciplinary action following the publication of an obscene article was unconstitutional. Chief Justice Burger indicated his displeasure with the ruling in a dissenting opinion which reaffirmed his desire to restrict the Court's intervention into the administration of schools. This sharply-worded dissent, however, was

---

[78]Walter Murphy and Herman Pritchett, Courts, Judges, and Politics (New York: Random House, 1961), p. 504.

ineffective, as the majority supported the "bizarre" extension of the Court's prior decisions, as the Chief Justice called the majority opinion, by a six-to-three margin.

The Rodriquez decision represents what appears to be a victory for the Chief Justice and his efforts to restrict the Court. In this case the Court was asked to rule on the constitutionality of the system by which public schools were financed in Texas. The lower courts had been hearing cases for some time that dealt with the inequalities produced by local funding of public education resulting from varying tax bases in wealthy and poor school districts within the same state or city. Because of the possible repercussions for public education in the entire nation, this case was considered to be critical. The Chief Justice, having already expressed his feeling that petitions originating from institutions created by state law should be presented to state rather than federal courts, would have been expected to exert his influence in the direction of restricting the Court in this case. The Chief Justice was able to cast the fifth and deciding vote for just such a decision in this case.

The degree to which Chief Justice Burger was able to influence the other justices in this case is difficult to determine. Since he assigned the majority opinion to Justice Powell, a member of his restrictionist bloc, there is no evidence to indicate that he used the power to assign the opinion to influence swing votes. There is little doubt, however, that the

Chief Justice worked for this restrictionist decision in conference and that his vote was the difference in the decision.

In LaFleur the Chief Justice was unable to marshal the support needed to obtain a decision which would have limited the Court's entry into an area he felt was more suited for state courts. In this decision which struck a school board's rule requiring maternity leave five months before the expected childbirth, the Chief Justice joined Justice Rehnquist's dissent. Any attempt to influence the Court on the part of Chief Justice Burger in this case seems to have been futile.

The Chief Justice found himself in the minority again when the Court ruled that a student must receive oral or written notice of the charges against him when he is suspended or expelled from school and must have an opportunity to present his defense in a hearing. The five-to-four decision in Goss v. Lopez was contrary to Chief Justice Burger's desire to limit the Court's involvement in educational matters that he felt could best be handled by the school or the state. This attitude is expressed in Justice Powell's dissent which the Chief Justice joined.

The majority in Goss v. Lopez was composed of the Brennan-Marshall bloc, Justice Douglas who often voted with this bloc, and swing justices White and Stewart. The majority opinion was assigned by Justice Douglas, the senior justice voting with the majority. By assigning the majority opinion to Justice White, Justice Douglas may have been acting to consolidate the majority

by having this nonaligned justice write an opinion that would be acceptable to his nonaligned colleagues.

The Court again issued a ruling which went beyond the bounds that Chief Justice Burger felt were proper when it ruled that school board members were not immune from liability for damages resulting from their unconstitutional actions. In this case, Wood, v. Strickland, the majority opinion was written by Justice White who was joined by Justices Douglas, Brennan, Stewart, and Marshall. This majority is composed of the same group of justices that dissented in Goss v. Lopez.

The Wood decision is another decision in which there seems to be little effect from any influencing efforts that the Chief Justice may have made. The tone of the dissenting opinion which Chief Justice Burger joined indicates that these dissenting justices felt strongly that the majority opinion had placed an unfair burden on school officials and had extended the protection of the Constitution past the bounds that had been intended by its framers. This situation would seem to lead to the conclusion that efforts were made to move the Court in another direction during the conference but were unsuccessful.

In School District v. Hortonville Education Association, Chief Justice Burger delivered a majority opinion which gave school boards the right to terminate striking teachers. This six-to-three decision was consistent with Chief Justice Burger's feeling that the local school authorities should control their own affairs without interference from the federal courts. The dissenting members of the Court, Justices

Stewart, Brennan, and Marshall questioned the ability of the school board to make reasonable decisions in the context of heated negotiations. The Court, however, seems to have been fairly well unified in this decision, and since Chief Justice Burger wrote the majority opinion himself rather than assigning it to a nonaligned justice, it would appear that little influence was needed in order to secure the majority behind this restrictionist decision.

Chief Justice Burger again delivered the majority opinion in School District v. Wisconsin. This six-to-three decision granted a nonunion teacher the First Amendment right to speak about a union proposal being considered at an open board meeting. The members of the majority and minority in this decision were the same as those in the majority and minority in School District v. Hortonville Education Association. The conclusion reached concerning the Chief Justice's influence in Hortonville, therefore, seems valid in this case also.

In Mt. Healthy v. Doyle, a unanimous court set the standards under which a teacher could obtain remedial action if he had been terminated as a result of a constitutionally protected action. This decision, written by Justice Rehnquist, seems to have been consistent with Chief Justice Burger's restrictionist attitude about the involvement of the courts in educational matters. The degree to which he tried to influence or was successful in influencing the court is difficult to determine.

The Court was asked to rule on the constitutionality of using corporal punishment to discipline public school students

in Ingraham v. Wright. The Chief Justice was able to play a major role in the disposition of this case by casting the fifth and deciding vote for a decision which left the use of corporal punishment to the discretion of school officials. The degree to which Chief Justice Burger influenced the votes of other members of the court is difficult to determine. Since the majority opinion was assigned to Justice Powell, who is a member of the restrictionist bloc, there is little evidence to indicate an attempt on the part of the Chief Justice to win swing votes through the assignment of the majority opinion. There seems little doubt, however, that the Chief Justice worked to get this restrictionist decision in the conference and was able to cast the vote that sealed the decision.

The Chief Justice seems to have been unsuccessful in any attempts he may have made in an attempt to influence the Court in Board v. White. This decision, which was made by a five-to-one vote, struck school board restrictions placed on school employees who became candidates for public office. The majority opinion in this case is contrary to the Chief Justice's feelings that the federal courts should leave public school problems to school officials and state courts. Chief Justice Burger indicated his inability to influence the Court and his displeasure with the majority by joining the dissent written by Justice Powell.

The Court's unanimous decision in Carey v. Piplus appeared to maintain a restrictionist posture that was acceptable to the

Chief Justice. The degree to which the Chief Justice influenced this unanimous decision is difficult to determine. The decision did place the Court in a position to interfere with school operations; however, the restrictions this decision established for the granting of compensations to students whose constitutional rights had been violated seemed to be consistent with the restrictionist posture of the Chief Justice. The Chief Justice may have worked to influence the Court to accept this decision, thinking it would soften the impact of previous decisions with which he had disagreed because they had drawn the court into this controversy.

The Court again accepted a restrictionist attitude when it held, in Ambach v. Norwick, that the state of New York could withhold teacher certificates from aliens who refused to apply for citizenship. This decision was consistent with the Chief Justice's restrictionist attitudes and appeared to be one which he would have advocated in conference.

The Chief Justice appears to have been able to influence the Court to deny certain petitions for certiorari. As was noted in Chapter I, the Court is able to have a major impact on public school issues by denying petitions for certiorari. This action on the part of the Court has the same impact as affirming the lower court decision because that decision stands when certiorari is denied. The Burger Court has received petitions for certiorari from cases dealing with homosexual rights in the public schools, due process, and freedom of speech. In

each of these cases the Court, by denying the petition for certiorari, has affirmed a restrictionist lower court decision. Though it is difficult to determine the impact of Chief Justice Burger's influence in these decisions, it seems logical to assume, based on his restrictionist philosophy, that he advocated these denials.

In cases dealing with constitutionally guaranteed rights, the Chief Justice seems to have tried to influence the Court to take a position that would restrict access for public education cases which he felt were more properly handled by state courts. He seems to have been successful in leading the Court in a number of cases which resulted in five-to-four decisions. He also seems to have been successful in influencing a number of decisions by means of his assignment to the majority opinion. His efforts seem to have split the Court, and this served to make the decisions rendered in this area less influential than they would have been if the Court had been unified behind one philosophical position.

TABLE XVIII

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975

Voting Record in Relation to the Majority Opinion

Wisconsin v. Yoder, 406 U.S. 205 (1972)
Religious group granted exemption from compulsory attendance.

C*	X	D	X	C	C	C	C	C	N	N	X

Board v. Roth, 408 U.S. 564 (1972)
Teacher denied right of hearing following termination after one year contract.

C	X	D	X	D	C*	C	D	C	N	C	X

Perry v. Sindermann, 408 U.S. 593 (1972)
Teacher granted right of hearing following termination.

C	X	D	X	D	C*	C	D	C	N	C	X

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

TABLE XIX

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Papist v. Board, 410 U.S. 667 (1973). per curiam
Regulation of speech by university ruled unconstitutional.

D	X	C	X	C	C	C	C	D	C	D	X

San Antonio v. Rodriguez, 411 U.S. 1 (1973)
State system of financing education did not discriminate.

C	X	D	X	D	C	D	D	C	C*	C	X

Board v. LaFleur, 414 U.S. 632 (1974)
Mandatory termination of pregnant teachers held unconstitutional.

D	X	C	X	C	C*	C	C	C	C	D	X

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

TABLE XX

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Gross v. Lopez, 419 U.S. 565 (1975)
Suspension of pupils up to ten days without hearing unconstitutional.

D	X	C	X	C	C	C*	C	D	D	D	X

Board v. Jacobs, 420 U.S. 128 (1974). per curiam
Graduation of students involved in suit over newspaper rendered case moot.

C	X	D	X	C	C	C	C	C	C	C	X

Wood v. Strickland, 420 U.S. 308 (1975)
School board members not immune from liability.

D	X	C	X	C	C	C*	C	D	D	D	X

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

TABLE XXI

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

School District v. Hortonville Education Association, 426 U.S. 482 (1976)
Striking teachers granted only School Board review when terminated.

C*	X	X	X	D	D	C	D	C	C	C	C

School District v. Wisconsin, 429 U.S. 167 (1976)
Nonunion teacher granted First Amendment freedom of speech.

C*	X	X	X	D	D	C	D	C	C	C	C

Mt. Healthy v. Doyle, 429 U.S. 274 (1977)
Conditions under which an untenured teacher can be terminated outlined.

C	X	X	X	C	C	C	C	C	C	C*	C

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

TABLE XXII

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 -71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Ingraham v. Wright, 430 U.S. 651 (1977)
Disciplinary paddling of students acceptable under certain conditions.

C	X	X	X	D	C	D	D	C	C*	C	D

Board v. White, _____ U.S. _____ (1978)
Board policy requiring political candidates to take leaves held invalid.

D	X	X	X	C	D	C	C*	C	D	D	C

Carey v. Piphus, 98 S. Ct. 1042 (1978)
Students suspended without justification entitled to recover damages.

C	X	X	X	C	C	C	C	N	C*	C	C

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

TABLE XXIII

VOTING RECORD OF THE MEMBERS OF THE BURGER COURT

Justices and Terms

Ch. J. Warren E. Burger 1969 -	J. Hugo L. Black 1937 - 71	J. William O. Douglas 1939 - 74	J. John M. Harlan 1955 - 71	J. William J. Brennan 1956 -	J. Potter Stewart 1958 -	J. Byron R. White 1962 -	J. Thurgood Marshall 1967 -	J. Harry A. Blackmun 1970 -	J. Lewis F. Powell 1972 -	J. William H. Rehnquist 1972 -	J. John P. Stevens 1975 -

Voting Record in Relation to the Majority Opinion

Ambach v. Norwick, _____ U.S. _____ (1979)
State statute barring noncitizens for teacher certification held valid.

C	X	X	X	D	C	C	D	D	C*	C	D

Givhan v. School District, _____ U.S. _____ (1979)
Teacher's right to criticize school board policy upheld.

C	X	X	X	C	C	C	C	C	C	C*	C

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

CHAPTER VI

SUMMARY AND CONCLUSION

The cases reviewed in this study revealed that Chief Justice Burger's opinions were identifiable as to how the basic questions in church and state, desegregation, and constitutional freedoms cases should have been resolved. The study has as its purpose the task of analyzing the Chief Justice's influence in Supreme Court cases affecting education. Since Chief Justice Burger's philosophical position can be identified from his opinions, the analysis of his influence has consisted of reviewing the cases and evaluating his utilization of the influencing powers and rights afforded the Chief Justice.

This task was complicated by the shroud of secrecy which surrounds the justices' interactions. As a result of this secrecy, the analysis has been made using indirect means. Interviews, memoirs, biographies, and private papers have not been used in the analysis because they often represent the after-the-fact reconstructions of justices who were apt to report subjective recollections. The voting records and opinions of the justices have been used, however, because they appear to be the most objective indicators of the Court's behavior, though they too have been interpreted with care.

In all three classifications of cases, Chief Justice Burger supported a position which was opposed by an individual or group of justices. The Chief Justice supported the attempts of accommodationists who wanted the Court's approval of tax exemptions and tuition reimbursements for parents of parochial school students. Justices White and Rehnquist joined Chief Justice Burger's position, and the three formed a voting bloc in church and state cases. This bloc was opposed by a separationist bloc consisting of Justices Douglas, Brennan, and Marshall. The cases dealing with desegregation of the nation's schools were more unified than the cases in the other two areas; however, the Chief Justice was opposed by some justices when he attempted to restrict desegregation remedies to the limits established by the Brown decision. Though no blocs were identifiable in desegregation cases, the philosophical differences between Chief Justice Burger and other members of the Court can be seen in the concurring and dissenting opinions written in these cases. The cases which dealt with constitutional freedoms also produced blocs. The Chief Justice, joined by Justices Powell and Rehnquist, advocated the position that the Court should restrict access to people who claimed that their constitutional rights had been violated by state-governed educational institutions. This bloc felt that these cases could be handled more properly by state courts. Justices Brennan and Marshall were members of a bloc which opposed this position.

The Court's differences of opinion in education cases resulted in a divided Court. One of the major criticisms of the Burger Court has been its lack of unity, especially in major cases. This situation could be interpreted as an indication of Chief Justice Burger's lack of influence with the members of the Court. As was noted in Chapter II, the men who have served as Chief Justice have varied widely in their ability to influence the Court. When compared with men like Chief Justice Marshall and Chief Justice Warren, there seems little doubt that Chief Justice Burger has not been able to unify and persuade as they could. Chief Justice Burger has, however, been an influencing force on the Court.

In evaluating Chief Justice Burger's influence, the conditions under which he has functioned must be considered. President Nixon appointed Chief Justice Burger because he felt his appointee's constructionist philosophy would constrain the liberal Warren Court and bring the Court back into line with the more conservative attitudes that the two men shared. The assumption, therefore, that the conservative new Chief Justice found himself in the minority as he assumed leadership of a Court that retained all but one member of the old Warren Court seems justified. The new Chief Justice wasted little time, however, in giving notice that he intended to reduce the Court's case load and limit access to the Court. When viewed in light of this situation, the lack of unity of the Burger Court could be interpreted to be an indication of the Chief Justice's

unwillingness to compromise with his more liberal colleagues and his lack of concern for a unified Court. The lack of Court unity has, in fact, had the effect of weakening the Court's rulings and this weakening could be one of the ways in which Chief Justice Burger has attempted to remove the Court from the activist stance it had assumed under Chief Justice Warren.

Chief Justice Burger seems to have failed in most attempts that he made to exercise social and task leadership to influence the decision of the Court. This conclusion seems to be justified by the lack of unity exhibited in the education cases. The lack of unity, however, allowed the Chief Justice to exert a different kind of influence. The polarization of justices around philosophical positions which resulted in the formation of voting blocs gave Chief Justice Burger an opportunity to utilize the influencing powers available to a Chief Justice when the Court is divided. Positioned somehwere between the voting blocs in the church and state cases and in the constitutional freedoms cases was a group of nonaligned justices known as swing-vote justices. The possibility exists that these uncommitted justices could be attracted to support a decision when a middle-of-the-road opinion was written by one of their uncommitted colleagues. The Chief Justice had the right to assign the majority opinion when he was a member of the majority in a case. There is evidence to indicate that Chief Justice Burger may have used this right to assign the majority opinion in order to attract swing votes to the positions he supported.

Chief Justice Burger may have been the leader of the two blocs to which be belonged. This is a plausible contention because of the potential power he possessed as Chief Justice. No evidence, however, was found to indicate definitely who served as leader of the various voting blocs. The significance of the Chief Justice in attracting swing votes is not diminished, however, even if he were not the leader of the bloc.

Chief Justice Burger further utilized his right to assign the majority opinion on several occasions when he retained the opinion-writing task for himself. In a number of cases the Chief Justice was able to soften a decision which could have been written in a way that would have been contrary to his basic philosophical position. For example, in the Lemon decision the Chief Justice was able to minimize the harm done to the accommodationist cause resulting from an unfavorable decision. Chief Justice Burger softened the pro-separationist Lemon decision by writing an opinion stating that church and state were separated only by a "blurred, indistinct, and variable barrier" rather than the wall that the separationists would have built. The number and length of the concurring opinions written by the separationists in this case leave little doubt that the Chief Justice had succeeded in softening this decision far more than they had wished. There is some evidence to indicate that the Chief Justice attempted to accomplish a similar result when he wrote the Swann opinion; however, the

lower court busing orders which followed this decision seem to indicate his lack of success. By writing the Court's opinion in important precedent-setting cases, such as Lemon, Swann, and Milliken, Chief Justice Burger has influenced the Court in these specific cases and presumably in future cases by the precedents established.

In eight cases the Chief Justice has been able to control the decision completely. The Chief Justice is afforded the privilege of voting last when the vote is taken in a case. On the occasions when the Court is split evenly with four justices favoring one decision and four justices favoring another, the Chief Justice is able to cast the deciding vote. Chief Justice Burger found himself in that position in these eight cases. Two of these decisions, Milliken and Rodriquez, were significant decisions which served to limit the Court's involvement in desegregation by busing and in school finance.

When compared with Chief Justice Warren, Chief Justice Burger appears to be less able to unite the Court and to bring his influence to bear in persuading the Court to accept his position through social and task leadership as Chief Justice Warren was able to do. The Burger Court has delivered only nineteen unanimous decisions in education cases. This lack of unity seems to be partly due to the hard-line position of the Chief Justice. Chief Justice Burger seems to be unwilling to work for unity in the Court's decisions and his record of dissents indicates his desire to depart from the majority when he

feels that they are following the wrong path. Chief Justice Warren was able to unite a Court that was divided in the Brown decision, and his effort to unify the Court behind a unanimous decision has been called the most significant factor in the decision. In comparison, Chief Justice Burger has not been able to influence the Court in this manner. An analysis of the decisions of the Burger Court which were favorable to the position taken by the Chief Justice and those that were not shows that the Chief Justice had only moderate success in influencing the Court to adopt his position. Chief Justice Burger dissented in nine of the Court's education decisions and indicated displeasure with the majority in a number of concurring opinions.

The Burger Court seems to have gone through three cycles. During the early years of the Chief Justice's tenure, the Court seems to have been influenced only slightly by the Chief Justice. This can be explained by the fact that the Court was dominated by Warren Court holdovers. As the Court changed and President Nixon was able to appoint more constructionist justices, Chief Justice Burger's influence seemed to grow. In recent years, however, the Nixon justices seem to have broken away from the Chief Justice. The most significant indication of this split can be found in Justice Blackmun's lack of agreement with the Chief Justice in recent education cases. These two justices had agreed so often in their early years that they were called the Minnesota Twins. If the Nixon-appointed justices who have supported the positions taken by Chief Justice Burger

in education cases during the middle seventies do not continue their support in future education cases, the Chief Justice's ability to utilize the influencing tactics he has used in the past would be affected.

Chief Justice Burger does not seem to have been able to guide the Court to accept his position in education cases. His influence has resulted mainly from his ability to attract swing votes by means of the majority opinion assignment, his ability to control an unfavorable decision by writing the majority opinion himself, and his ability to cast the deciding vote in five-to-four decisions. The erosion of his base of influencing power obtained through the support of those justices who have traditionally joined him in education cases could severely limit the Chief Justice's ability to utilize those influencing tactics in future education cases. Chief Justice Burger's influence could also be affected by retirements. The age of some Court members makes this a real possibility. The philosophical position of the person chosen to replace a retiring justice could have a dramatic impact on the Chief Justice's ability to influence the Court.

Questions which this study suggests for further research include:

1. Have the interagreement rates between the Chief Justice and the associate justices changed since the October 1978 term? How has any change affected the Chief Justice's ability to influence the Court?

2. Has the Chief Justice been able to limit access of cases in education? What effect has this limitation, if any, had on the litigation of education cases?

BIBLIOGRAPHY

Books

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

Blaustein, Albert P. and Roy M. Mersky. The First One Hundred Justices. Hamden, Connecticut: Archer Books, 1978.

Bolmeier, Edward C. The School in Legal Structure. Cincinnati, Ohio: The W. H. Anderson Company, 1968.

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

Bryson, Joseph E. Legality of Loyalty Oath and Non-Oath Requirements for Public School Teachers. Boone, North Carolina: Miller Printing Company, 1963.

Bryson, Joseph E. "Recent Church-State Litigation." Contemporary Legal Problems in Education. NOLPE 20th Annual Convention, Miami Beach, Florida, 1974, pp. 239-249.

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

Cox, Archibald. The Role of the Supreme Court in American Government. New York: Oxford University Press, 1976.

Deakin, George R. "The Burger Court and Public Schools." Ed. D. Dissertation, University of North Carolina at Greensboro, 1978.

Ernst, Morris L. The Great Reversals. New York: Weybright and Talley, 1973.

Fein, Bruce E. Significant Decisions of the Supreme Court 1974-75 Term. Washington, D. C.: American Enterprise Institute for Public Policy Research, 1976.

Gell, Tyll van. Authority to Control the School Program. Lexington, Massachusetts: D. C. Heath and Company, 1976.

Gimlin, Hoyt, ed. Editorial Research Reports, Vol. II. Washington, D.C.: Congressional Quarterly, 1978.

Hooker, Clifford P., ed. The Courts and Education: The Seventy-seventh Yearbook of the National Society for the Study of Education Part I. Chicago: University of Chicago Press, 1978.

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

Hudgins, Herbert C., Jr. The Warren Court and the Public Schools. Danville, Illinois: The Interstate Publishers and Printers, 1970.

Kalodner, Howard and James J. Fishnam, eds. Limits of Justice. Cambridge, Massachusetts: Ballinger Publishing Company, 1978.

Kluger, Richard. Simple Justice. New York: Alfred A. Knopf Publishing Company, 1976.

Kurland, Philip, ed. Church and State. Chicago: University of Chicago Press, 1975.

Moritz, Charles, ed. Current Biography. New York: Wilson Company, 1969.

Murphy, Walter F. and C. Herman Pritchett. Courts, Judges, and Politics: An Introduction to the Judicial Process. New York: Random House, 1961.

Murphy, Walter F. and J. Tanenhaus. The Study of Public Law. New York: Random House, 1972.

Nolte, M. Chester. Guide to School Law. New York: Parker Publishing Company, 1969.

Nolte, M. Chester. School Law in Action: 101 Key Decisions with Guidelines for School Administrators. New York: Parker Publishing Company, 1972.

Reutter, E. Edmund, Jr. Schools and the Law. New York: Oceana Publishing Company, 1960.

Rohde, David W. and Harold J. Spaeth. Supreme Court Decision Making. San Francisco: W. H. Freeman Company, 1976.

Schubert, Glendon, ed. Judicial Behavior: A Reader in Theory and Research. Chicago: Rand McNally and Company, 1964.

Simon, James F. In His Own Image. New York: David McKay Company, 1973.

Stogdill, Ralph M. Handbook of Leadership. New York: The Free Press, 1974.

The Supreme Court: Justice and the Law, 2d ed. Washington, D. C.: Congressional Quarterly, 1977.

The Supreme Court: Views From Inside. New York: W. W. Horton Company, 1958.

Thomas, William R. The Burger Court and Civil Liberties. Brunswick, Ohio: King's Court Communication, Inc., 1976.

Umbreit, Kenneth Bernard. Our Eleven Chief Justices. New York: Harper and Brothers, 1938.

Wasby, Stephen L. The Supreme Court in the Federal Judicial System. San Francisco: Holt, Rinehart and Winston, 1978.

Westin, Alan F., ed. The Supreme Court: Views From Inside. New York: W. W. Norton and Company, 1961.

Articles

Bartholomew, Paul C. "The Supreme Court of the United States, 1971-1972," The Western Political Quarterly. 25:761-785. December, 1972.

Bartholomew, Paul C. "The Supreme Court of the United States, 1972-1973," The Western Political Quarterly. 27:381-402. March, 1974.

"The Burger Court: A New Tone," U.S. News and World Report. May 25, 1970, p. 36.

"The Chief Justice," Sixty Minutes Transcript (CBS News). March 25, 1979, pp. 11-19.

Halpern, Stephen and Kenneth Vines. "Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court," The Western Political Quarterly. 30:476-481. December, 1977.

Handberg, Roger B. "The 1974 Term of the United States Supreme Court," The Western Political Quarterly. 29:298-313. June, 1976.

Hoyer, R. W., Lawrence S. Mayer, and Joseph L. Bernd. "Some Problems in Validation of Mathematical and Scholastic Models of Political Phenomena: The Case of the Supreme Court," American Journal of Political Science. 21:381-403. May, 1977.

"Inside the Burger Court," Newsweek, June 13, 1977, pp. 101-102.

"Interview with Chief Justice Warren E. Burger," U.S. News and World Report, December 14, 1970, pp. 32-46.

Johnson, Dan L. "The First Amendment and Education: A Plea for Peaceful Coexistance," Villanova Law Review, 17:340-359. June, 1972.

Johnson, Richard E. "Some Comparative Statistics on Chief Justice Opinion Writing," The Western Political Quarterly. 26:453-460. September, 1973.

LeVar, C. Jeddy. "The Nixon Court: A Study of Leadership," The Western Political Quarterly. 30:484-492. December, 1977.

McDonald, Laughlin. "Has the Supreme Court Abandoned the Constitution?" Saturday Review, May 28, 1977, pp. 10-14.

Pike, David F. "Supreme Court Trials and Tribulations," U.S. News and World Report, March 26, 1976, pp. 32-37.

"A Rudderless Court," Newsweek, July 23, 1979, p. 67.

Steamer, Robert J. "Contemporary Supreme Court Directions in Civil Liberties," The Western Political Quarterly. 92: 424-442. Fall, 1977.

Steneel, Sandra. "Burger Court's Tenth Year," Editorial Research Reports, September 22, 1978.

Legal Aids

American Jurisprudence. By the Publisher's Editorial Staff, Rochester, New York, Lawyer's Cooperative Publishing Company.

American Law Reports. By the Publisher's Editorial Staff, Rochester, New York, Lawyer's Cooperative Publishing Company.

Black, Law Dictionary 85 (4th ed. 1951). This work is entitled Black's Law Dictionary.

Corpus Juris Secundum. Edited by Frances J. Ludes and Harold J. Gilbert. New York, The American Law Book Company.

National Reporter System. Containing reports in full of decisions of the courts of record of the various states, and of the federal courts. St. Paul, Minnesota, West Publishing Company, 1897, and published to date with weekly advance sheets. The system consists of the following "reporters:"

The Atlantic Reporter, est. 1895. Reports completely decisions of Court of last resort of Maine, New Hampshire, Vermont, Connecticut, Rhode Island, New Jersey, Pennsylvania, Delaware and Maryland.

The Federal Reporter, est. 1888. Reports completely all decisions of the United States Circuit, District and Circuit Court of Appeals.

The New York Supplement, est. 1888. Reports completely decisions of the Supreme Court and lower courts of record in New York State.

The Northeastern Reporter, est. 1885. Reports completely decisions of Courts of last resort of New York, Massachusetts, Ohio, Illinois and Indiana and the intermediate Appellate Court of Indiana.

The Pacific Reporter, est. 1883. Reports completely decisions of Courts of last resort in California, Colorado, Idaho, Oregon, Montana, Nevada, New Mexico, Kansas, Arizona, Utah, Washington and Wyoming.

The California Reporter, est. 1961. Reports completely cases decided in the Supreme Court, District Courts of Appeal Appellate Department and Superior Court.

The Southeastern Reporter, est. 1887. Reports completely decisions of Courts of last resort in Georgia, South Carolina, North Carolina, Virginia and West Virginia.

The Southern Reporter, est. 1886. Reports completely decisions of the Courts of last resort in Alabama, Florida, Louisiana and Mississippi.

The Southwestern Reporter, est. 1886. Reports completely decisions of Courts of last resort of Missouri, Arkansas, Indiana Territory, Texas, Kentucky and Tennessee and intermediate courts in Missouri and Texas.

The Supreme Court Reporter, est. 1882. Reports completely the decisions of the United States Supreme Court.

United States Reports, est. 1885. Reports completely the decisions of the United States Supreme Court. Annotated with respect to legal issues involved in each case.

Shepard's Reporter Citations. By the Publisher's Staff, Colorado Springs, Colorado, Shepard's Citations, Inc. Reports cross-annotated cases.