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AMERICAN EDUCATIONAL JURISPRUDENCE: A STUDY OF THE INFLUENCE OF STATE STATUTES AND FEDERAL COURTS ON PUBLIC SCHOOLS AND THE DESEGREGATION PROCESS IN THE UNITED STATES.

THE OHIO STATE UNIVERSITY, PH.D., 1978
AMERICAN EDUCATIONAL JURISPRUDENCE:
A STUDY OF THE INFLUENCE OF STATE STATUTES AND
FEDERAL COURTS ON PUBLIC SCHOOLS AND THE DESEGREGATION
PROCESS IN THE UNITED STATES

DISSERTATION

Presented in Partial Fulfillment of the Requirements
for the Degree of Doctor of Philosophy in the
Graduate School of The Ohio State University

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****

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1978

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ACKNOWLEDGMENTS

The author wishes to express personal indebtedness to his committee, Dr. Robert R. Bargar, Dr. James J. Buffer, Jr., and Dr. Richard Kelsey for their guidance and encouragement throughout this study.

Sincere thanks are extended to attorneys Nathaniel Jones, Louis Lucas, and Jack Greenberg for their assistance and encouragement during this study.

Gratitude is extended to Dr. James V. Miller for providing me with the opportunity to realize my potential.

And to my wife, Karen, appreciation for her continued support and assistance.

Finally, to my parents, John and Freda Dunn, for their guidance and direction during the formative years of my life, I dedicate this manuscript with love and appreciation.
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CHAPTER I

INTRODUCTION

Education is as old as mankind, some form of education has always served the needs of society. The earliest and simplest form of education consisted of the more mature teaching the immature in order to prepare them for adulthood in the society. From this universal form of education, formal structures of various kinds have developed. In the United States, from the early settlements to the present time, our society has realized the increasing need to educate the masses (Stone and Schneider, 1965, p. 188).

From the early beginnings of formal schooling in the United States, law has guided and framed the educational system. The Massachusetts School Law of 1642, passed by the Massachusetts Bay Colony as an attempt to check and see that the children were properly educated, was the first legislation affecting schooling in the New England Colonies. When this law was found to be inadequate to accomplish the intended purpose, the Massachusetts Law of 1647 -- "Old Deluder Satan Law" -- was passed in a further attempt to effect the educational intent of the 1642 law (Stone and Schneider,
1965, p. 194). With this early beginning of defining educational goals through legislation and further attempts to effect these goals through additional legislation, the pattern of the law's relationship to schooling was established.

Since the legislation affecting education in Massachusetts was passed, many cases have been taken before the courts seeking decisions with regard to educational controversies. The decisions handed down from the courts have had a tremendous influence upon the framework of the educational system. Many of these decisions have not followed a pattern based upon the *stare decisis* principle, but have been a reflection of the time in which they occurred. Newton Edward (1947, p. 223) stated:

> Political theories and social philosophies are seldom, if ever, intellectual abstractions; they are usually weapons forged by articulate groups in society as they struggle either to maintain or to advance their own interests.

Schooling, then, is sensitive to the immediate social setting and forces of the society.

Schooling in the United States is unique in several ways, but our cultural heritage has played a great role in its formation. The settlers of the New World could not help but draw upon their past experiences. This cultural heritage can be traced all the way back to ancient Greece and Rome (Stone and Schneider, 1965, p. 188). Cultural
heritage, however, has two aspects: not only is it passed on from one generation to the next, but social forces promote change in this heritage due to controversies. Change in cultural heritage is very slow in developing, and as a result, judicial decisions are sometimes sought to effect a more rapid change (Johns, 1967, p. 249).

The movement toward free and equal public schooling for the masses in the United States moved forward slowly from 1642 to the middle of the twentieth century. By 1954, schooling across the various states had become very similar for most children with the marked exception of that provided for blacks. Educational opportunity for blacks was far below that afforded whites as a general rule. Many conflicts in case law have dealt with this problem. Beginning with Brown vs. Board of Education of Topeka, 347 U.S. 483 (1954), the separate but equal doctrine which was firmly established in Plessy vs. Ferguson, 163 U.S. 537 (1896), was struck down. The court actions since that time have been in an effort to implement the Brown decision to desegregate. But experience has taught us that in all fields it is easier to make a decision than to implement that decision. The forces opposing desegregation have fought many long, hard battles, and have attempted in various ways to postpone or prevent the establishment of a unitary school system.
This must be understood because throughout most of our country's history, until recently, the courts and the federal government have followed a "hands off" policy with respect to education, thereby leaving the operation of public schools to the states primarily because of the Tenth Amendment of the United States Constitution, which states:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Consequently, this allowed the fifty states a great deal of diversity in public schooling. This diversity has come about because the states have adopted different methods of operating their schools. The most obvious example of this is the dual school system.

In Brown, the Supreme Court of the United States ruled that the laws which permitted racial segregation in the American public school systems were in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution; and since that time until the Supreme Court's most recent desegregation decision in Detroit, Michigan, there have been numerous federal court decisions under the Fourteenth Amendment designed to erase all vestiges of discrimination in schooling caused by dual school systems.

The Nation has recently observed the twenty-fourth anniversary of the Brown decision, and yet there still
continues to be separate and unequal schools in America today. Twenty-four years, a generation, of evasion and non-deliberate speed has passed, and full faith and credit in the implementation of the Brown decision has yet to be made. Today, as evidenced by ongoing litigation, hundreds of thousands of public school students are being educated in segregated school systems just as they were in 1954. The reasons for the continued segregated education and relative non-implementation of Brown seem to lie in the policy or lack of policy concerning the implementation of the United States Supreme Court's desegregation decisions by state and local school officials.

Currently many American public school systems are undergoing a transformation that is intended eventually to make them conform at least to the basic minimum requirements of the United States Constitution. It is therefore reasonable to conclude that desegregation in many urban areas is inescapable.

Statement of the Problem

All of what has been said is not new, although it is not yet widely recognized outside the cadre of lawyers, judges, and educators who are concerned with schooling and the law. What is not known are the long-range implications of our judicial system on schooling, which could be more far-reaching than the 1954 Brown decision. More importantly,
it may mean that hardly a thread in the fabric of schooling will be immune to "judicial scrutiny." Herein lies the serious problem which educators, yet unbeknownst to many of them, face; the operation of schools under the scrutiny of the courts. It is to this problem that this dissertation is primarily addressed.

Additionally, this dissertation will be limited to the investigation of one critical point in the educational system where education and law intersect: racial discrimination in the public schools. We will be looking primarily, but not exclusively, at court decisions which have applied the First and Fourteenth Amendments to the schools. The study will only examine those court decisions which fall within the one category previously identified and those which, in the opinion of legal experts, as defined in this study, have called for a significant change in the operation of the public school system.

Objectives of the Study

There is an immediate need for an analysis and appraisal of the court to order changes in the educational system. We need to define the scope and limitations of this new judicial function. We need to examine our schooling policies and practices for their vulnerability under a judicial standard. We must be able to defend those practices which we believe to be educationally sound, and to do so we must
be able to show that they are necessary to the achievement of a "compelling state interest." We know from past court decisions that educational policies which discriminate on the basis of race will not withstand strict scrutiny by the courts.

Therefore, the major objectives of this dissertation are:

1. To determine what policies regarding public school desegregation have been made by the United States Supreme Court from 1954 to 1978.

2. To determine what principles were involved and the positions taken by the courts in the formulation of policies regarding public school desegregation in selected federal court decisions.

3. To determine what local implementation provisions were made for carrying out school desegregation policies mandated by the courts.

Procedure

The method of research is to be both historical and legal in nature. This procedure section will provide a general overview of the historical and legal methods and procedures employed throughout this study which are designed to provide clearer perspectives of the present state of public school desegregation litigation.
Following a review of Mouly (1965), Gottschald (1950), and Brickman (1949), procedures were established for this investigation. The historical and legal methods were utilized in order to collect the necessary data needed for this treatment.

The historical method is used to follow the legal concepts chronologically based on documents, while the legal method is used to follow the development of different legal issues not necessarily in a chronological order.

The present state of public school desegregation is only understandable on the basis of their past. Historical research can provide us not only with hypotheses for the solution of current problems in desegregation, but also a greater appreciation of the role which the law is to play in the operation of public schools.

A common motive underlying historical research is the simple scholarly desire of the researcher to arrive at an accurate accounting of the past. This often involves nothing more than a scholarly interest in the truth — that is, the desire to know what happened in the past, and how, and "why the men of the times allowed it to happen" (Smith and Smith, 1959, p. 127).

Historical sources will be classified into two categories, primary (legal cases, statutes, etc.) and secondary (educational and social literature, conversations, etc.). Primary sources will be relied upon as much as possible
while secondary sources will be utilized to bridge the gaps between the primary sources or when primary sources are inadequate. In view of the legal responsibilities of school officials, legal research is particularly appropriate. The purpose of legal research is to locate and summarize pertinent cases and statutes to trace the legal development of school desegregation. In doing this, this dissertation will convey legal information to educators and laymen who are not themselves legally trained.

The method of inquiry is to be analytical and is to involve the following steps:

1. Each volume of the United States Reports (1789 to 1978) will be examined for decisions which have affected the schools.

2. The American Digest System (1658-1978), the Modern Federal Practice Digest (1939-1978), and the United States Supreme Court Digest (1754-1978) will be examined for cases affecting schools, principally those classified under the topic "Schools and School Districts."

3. Court decisions will be selected, on the basis of the criteria previously stated, and will be individually examined for new legal principles, theories, or conceptions which apply to schools. This will involve looking critically at the structure, subject matter, and precepts of each decision and
comparing it with previous decisions on the same subject. The test for inclusion of a decision in the study will be whether it modified or over-turned established school policies and practices and whether it ordered a fundamental change in the educational system.

4. The literature from the fields of education and law will be surveyed and used to provide a background for further study of the court's decisions. In order that the study would reach original conclusions and not be prejudiced by what had been previously said or concluded in secondary sources, the review of the literature will occur after the court decisions have undergone a preliminary review.

5. Additional data will be gathered from documents, conversations and assistance provided by The Center for Law and Education, the National Organization on Legal Problems of Education, the Potomac Institute, the Lawyers' Committee for Civil Rights Under Law, the NAACP, the NAACP Legal Defense Fund, and the Notre Dame University Center for Civil Rights. These sources will identify school administrators, school board members, attorneys, judges and plaintiffs directly involved in the previously mentioned federal court cases.
6. Findings from the analysis of the court decisions, the critical review of the literature, and the analysis of data gleaned from item 5 will then be synthesized and conclusions set forth in the final chapter in the form of the specific Findings of the Study, Recommendations, and Implications for Educators.

Orientation to Educational Jurisprudence

Oliver Wendell Holmes, Jr., in his book, The Common Law (1948), said of the law: "In order to know what it is, we must know what it has been, and what it intends to become." In that passage, Holmes was speaking about all of the law, not just some narrow body of rules or regulations which have been applied by the courts to specific areas such as contracts, property, torts, criminal justice, or education. It is this kind of broad jurisprudential approach to the study of court decisions which will be adopted and followed in this dissertation. We shall, therefore, be looking for "principles of law," from whatever areas of the law they derive, and not at the rules and regulations which the courts have said are applicable to specific factual situations involving the schools.

We shall be talking about such fundamental concepts as the Constitutional guarantee of "equal protection of the laws" which flows directly from the text of the Fourteenth
Amendment itself. We shall be examining the evolution of these concepts from the wider perspective of the law in general. The law, applied in light of the special characteristics of the school environment, is but a part of the mainstream of justice which emanates, consistently and harmoniously from the United States Constitution.

We intend to enter the "inner sanctum" of the judiciary and observe how federal courts operate when deciding cases involving matters touching on a "fundamental interest" which education has now become. Since we want to know what the law is, following Holmes we shall be looking at what has been and what it intends to become. With these two points on the continuum -- the past and the tendency for the future -- we will make findings about what the law is, and draw conclusions about what courts might reasonably and logically be expected to decide when a school policy or practice is challenged in the future. In summary, we shall be examining the court decisions with strict scrutiny for "principles of law" and drawing conclusions therefrom which have relevance for the schools.

No other method, no less thorough approach to the study of law, will yield a complete and accurate understanding of the legal "reformation" which is taking place in the public schools. This is not rhetoric; rather, it is a factual statement of how educational jurisprudence should be studied and taught.
Definitions

Most of the legal terminology used in this dissertation which require definition will be found in Black's Law Dictionary, Fourth Edition, 1968, where the terms are defined and frequently annotated with cases. Words and phrases selected for inclusion in this section either (1) are not strictly a part of the working vocabulary of law, social science, or education; or (2) they are new and do not yet appear in any legal or standard dictionary.

**Administration.** The organization and operation of a public school or schools within a district or state.

**Allegation.** The assertion, declaration, or statement of a party to an action, made in a pleading, setting out what he expects to prove.

**Appeal.** The complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse.

**Certiorari.** The name of a writ issued by a superior court directing an inferior court to send up to the former some pending proceeding . . . for review or trial.

**Citation.** A writ issued out of a court of competent jurisdiction, commanding a person therein named to appear on a day named and do something therein mentioned, or show cause why he should not.
Civil Rights. A term applied to certain rights secured to citizens by the Thirteenth and Fourteenth Amendments to the Constitution, or by various Acts, state or federal.

Classification. A technical legal term signifying the act (and also the result) of drawing lines that separate people into classes so that they can be treated differently. The lines must be drawn so that all persons similarly situated are included in the same class and are treated alike. Classification has been described as the "jugular vein" of equal protection.

Constitution. Unless otherwise qualified in the context in which it is used, this term signifies the United States Constitution and its Amendments.

Decree. The judgment of a court of equity.

De Facto. In fact; actually, indeed, in reality. De Facto segregation is adventitious separation of the races, e.g., segregation in the public schools which results from normal housing patterns.

De Jure. By law, state action of any kind. Segregation of white and black children in the public schools on the basis of race, pursuant to state laws permitting or requiring such segregation, is *de jure* segregation (Brown).

Dictum. Any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion.
Due Process of Law (due process). Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one question belongs.

Education. The official action of the state to school its citizens. (In this dissertation used synonymously with schooling.)

Educational Needs. A conclusory term which presumably reflects "The interaction of several factors such as the quality of teachers, the students' potential, prior education, environmental and parental upbringing, and the schools' physical plant" [McInnis vs. Shapiro, 293 F. Supp. 327, 329, note 4 (1969)]. This is a "nebulous concept" lacking in "judicially manageable standards" (McInnis).

Enjoin. To require a person, by writ of injunction from a court of equity, to perform, or to abstain or desist from, some act.

Equal Protection Clause. This phrase refers to the first paragraph of the Fourteenth Amendment to the Constitution, the third clause of the second section thereof, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."
Equity. In its broadest and most general significa-
tion, this term denotes the spirit and the habit of fair-
ness, justness, and right dealing which would regulate the
intercourse of men with men.

Fundamental Interest. This is a term used by the courts
to describe an interest which the legal order will secure.
A "fundamental interest," although not expressly enumerated
in the Constitution, is afforded substantially the same
safeguards and protections as a constitutionally enumerated
right.

Interest. An interest is a demand or desire which
human beings either individually or in groups see, to sat-
isfy. The law does not create interests; it merely clas-
sifies them. Pound (1943, p. 96) identified three categor-
ies of interests which press for recognition: individual
interests, public interests, and social interests.

"Invidious Discrimination." Discrimination based on
race is described as "invidious" [Yick Wo vs. Hopkins, 118
U.S. 356, 367 (1886)].

Jurisdiction. The power and authority constitutionally
conferred upon (or constitutionally recognized as existing
in) a court or judge to pronounce the sentence of the law,
or to award the remedies provided by law. Original Juris-
diction and Appellate Jurisdiction differ only in the fact
that the court of original jurisdiction deals with the case
initially, while appellate jurisdiction gives authority to take cognizance of a case and to proceed to its determination only after it has been decided by an inferior court.

**Law.** A system of principles and rules of human conduct being the aggregate of those commandments and principles which are either prescribed or recognized by the governing power in an organized jural society as its will in relation to the conduct of the members of such society, and which it undertakes to maintain and sanction and to use as the criteria of the actions of such members.

**Mandamus.** This is the name of a writ issued from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.

**New Equal Protection Standard.** A test used by the courts for measuring classifications against the equal protection clause. In cases involving "suspect classifications" (race or wealth) or touching on a "fundamental interest" the courts adopt an attitude of "active and critical analysis," subjecting the classification to strict scrutiny.
The standard requires that the state bear the burden of establishing that the law is necessary to the achievement of a compelling state interest.

**Organization.** This term signifies the administrative or functional structure of the public schools, including the local districts.

**Petition.** A written address, embodying an application or prayer from the person or persons preferring it, to the power, body, or person whom it is presented, for the exercise of his or their authority in the redress of some wrong, or the grant of some favor, privilege, or license.

**Plenary.** Full; entire, complete, unabridged.

**Policy.** A course of action; principle; expedience.

**Principle.** The cause, source, or origin of anything; that from which a thing proceeds, as the principle of motion, the principles of action; that which supports an assertion, an action, or a series of actions, or of reasoning; a law comprehending many subordinate truths, as the principles of morality, law, or government.

**Precedent.** An adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising in a similar question of law.
Programs. This term includes all of the studies and activities which are under the supervision and control of local schools or school districts.

Public Schools. Schools under the exclusive control of the officers of the state and financed with public monies.

Right. The right is the power to enact a particular act or forebearance. It may also be an interest which the legal order will secure. "It is related to the interest as the fortification (is) to the protected land" (Pound, 1943, p. 149).

Schooling. See Education.

Segregation. The separation of pupils or teachers in the schools because of race, color, or nationality -- or for any other reason, including marriage or pregnancy. De jure segregation has been declared unconstitutional by the Supreme Court of the United States. (See also De Facto.)

"Separate but Equal." A legal doctrine which required classification of people on the basis of race and separating them for educational and other purposes, involving the establishment of dual school systems and other dual accommodations which provided the same equal advantages [Plessy].

Stare decisis. To stand by a decided case; to uphold precedents; to maintain former adjudications.
Stare decisis et non euieta movere. To adhere to precedents, and not to unsettle things which are established.

Statute. A particular law enacted and established by the will of the legislative department of government.

Strict Scrutiny. This term signifies the attitude of active and critical analysis which courts adopt when reviewing cases involving "suspect classifications" or touching on a "fundamental interest."

Supreme Court. Unless otherwise qualified in the context in which it is used, this term signifies the United States Supreme Court sitting in Washington, D.C.

Suspect Classification. Lines drawn on the basis of race or wealth and which are used to separate people for purposes of unequal treatment.

Traditional Standard. A long-established rule that a state does not deny equal protection if it is "reasonable" and rationally related to a legitimate government objective.
CHAPTER II

HISTORICAL AND LEGAL BACKGROUND
OF BLACKS IN THE UNITED STATES

A Brief Historical Look at Blacks in the United States

Exploration and Colonization

Spanish and Portuguese explorers began taking blacks from the West African coastal areas in the fifteenth and sixteenth centuries. The Portuguese called them Negro because that was their word meaning black, which was derived from the Latin "Niger," also meaning black. Their intent was not to use blacks as slaves, but in a time when all who were dependent were slaves, this was only the natural course of events. The practice of taking slaves from the coast of Africa either by force or by contract with African Chieftans was well established long before the settlement of North America.

When the new country to the West was discovered and began to be settled, the European nations set up trading companies to handle slavery among other pursuits to amass wealth (Fant and Fant, 1926, pp. 47-49). But these were not the first blacks in the New World: "Negroes were with the Spanish and Portuguese explorers who came to the New World" (Flift, 1960, p. 19). Pedro Alonzo Nino of
Columbus' crew is thought to have been black. Balboa had thirty blacks among his crew when he discovered the Pacific Ocean. Cortez also had blacks with him when he entered Mexico. Actually, the formal opening of slave trade occurred when Bishop Las Casas allowed Spaniards to import twelve blacks each to America in 1517. However, the Spanish had allowed blacks to go to the "Spanish lands in the New World as early as 1501" (Clift, 1960, pp. 19-20).

Settlers in the new colonies found that Indians could not adapt to the rigid farm labor of the plantation system. Indentured slaves also proved to be an inadequate labor source. Black slave labor was inexhaustable and by far the cheapest source of labor in the long run (Clift, 1960, p. 20). Because of this, trading companies became involved in supplying black laborers to the new settlements in America.

John Law's famous trading company, the Mississippi Company, had an obligation under contract to bring 6,000 whites and 3,000 blacks into the Province of Louisiana between 1717 and 1743 (Rowland, 1907, pp. 952-953). Although this company went bankrupt in 1732, it marked the first attempt to bring a large number of slaves into the South.

The Colonial Period

Educational opportunities in the southern colonies during the colonial period were extremely limited. The
population was sparsely scattered due to the plantation system, and many times home instruction by parents was the only education that children received. Only the wealthy planters had the financial ability to offer their children an education through employing tutors at home or sending their children away to Europe.

Some of the religious organizations wanted to educate blacks so that they could read the Bible and become Christians. Educational efforts were carried on by the Society for the Propagation of the Gospel in Foreign Parts, the Quakers, the Puritans, and others. However, there was opposition to the education of blacks because it was generally believed that their education would be a factor in the destruction of slavery.

The Revolutionary Period

The philosophy held by the people during the revolutionary period had an influence upon education. Slavery was attacked as a violation of the natural right of man. The opponents of slavery claimed this doctrine gave blacks the right to be educated. Some men, including Benjamin Franklin, favored full education of blacks. Thomas Jefferson, although not in favor of the same education for blacks as for whites, still felt that blacks should be given industrial and agricultural education (Frazier, 1969, p. 419).
The philosophy of this period, however, did not promote a change in the attitude of opposition to the education of blacks in the South. This opposition limited the educational work of the churches by the passage of strict laws which prohibited the instruction of slaves and placed limited upon education for free blacks as well. In much of the South, instruction of free blacks as well as slaves was prohibited by statute (Bond, 1934, p. 21).

**Prior to the Civil War**

Legal restrictions upon education of blacks were not favored throughout the South by all. Black slaves did receive some education in part of the South. Some slave owners taught their own slaves. However, the insurrection of 1800 greatly discouraged the expansion of Black education (Clift, 1960, pp. 24-25).

Blacks in the North benefited from the trend toward the establishment of schools. In some places there were schools established especially for blacks, such as the New York African Free School founded in 1787. In other places blacks attended the same schools as white students. During this period, a small number of blacks were attending Oberlin, Franklin and Rutland Colleges, and Harvard Medical School (Clift, 1960, pp. 24-25).
During the Civil War and Prior to Congressional Reconstruction

As the Federal Army advanced into the South, the trail was opened for missionaries. Teachers and money was sent South to educate blacks. Six months after the start of the war, the first day school for blacks was established at Fortress Monroe, Virginia, by the American Missionary Association; the teacher was Margret L. Peake, a free black. This was the beginning of what later became Hampton Institute. Other schools were established in areas of the South by missionary groups after military occupation of the area.

An Act of Congress on March 3, 1865, established the "Bureau for Freedom, Refugees, and Abandoned Lands." This was established to a great extent to help organize efforts to educate blacks (Bond, 1934, p. 28). According to Bond, (1934, p. 29), "Whatever its faults, the Freedmen's Bureau may justly be credited with the establishment of a widespread and fairly organized system of free schools for Negroes in the South."

Opposition to the education of blacks had been strong in the South prior to the Civil War. After the establishment of the Freedmen's Bureau, the continued opposition resulted in acts of violence. School houses were burned and teachers were assaulted by the more radical segment of this opposition (Frazier, 1969, p. 421).
Frazier describes three separate political entities in the South during this period. First, the conservatives, who through the "Black Codes" wanted to maintain blacks in a servile status; second, the moderates who recognized that slavery was dead and that blacks should be considered in the creation of a new society. This group included many plantation owners who were willing to provide education for blacks in order to maintain a labor force. The third entity consisted of small farmers and poor whites with no property. During Reconstruction, the members of this group were called "scalawags." They played an important role in the attainment of public schools. At first they were aligned with blacks in the struggle for free public schools, but they later became aligned against them in the struggle (Frazier, 1969, p. 421).

Congressional Reconstruction

The first two years after the Civil War were a reconstruction period under the policies of Presidents Lincoln and Johnson. The "Congressional Reconstruction," according to Bond (1960, pp. 46-47), is defined by the passage of laws in the United States Congress on March 2, 23 and July 17, 1867. It is claimed that these laws were provoked by the southern legislature's refusal to accept the Fourteenth Amendment to the Federal Constitution. The acceptance of
this Amendment would have guaranteed blacks privileges of citizenship.

The opposition of the South to the Fourteenth Amendment was due mostly to their opposition to public tax-supported schools. Attempts by the poor white class to obtain public supported schools, before the Civil War, were thwarted by the aristocratic slave-holding class. Education on the public-supported level for all citizens would have given blacks a status inconsistent with their place in the social order. The social system in the southern states not only had whites set in classes, but blacks as well. According to Charles Sydnor, (1933, pp. 1-6), domestic slaves were of a higher social order than field slaves. Within these two distinct classes further social order partitioning existed. Life was more pleasant for domestic house slaves, and they were allowed to read and write. Another class of blacks were referred to as town slaves, they had a class distinction of superior intelligence and acuteness. These blacks worked in town at miscellaneous jobs (Frazier, 1969, p. 421).

Under the Congressional Reconstruction between 1868 and 1870, education for black children in the South changed in those areas where the black electorate was an important element. Blacks were elected as state superintendents of education in Mississippi, Florida, Louisiana, Arkansas, and South Carolina. The schools changed in three major ways
during this period: schools were opened to blacks, central-
ization of authority and supervision from state officials,
and the levying of taxes along with the creation of addition-
al sources of income made more funds available to the
schools (Bond, 1934, pp. 49-50).

The question of mixed and separate schools was a ser-
ious problem and many states varied in their approach to
the problem. West Virginia had made provisions in 1863 in
its Constitution for "separate but equal" schools. Some
states questioned the source of the support for black
schools, and in some border states, the support for black
schools came from taxes paid by the blacks of the state.
All of this debate on school support and mixed and separate
schools revolved around the status that blacks had. Legal
status was accomplished with the passage of the Fourteenth
and Fifteenth Amendments giving citizenship rights to all
blacks in the United States. Frazier (1969, p. 424), gives
credit for the passage of these long-delayed amendments to
Congressional Reconstruction.

The Reconstruction governments under military author-
ity made Constitutional provisions for equal education in
mixed schools in Mississippi, Arkansas, Louisiana, Florida
and South Carolina. However, not many integrated schools
were actually established. Pierce (1955, p. 42), states:
Actually, mixed schools were tried in only a few places in three states. Mississippi had a few mixed schools for a brief period; then they withered away. Integrated schools were set up in Columbia and Charleston, South Carolina, but they survived for only a short time and amounted to no more than white and black children attending separate classes in the same building. The records reveal only one instance in Louisiana in which Negroes sought admittance to a white school, and the incident was quickly closed when the Negro children were driven from the school by white pupils.

According to Pierce (1955, pp. 42-43), blacks were more concerned with equal education than with mixed schools, therefore, the matter was not given much impetus.

The most important outcome for education under the Reconstruction governments was the establishment of the democratic principle of public tax-supported education for all. The date usually given for the end of Reconstruction is 1876, but it actually ended with the return of the conservative southerners to power in 1877 (Bond, 1934, p. 47). Due to the voting power which blacks held during the years from 1874 to 1877, the conservatives who wanted to be elected to office had to promise the continuation of the equality of educational opportunity which had been established at least in ideal, during Reconstruction. Although education was of a higher caliber in the cities than in rural areas, for several years educational equality was maintained to a fair extent. While conservative leaders were promising blacks a continuation of equal educational opportunity, they were
slowly taking away all of their political power (Bond, 1934, pp. 82-83).

Not everyone in the South believed that "separate but equal" education would remain equal or economically feasible. Senator Revels, a black Mississippi politician, argued in the Senate that the support of two separate systems for the races would prove to be uneconomical and would lead toward inequality between the systems. There were also indications that many others felt that separate but equal facilities could not be maintained (Bond, 1934, p. 53).

**Education After Reconstruction**

After Reconstruction, blacks became a separate racial entity as well as a separate economic class. During this time, the recognition that education was a preparation for a better life caused a great increase in the number of students, black and white, enrolling in schools. From 1880 to 1895 in ten southern states, the increase of white enrollment in public schools increased 59%. This placed an even greater financial burden upon an already crippled South (Bond, 1934, pp. 90-91). Even under the circumstances after the overthrow of the Reconstruction government, black schools and white schools were maintained on a somewhat equal basis for a while (Frazier, 1969, p. 30). But historically the South had been opposed to education for all children at public expense (Flict, 1960, p. 30). The
southern conservatives in power wanted to keep down taxes, and as a result they placed restrictions upon educational expenditures for both black and white schools. During the period from 1875 to 1880, the educational load (according to increased enrollment) increased 33%, but educational expenditures were decreased by 21%. This caused an educational dilemma in several southern states where local taxation for schools was still against state law (Bond, 1934, pp. 91-92).

Since blacks had relinquished their political power to the post-War conservative government, it was to be expected that local white school boards would begin diverting state funds allocated for the education of black students to the education of white students. Although this practice was unconstitutional, several state legislators soon found methods of legalizing the practice. In 1886, the Mississippi legislature passed a law, sponsored by counties with large proportions of black students, which established a legal procedure for the granting of certificates to teachers by local boards of education. Local boards could then pay teachers on the basis of the certificates which they issued. It was a simple procedure to issue certificates to white teachers which paid maximum salaries under state law, and issue certificates to black teachers which paid minimum salaries under state law. If a district had 100 black students and 100 white students, the board could hire one black teacher for all the black students and pay
a minimum salary based upon the type of certificate that they had granted. At the same time, they could hire three white teachers for the 100 white students and pay them all a maximum salary based upon the granting of a higher level certificate to each white teacher. Thus, the diversion of funds from black to white schools served as a means of improving white schools at the expense of black schools. This practice was especially advantageous to whites in those counties where there was a large proportion of black students. It was not, however, of much benefit to those counties which had only a small proportion of black students (Bond, 1934, pp. 93-94).

To illustrate, Bond (1934, p. 95) develops a hypothetical case of two counties. County A has 1,000 students of which 900 are black and 100 are white. County B has 1,000 students of which 900 are white and 100 are black. Using only teacher salaries as a basis for the diversion of funds, he shows the following expenses per child based upon $1,000 of funds allocated to each county from the state for education:

Expenditures for white students in County A (black county), $3.52 per cap.
Expenditures for black students in County A (black county), $0.72 per cap.
Expenditures for white students in County B (white county), $1.03 per cap.
Expenditures for black students in County B (white county), $0.72 per cap.
This distribution of funds is readily seen to be unfair to black students in both counties, and unfair to white students in County B. To further these unfair practices, in 1890 the state legislature granted additional discretionary powers to local schools boards:

... in order that discrimination which hitherto had been made in evasion of the spirit of the constitutional requirement for equal school opportunities for the two races might from thenceforward be done with the full acquiescence of the letter and the spirit of the law. (Bond, 1932, p. 98.)

The practice of diverting funds from blacks to whites became a point of contention between whites in a "white" county (a county which had a high ratio of whites to black students) and those in a "black" county (a county with a high ratio of black to white pupils):

In 1907 a "white" county had a per capita expenditure for the education of white students of $5.65 as compared to $3.50 for black students. In the same year, a "black" county spent $80.00 per white student and $2.50 per black student. (Pierce, 1955, p. 49.)

With such discrepancies in available funds for white children in "black" and "white" counties, whites in "white" counties were highly in favor of local taxation for schools. Such taxation was violently opposed by whites in "black" counties for two reasons: first, they could maintain adequate white schools by directing money from black schools; and second, if they paid local taxes, a large proportion of the white taxes would be used to support black schools.
The diversion of funds from black to white schools became the accepted practice in every southern state (Pierce, 1955, p. 49). The result of such practices was that the education of black students by the turn of the century was but little improved over that of 1875 (Bond, 1934, p. 115). Also, by this time blacks had been deprived of political power on a promise of "separate but equal" educational opportunity, the maintenance of which had been circumvented by local school boards and legislative actions.

The First Half of a New Century

The twentieth century began with an increased demand for educational opportunity. The political conservatives in the South had been striving for economy and were opposed to the additional outlay of funds from the state level, and against local taxation for education (Hesseltine, 1943, p. 594). As the effort to maintain a dual system bore heavily upon the southern states, the Populist movement gained strength over conservatives. One of the long sought after changes occurred when local taxation for public school support was achieved. At the turn of the century, state funds provided for more than 50% of the revenues for public school support; but within ten years, local taxes had become the main source of school revenue (Pierce, 1955, p. 53).
Philanthropic organizations had started support for black education in the South after the Emancipation, and they continued their work well into the twentieth century. Included in a listing of such philanthropists would be Rockefeller, Peabody, Slater, the Anna T. Jeanes Fund, and the Julius Rosenwald Fund (Frazier, 1969, pp. 428-429). Despite the help received from philanthropic efforts, the perpetuation of inequalities between black and white schools continued. This can be seen with clarity when consideration is given to a comparison of teachers' salaries in a time of prosperity. During the period from 1900 to 1930, the average salary of white teachers rose from about $200 to $900, and the average salary for black teachers rose from $100 to $400 (Ashmore, 1954, pp. 17-18).

The depression, beginning in 1929, caused a curtailment of educational expenditures and many educational programs. The length of the school year and teachers' salaries were directly affected. Even though in some cases the policy was to cut the same proportion of support from both school systems, blacks generally were cut more. Because of the previous inequalities created by the diversion of funds, the heart of the black educational program had to be cut, when many times only the extra-curricular programs were eliminated in the white schools (Frazier, 1969, pp. 431-432).
During this period, a larger number of black students were out of school than were white students. In seventeen states with separate school systems -- Alabama, Arkansas, Delaware, the District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia -- the average length of the school year for white students was 167 days and for black students it was 146 days. The greatest difference was shown in Louisiana with 175 days for white school attendance and 128 days for black school attendance (Frazier, 1969, p. 433).

While in most states black students would require one extra school year to complete the eight years of schooling given white students, in Mississippi, Louisiana and South Carolina they would require from two and one-half extra years to receive the eight years of elementary education given to white students. (Frazier, 1969, p. 434.)

This caused a concentration of black students in the first four grades of elementary school. The school facilities were inadequate and the dropout rate was high: "Out of every 100 black students who entered the first grade, only 14 reached the first year of high school, while 49 of every 100 white students who entered the first grade reached that level." (Frazier, 1969, p. 434.)

Poor attendance and a high dropout rate were also related to inadequate or no transportation facilities. In most of the southern states little money, comparatively
speaking, was spent on transportation of black students. In the eighteen segregated states, the number of white students per teacher was 34, and the number of black students per teacher was 43. In order to equalize the number of students per teacher between the races, it was estimated that 16,000 additional black teachers would be necessary. Another problem was that on the whole, black teachers had less education and training than white teachers and were rather ill-equipped to handle such teaching loads (Frazier, 1969, p. 435).

There were some improvements in the education of blacks from 1930 to 1940: the length of the school year was increased, black teachers' salaries were higher by 1940, leadership within the black population was developing and blacks began to ask the courts to examine and interpret their citizenship rights (Pierce, 1955, pp. 58-59).

World War II had a great deal to do with forcing the Nation's attention upon the educational deficits of blacks. A study of four months duration in 1941 indicated that five times as many black draft registrants as white were rejected (Directory of Selective Service, 1943, p. 289). A lack of educational proficiency caused more than a third of the black rejections. About 11% of the black draft registrants were rejected because they could not read or write on a fourth grade level (Montgomery, 1944, p. 2).
Such deficiencies could not but help focus the Nation's attention upon the need for an analysis of its educational institutions.

Midway through the twentieth century, the Nation and the South began to grope for new solutions to old problems. Much progress had been made in offering educational opportunity to all people from the meager education available at the time of the Civil War; but much remained undone and inequalities of opportunity were still great between black and white students.

Legal Power of the State to Control Education

The Federal Constitution and Education

Some form of government based on laws has always been necessary for a society to exist. All men are possessed by opinions and prejudices, and what they say and think are reflections of this characteristic of man. Because of man's ability to think and exhibit individual differences, conflicts of opinion result which must be resolved. Many of these conflicts are resolved by man through the legal structure of his society. The United States Constitution was an effort of the founding fathers to afford the people of the United States a legal structure which would provide a sound basis for equality and justice. The Constitution has built-in flexibility and modification characteristics. It provides for separation of powers for the United States
government for the protection of the government. It provides for the general welfare of all citizens collectively and also the welfare of individuals. Although not stipulated in the United States Constitution, individual state governments have separate powers similar to the federal government (Alexander, Corns and McCann, 1975, pp. 1-2).

The public education system of the United States evolved from three main sources: state constitutions, statutory enactments and judicial review (Alexander, et al., 1975, p. 2). All three of these courses of the public education system must conform to or remain within the limits imposed by the United States Constitution. It is the law of the land, and even if Congress can act only within the delegated powers as granted to it by the Constitution, the state legislators must also remain within the limits of the Constitution, as well as the limits of the Constitutions of the particular states (George, 1933, p. 9).

The Fourteenth Amendment has also had a profound effect upon education because of its judicial interpretation. This Amendment not only has been the basis for establishing the supremacy of the Federal Constitution and its provisions over the states, but it has also made the First and Fifth Amendments originally written to protect the people from federal government transgressions, applicable to the states (Edwards, 1965, p. 9).
Many school cases have gone before the courts which have involved the First, Fifth and Fourteenth Amendments. Most of these cases have been in the areas of segregation and religious practices, but some have occurred in the area of textbook selection, compulsory attendance legislation, teacher tenure legislation and curriculum legislation (Alexander, 1975, p. 45).

Section I of the Fourteenth Amendment states:

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

At the time of ratification of the Federal Constitution, many people did not feel that the Constitution gave them protection against federal governmental transgressions; and, as a result, the Bill of Rights, consisting of the first ten Amendments, was ratified in 1791 (Bartholomew, 1951, p. 42). The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
Even though there is no mention of states in this Amendment, and it was therefore intended for federal prohibition, provision for application to states was provided for by the "due process clause" in the Fourteenth Amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." Prior to the adoption of the Fourteenth Amendment, it had been well established in Barron vs. Baltimore, 7 Pet. 243 (1833), that the first ten Amendments limited only the federal governmental powers and actions and did not apply to the states at all (Bartholmew, 1951, p. 42).

The Fifth Amendment, made applicable to the state governments by the Fourteenth Amendment, has had a profound effect upon education in the South. This was brought about by the United States Supreme Court's expanding the "due process" clause beyond procedural protection to the point that it protects the substantive rights of individuals. This expanded coverage is clear in the Supreme Court's statement that the Fourteenth Amendment, ". . . operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment." [Hibbes vs. Smith, 191 U.S. 310 (1903).] An example of this protection is the voiding of legislation which impaired personal rights by allowing racial discrimination (Alexander, 1975, p. 52).
The portion of the Fifth Amendment of most concern in cases involving education is ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The First, Fifth, and Fourteenth Amendments are constraints upon the government, state governments as well as the federal government, not restraints against individuals. United States Supreme Court decisions made in the area of violation of individual rights have revolved around the "Bill of Rights" and the Fourteenth Amendment. The concepts most often considered in relationship to these Amendments have involved denial of individual rights or lack of due process of law.

Another portion of the Constitution which is not related to desegregation, but has implications for education, is Article I, Section 8, Clause 1. This clause gives Congress the power ". . . to lay and collect taxes, duties, imports and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . ." This has been interpreted by the courts to mean that Congress has the power to tax and spend for the general welfare [Helvering vs. Davis, 301 U.S. 619 (1937)]. Even though no case has arisen regarding the power of Congress to tax and spend for educational support, Edwards
There can be no doubt that Congress under the general welfare clause would be accorded authority to make any reasonable appropriation for the support of education.

Article I, Section 10 of the Constitution has placed limitations upon the powers of the states. It prohibits states from being able to pass legislation which would impair the obligation of contracts. This Amendment was important in the Dartmouth College case where it was established that a charter was a contract between the state and the corporation [Trustees of Dartmouth College vs. Woodward, 17 U.S. 518 (1819)].

The State Legislation and Education

It has been previously shown that the United States Constitution, through reserve powers, gives the states the power and responsibility for education of the people of the state. Every state has a constitution which makes provision for a state-supported system of public schools. Nolte and Linn (1963, p. 9) stated:

As each state was admitted to the Union, a clause in its state constitution was inserted for the public schools. Under each constitutional provision, the legislature is made responsible for the operation and maintenance of this intra-state school system.

In the beginning, states were permissive concerning education, but this caused difficulties and inadequacies which led to mandatory legislation. With the adoption of
state financial aid for public schools, it was necessary to define the powers of the state. The adoption of school laws provided a framework by which states regulated their school districts (Campbell, Corbally, and Ramseyer, 1966, p. 31).

The legislatures did not relinquish their final authority over the schools when they established school districts. Goldhammer (1964, p. 1) states "Most authorities on school law assert that within the limitations imposed by the state or federal Constitutions, the legislatures have plenary, or complete power over education within the respective states."

Even though this control which the legislature of a state has over education is subject to the constitutional limitations as imposed by the state Constitution and not prohibited by the federal Constitution, the legislature is free to decide the what, when and how of public education for the state. Most states have established a state educational agency. The state legislatures have established school districts with statutes established for the governing of the districts. These statutes provide for the appointment or election of school board members, and to these school boards certain administrative duties (involving direct and implied powers) have been assigned (Nolte and Linn, 1963, p. 9).

These school districts have been established to act on the state's behalf with regard to education and are classed as "quasi-corporations." The school board members of
districts are therefore legally state officers rather than local officers. The school board's powers evolved from the state's Constitution and statutes and are subject to limitations from the legislature of the state (Nolte and Linn, 1963, pp. 10-11).

The Courts and Education

The United States Constitution establishes the structure of the federal courts: "The judicial power of the United States shall be vested in one Supreme Court, and in such enforcements as Congress may from time to time ordain and establish." (United States Constitution, Article III). In the same manner, the constitutions of the states provide for the structure of the state courts (Alexander, 1975, p. 9). This system of courts on the state and federal level is established for the purpose of settling conflicts. Even in the legal structure, man (lawyers, judges and juries) in making "just decisions," reflects his individual attitudes, opinions, and philosophies. When the law lacks clarity, personal considerations become highly significant. This subjective involvement is the reason why it is necessary to have a hierarchy of courts so that appeals may be made through the various levels when a judgment seems out of step with justice.

The social structure changes and often the courts lag behind. A precedent case of the past may no longer serve to render justice and the precedent must be broken.
Generally, this kind of case must go up through the courts of appeal, perhaps all the way to the United States Supreme Court, in order to break the precedent, because lower courts tend mostly toward stare decises et non quieta mouere decisions (Alexander, 1975, p. 10).

Both the state and federal governments provide appellate courts through which appeals may be made. The nation's highest court is the United States Supreme Court. Cases reach the Supreme Court only through appeals, through original jurisdiction, or through a writ of certiorari. School cases go to the Supreme Court mostly on writs of certiorari (Alexander, 1975, pp. 10-11).

Judicial review forms a body of case law or common law apart from legislative statutes. This law is another part of the framework of education. Judicial review in recent years has played by far the greater part in influencing the processes and changes in public schools

The Relationship Between the Federal Constitution and Education

The relationship between the Federal Constitution and education is highly complex and a simplification of the process is inappropriate except in an effort to generalize. The interaction between education and the courts is highly significant today; and educators, especially in administration, need a basic understanding of how the constitutional,
legislative and judicial influences have laid a basic framework for education.

Education is controlled at the state level through the state Constitution, state statutes regarding education, actions by the local school boards, and actions by state officials and quasi-legislative corporations. The United States Supreme Court decisions can effect all of the areas of state control just mentioned by a two-directional flow. First, Supreme Court decisions can be made that will either strengthen or obviate decisions made on the state level. Second, state level decisions challenged by citizens of the state may go through the hierarchy of courts and finally receive a Supreme Court ruling. The decisions made on the Supreme Court level are based upon interpretation of the United States Constitution. The decisions by the Supreme Court which have influenced educational practices have been based on the First and Fifth Amendments (made applicable to the states by the Fourteenth Amendment), the Tenth Amendment, and Article I, Section 8 and 10 of the United States Constitution (Spurlock, 1955, p. 14).

A Review of Significant Federal Court Cases to 1954

The industrial society of the post-Civil War years sought solutions to conflicts and problems in the courts. By the mid-twentieth century, the United States Supreme Court had been called upon many times on many subjects for
constitutional interpretations for the resolution of con-
flicts (Acheson, 1962, p. 208). The question of the
constitutionality of segregation of the races had arisen a
number of times.

Supreme Court decisions are made by men, and their
decisions necessarily reflect the opinions of these men as
they are influenced by the society. Concepts about minor-
ities have changed as society has progressed and changed.
Certainly this is evidenced by the change from a firmly
established doctrine of "separate but equal" in Plessy to
the striking down of this doctrine in the School Segregation
cases in the 1950's: Brown, Bolling vs. Sharp, 347 U.S. 497
(1954); and Brown vs. Board of Education of Topeka, 349 U.S.
294 (1955).

From a judicial point of view, segregation in education
goes back to 1849 and the Massachusetts Supreme Court. In
the case of Roberts vs. City of Boston, 59 Mass. 198 (1849),
the admittance of a Negro child to a white school was sought.
The white school was but 800 feet from the home of the Negro
child, and the Negro school was 2,100 feet away. The court
rejected the arguments of denial of equality as guaranteed
by the state's Bill of Rights and discrimination in rela-
tion to caste. The court upheld the Boston School Commit-
tee's power in providing substantially equal schools for
Negroes.
There were a number of state court cases that upheld the practice of segregated education which occurred after the Roberts vs. City of Boston case in 1849; example cases are: State ex rel. Garnes vs. McCann, 21 Ohio St. 198 (1871); Ward vs. Floud, 48 California 36 (1874); Cory vs. Carter, 48 Indiana 327 (1874); People ex rel. King vs. Gallagher, 93 New York 438 (1883); and Lehew vs. Brommell, 103 Missouri 546 (1890). The basic mood of society as demonstrated by these cases influenced the United State Supreme Court decision in the Plessy case, which firmly established the "separate but equal" doctrine. Although not a school case, this case has been quoted many times in school cases. A Louisiana statute provided for separation of the races on trains within the state. A man of one-eighth Negro blood refused to sit in the section of the coach assigned to Negroes and insisted upon sitting in the coach designated "white." Plessy claimed that the statute was a violation of his rights under the Thirteenth and Fourteenth Amendments and wanted to court to uphold his rights by invalidating the Louisiana statute.

In denying Plessy's request, the court referred back to the Roberts and Gallagher cases which it said has established the rights of states to maintain separate but equal school systems. This dictum of the United States Supreme Court established the constitutionality of the "separate
but equal" doctrine. This became the precedent case for federal and state court decisions regarding segregation in the public schools.

None of the segregation cases directly challenged the separate but equal doctrine until the Brown I case in 1954. There were, however, three cases involving the education of blacks by 1927. In Cummings vs. Board of Education, 175 U.S. 528 (1899) the plaintiffs charged that the Richmond County Board of Education in Georgia had used funds to maintain the white high school, but had not provided similar schools for black students. The black school had been suspended for economic reasons. The Georgia State Supreme Court's ruling favored the Board of Education, and the United States Supreme Court held that this was a state matter.

In Berea College vs. Kentucky, 211 U.S. 45 (1908) Berea College was seeking a reversal of the highest court of Kentucky which had ordered that they could not instruct black and white students in the same place at the same time. The United States Supreme Court, in a three to two decision, upheld the State of Kentucky in their power to make the determination as to whether black and white students could be taught in the same class.

In Gong Lum vs. Rice, 275 U.S. 78 (1927) Lum petitioned the federal court for a writ of mandamus which would allow his daughter of Chinese decent to attend the public
white schools in the State of Mississippi. The United States Supreme Court again ruled on the state's right to classify students other than of the Caucasian race as either black or white. The unanimous decision of the court was that the classifying of students had nothing to do with the rights of individuals under the Fourteenth Amendment, and therefore was the right of the state. They upheld the Supreme Court of Mississippi in their decision that Martha Lum must attend a separate school for black students.

Several cases decided by the United States Supreme Court indicated that if "separate but equal" facilities were not available, students should be admitted to the existing facilities upon petition. One of the cases involved not "separate but equal," but segregation within the University itself.

In Missouri ex rel. Gaines vs. Canada, 305 U.S. 337 (1938) a black student was refused admission to the Law School of the University of Missouri. The state Supreme Court upheld the decision of the University and stated that although no equal facility was provided in Missouri, there were laws providing for the payment of tuition to attend facilities in neighboring states. The United States Supreme Court reversed the Missouri court decision by stating that supplying tuition to schools in other states was not sufficient to equalize the opportunities of black and white
students in the state, and therefore Gaines must be admitted to the University of Missouri Law School.

Another case similar to Gaines is that of Sipvel vs. Board of Regents of the University of Oklahoma, 332 U.S. 61 (1948). Sipvel, a black female, applied for admission to the School of Law at the University of Oklahoma. She was denied solely on the basis of her race. Again, the state Supreme Court decision was reversed by the United States Supreme Court upon the basis that separate but equal facilities were not available to the applicant and that denial of admission under such a situation was a violation of the "equal protection" clause of the Fourteenth Amendment.

The states reacted to the decisions of the Gaines and Sipvel cases in two ways: by setting up separate facilities, and by carrying on segregated practices within the same facility. Two cases decided in the United States Supreme Court in 1950 on the same day refuted both of these ways devised by the states to maintain education on a segregated basis in higher education. In Sweatt vs. Painter, 339 U.S. 629 (1950). Texas had set up a black law school and refused to admit Sweatt, a black, to the University of Texas Law School on the grounds that a school was provided where he could attain his education on a segregated basis. The United States Supreme Court ruled that the University of Texas Law School was in many ways superior to the law school which had recently been opened for blacks. Because
of this fact, the rights of the petitioner were being abused and the United States Supreme Court ordered that the petitioner be admitted to the University of Texas Law School.

In *McLaurin vs. Oklahoma State Board of Regents*, 399 U.S. 637 (1950) decided on the same basis as the *Sweatt* case, the United States Supreme Court ruled that although the appellant had been admitted to the University of Oklahoma, his rights were still being violated because they were segregating him from the white students within the facility. This setting a student apart from other students by state law was ruled unconstitutional and the state was ordered to admit McLaurin as a regular matriculating student.

These court cases dealing with higher education show a direct relationship to the *Brown I* decision of 1954. *Sweatt* especially deals with the dual school system where the facility for black students was inferior to that provided for white students. It was only one additional step that was required in the thinking of the court to come to the decision that separateness is in itself unequal. The United States Supreme Court took that step in the *Brown II* decision and thus eliminated the dual public school system as a violation of the United States Constitution.
CHAPTER III

LEGISLATIVE, EDUCATIONAL AND JUDICIAL REACTIONS TO
THE PROCESS OF PUBLIC SCHOOL DESEGREGATION

The Segregation Cases

The issue of "separate but equal" with regard to public education was brought squarely before the Supreme Court with its consideration of Brown. Up until this time, the separate but equal cases had all revolved around higher education with the Sweatt case largely laying a foundation for the decisions reached on the Brown case and the other school segregation case decided on the same day. Even though the cases had different facts and conditions, the court found that a consolidation of the cases (with the exception of Bolling) for consideration was in order as they all involved a common legal question. A discussion of each of these cases is appropriate.

In Brown (1954), the plaintiffs were elementary school age black children seeking admittance to the schools of their community in Topeka on a non-segregated basis. Even though the judges of the District Court found that segregation of public education has a detrimental affect upon
black children, the plaintiffs were denied relief on the basis of substantially equal physical offerings in relation to the white schools.

In **Briggs vs. Elliott**, 347 U.S. 483 (1954) which originated in South Carolina, the plaintiffs were elementary and high school age black children. The action was brought to contest the state constitutional and statutory provisions which required segregation of blacks and whites in the public schools. The request for relief was denied in the district court even though the court found the black schools inferior to the white schools. The defendants were ordered to equalize the facilities.

In **Davis vs. County School Board of Prince Edward County**, 347 U.S. 483 (1954) which originated in West Virginia, the plaintiffs were high school age black children. The plaintiffs in this case also contested state constitutional and statutory provisions requiring segregation of blacks and whites in the public schools. The three-judge district court again found inferior offerings in the black school in relation to the white schools with regard to transportation, school plant, and curricular offerings. The court, however, denied the plaintiff's request for relief and upheld the validity of the contested provisions.

In **Gebhart vs. Belton**, 347 U.S. 483 (1954 which originated in Delaware, the plaintiffs were elementary and high school age black children. The action sought as in the two
previous cases to enjoin enforcement of state constitutional
and statutory provisions which required segregation of the
races in the public schools. This action was brought in the
Delaware Court of Chancery and the Chancellor granted the
request for relief and ordered the immediate admission of
the plaintiffs to the previously all-white schools based
upon the grounds that the black schools offered inferior
educational opportunity with regard to physical facilities.
The Chancellor further found that segregation itself has the
effect of inferior education for black children. Affirma-
tion to the Chancellor's decision was given by the Supreme
Court of Delaware, 91 A. 2d 137 (1952). The defendants,
upon contention that the Delaware courts erred in the
decision, applied to the Supreme Court for certiorari and
the request was granted, 344 U.S. 891 (1952).

In these segregation cases, the plaintiffs were all
denied attendance to white schools by laws requiring or
permitting segregation of the races. The plaintiffs claimed
that the segregation deprived them of the equal protection
of the laws as afforded them by the Fourteenth Amendment.
In three of the cases the judges denied the plaintiffs the
relief requested on the "separate but equal" doctrine
established in Plessy. In the Delaware case, the plaintiffs
were ordered admitted to the white schools because the
black facilities proved to be inferior to the white schools.
The "separate but equal" doctrine was not violated in the Delaware case because the doctrine purports equal facilities. The Supreme Court heard arguments and re-arguments over two terms on these cases. The decision was finally reached on May 17, 1954, and the opinion was delivered by Chief Justice Warren. The opinion is long, but does quite pointedly express the reversal of the "separate but equal" doctrine. After giving a brief historical summary surrounding the separate but equal doctrine and the Fourteenth Amendment, Chief Justice Warren in Brown (1954) p. 483 states:

We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

After describing the extreme importance of education in today's society, Warren continued:

We come then to the question presented:
Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal education opportunities? We believe it does. (Brown, 1954)

In Sweatt, it was established that facilities must be substantially equal or admission to the white schools must be granted. In McLaurin it was found that segregation of black students from their peers affected their ability in general to learn. With these cases as a background, Chief
Justice Warren in *Brown*, p. 485, states: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

*Bolling* was decided on the same day as the *Brown* case, and was concerned with the segregation of the races in the public schools in the District of Columbia. Black plaintiffs were denied admission to the public schools where whites attended based solely upon their race. When the petitioners sought relief through the District Court of the District of Columbia, the court dismissed the complaint. The petitioners claimed that the segregation deprived them of due process of law as guaranteed by the Fifth Amendment. The Supreme Court granted *certiorari* before a judgment was made in the Court of Appeals, "... because of the importance of the constitutional question presented" (*Brown*, p. 497).

The Supreme Court had already decided that the equal protection clause of the Fourteenth Amendment prohibited the continuing of public school segregation in the states; however, the Fourteenth Amendment did not apply to the District of Columbia. Due process of law is not as specific a protectorate of fairness as equal protection; however, the court in *Brown*, p. 497 stated that:
.... discrimination may be so unjustifiable as to be violative of due process .... Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective.

The court continued by stating that there was no relationship between segregation in public education and any governmental objective. The Supreme Court, having decided that segregation of the races in public schools of the United States was unconstitutional, could not, under that same Constitution, find a lesser obligation upon the part of the federal government. The racial segregation in the District of Columbia was therefore held to be unconstitutional as a denial of the due process of law as guaranteed by the Fifth Amendment (Bolling).

Thus, the decisions in the segregation cases were made; but putting these decisions into effect was another matter. The decisions were made in the face of strong overt opposition in the South, and strong covert opposition in the North. The precedent of "separate but equal" had been destroyed and a doctrine of long acceptance would have to be replaced with this new doctrine. Knowing that implementation might be difficult, and having a desire to implement the decision to as great an advantage to all as possible, the court ordered the segregation cases to be returned to the docket for re-argument. Questions 4 and 5 to be considered in re-argument were as follows:
4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,
   (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
   (b) may this court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color discrimination?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this court will exercise its equity powers to the end described in question 4(b),
   (a) should this court formulate detailed decrees in these cases;
   (b) if so, what specific issues should the decree reach;
   (c) should this court appoint a special master to hear such evidence with a view to recommending specific terms for such decrees;
   (d) should this court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the courts of first instance follow in arriving at the specific terms of more detailed decrees? (Brown, p. 483)

The segregation cases were re-argued on these questions of relief on April 11 - 14, 1955. Judgments were given in regard to the re-arguments and decrees were issued on May 31, 1955. The Supreme Court recognized that the problems of transition from a segregated educational system to a non-segregated one would vary from one place to another. They recognized that progress had been made in some areas toward the transition. The court stated that the implementation of the principles might require solutions according to the
locale, and that authorities of the schools would have the primary responsibility of reorganization, evaluation and solving the problems. The cases were remanded to the courts of original jurisdiction because it was necessary for the courts to determine whether local school authorities were implementing the constitutional principles in good faith. The Supreme Court then gave some broad principles to guide the lower courts in regard to implementation. The Supreme Court stated very explicitly that a "prompt and reasonable start" would be required toward full compliance and that any additional time needed by local officials for implementation rested squarely upon the shoulders of the local authorities to prove such need to the lower courts. The Supreme Court in Brown II further stated:

To that end, the courts may consider problems related to administration, arising from physical condition of the school plant, the school transportation, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially non-discriminatory school system.

All of the lower court decisions in these segregation cases were reversed by the Supreme Court with the exception of the Delaware care, and the cases were then remanded to the district courts for further proceeding in the interest
of implementation consistent with the opinion as rendered by the Supreme Court.

The Supreme Court's decision in Brown II was being awaited by the lower federal courts. There were cases in lower courts regarding the constitutionality of segregation pending decisions in regard to entrance to previously all-white schools at the time of the Brown decision. If these cases were in courts of appeal, they were generally remanded by the federal courts of appeal to the federal district court to take action consistent with the Brown decision as rendered by the Supreme Court.

Not only had some lower courts awaited the Brown II decision, but some reflected an anticipation of the Supreme Court's decision in findings and decisions made just prior to the Supreme Court's review and subsequent decision regarding segregation in public schools. In Gebhart, even though the decision to admit the black plaintiffs to the white school did not rest upon facilities being inherently unequal, the Chancellor stated:

I conclude from the testimony that in our Delaware society, state imposed segregation in education itself results in the Negro children, as a class, receiving opportunities which are substantially inferior to those available to white children otherwise similarly situated.

In Brown vs. Board of Education of Topeka, 98 F. Supp. 797 (1951) even though the district court ruled against the
black plaintiffs, the following is a court finding regarding segregation:

Segregation of white and colored children in public schools had a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the children to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

Legislative Reaction

There was a complex reaction to the Supreme Court's decision in the Brown, et al. cases in most of the southern states. As federal courts began to strike down the segregation policies of the South in accordance with the Supreme Court decisions, massive legislative efforts intent upon maintaining segregation were enacted. Generally the legislative devices took the form of reaffirmation of segregation statutes, pupil assignment statutes, proposed private schools, statutes making the closing of public schools possible, and abolition of compulsory attendance statutes. The criteria in some states were broad and in others more specific. Much of the criteria involved physical factors unrelated to the pupils such as the availability of rooms, teaching capacity, and transportation availability. Other
criterion measures involved personal attributes such as previous achievement, scholastic aptitudes and innate intelligence, student motivation, and psychological qualifications.

Many southern state legislatures enacted statutes for the establishment of private schools with the payment of tuition grants while other states even amended their constitutions to allow for the establishment and/or support of private schools.

Statutes were also passed in many states which allowed for the closing of public schools, and in some instances, provisions were made for the sale or lease of school property for the establishment of a private school. Many states repealed the constitutional requirement of state supported public education. Compulsory attendance laws were abolished, and statutes were passed which provided that no child would be forced to go to school with children of another race. In all, nearly 500 laws or resolutions concerning desegregation of schools were adopted by legislatures of the southern states. (Southern Education Reporting Service, 1964, p.3.)

Litigation Regarding Statutes

An increase in litigation with regard to school segregation was a national course of events after Brown. The complex reaction of the southern legislatures is exemplary of the shock reaction that affected the southern people.
Legislative attempts through enacted statutes to avoid or delay desegregation opened the way for such litigation. Due to the vast number of desegregation cases which have occurred over the operation of public schools as protected and condoned by state statutes, the following cases were selected to be representative of this protection and condonement.

Orleans Parish School Board vs. Bush, 365 U.S. 569 (1961) is a highly significant case in regard to legislation adopted by a state legislature in an effort to circumvent desegregation and to maintain segregation. This case was in the courts for over eight years. In 1954, the Louisiana legislature adopted a constitutional amendment (LSA - Constitution, Art. 12, Sect. 1) and two segregation statutes. The amendment and Act 555 were a reaffirmation of the state statute requiring compulsory segregation. The second Act (556) gave the school superintendent the authority and power to assign pupils to schools. In 1956, the court held this amendment and the two statutes invalid and ordered the school board and others involved to stop requiring or permitting segregation in the schools of New Orleans. [138 F. Supp. 336, 337 (1956)] This decision was affirmed by the Court of Appeals, [242 F. 2d 156 (1957)] and certiorari was denied by the United States Supreme Court. [354 U.S. 921 (1957)]
Non-compliance with the court's decision as well as new legislative devices and Act 319 (passed by the legislature in 1956) brought this case back before the courts. Act 319 was an attempt to "freeze" the existing racial classification and also gave the legislature the authority to make racial classifications in the public schools in a city with a population over 300,000. The school board claimed before the court that this Act relieved them of the responsibility to obey the previous desegregation order. The court in Orleans Parish School Board vs. Bush, 163 F. Supp. 701 (1958) stated:

Any legal artifice, however cleverly contrived, which would circumvent this ruling [of the Supreme Court in Brown v. Board of Education, supra], and others predicating on it, is unconstitutional on its face. Such an artifice is the statute in suit.

Non-compliance continued and the legislature enacted new segregation laws. Act 256 gave the governor the authority and power to close any school or school system under order to desegregate. This statute was also declared unconstitutional. Previously the court had ordered the New Orleans School Board to give the court a plan for desegregation. Since there had been no compliance with the order, the court formulated a plan and ordered the plan into effect at the beginning of the school year in 1960. To circumvent this order, the statute legislature had passed additional statutes: Acts 33, 495, 496, 542, 555, 319, and 256.
These were declared unconstitutional in this same court decision. [Bush vs. Orleans Parish School Board, 187 F. Supp. 42 (1960)].

The Louisiana legislature enacted twenty-five statutes designed to stop or delay desegregation in the Orleans Parish schools. Act 2 was an interpretive statute. Acts 3-9 were passed to repeal the previously court-declared unconstitutional statutes: Acts 319, 541, 496, 256, 333, and 555. The remaining seventeen Acts were again brought before the court. Act 10 permitted the governor to close the schools to prevent disorder in case of riots; Act 11 permitted the governor to close schools under court order; Act 12 permitted the governor to close schools if, due to court order, the schools were taken over; Act 13 allowed the withholding of textbooks, supplies and funds of schools operating under court-order desegregation; Act 14 required that the schools of the state be operated in accord with the State Constitution; Act 15 permitted the state sovereignty commission to employ counsel; Act 16 dealt with the state's police powers; Act 17 relieved the Orleans Parish Board of its responsibilities and placed them in the legislature; Act 18 was for tuition grants to private schools, Act 19 relieved the superintendent of his duty as ex officio treasurer of the school board, Act 20 required school operation in accord with the Constitution and laws of the state and with state board of education policies; Act 21 prevented
functioning of boards when the school was under operation of court orders to desegregate and permitted the board to dispose of school property; Act 23 provided for the state board and superintendent of education to take away a public school teacher's license who instructed a class against the Constitution or laws of the state and also held the principal or superintendent of such a teacher responsible; Act 24 denied promotion and graduation to a student who attended desegregated classes; Act 26 prohibited the transfer of pupils from a previous assignment to a segregated school; and Act 27 revoked compulsory school attendance laws. All of these statutes and Acts 25, 28, and 29, along with House Concurrent Resolutions 10, 17, 18, 19, and 23 of the First Extraordinary Session of 1960 were declared unconstitutional by the court. The United States Supreme Court affirmed the judgments made by the lower court.

Thus, in the Orleans Parish case, almost all of the more commonly passed state statutes were held to be unconstitutional—reaffirmation of segregation statutes, pupil placement, tuition grants, closing of schools and provisions for sale or lease of land, compulsory attendance, and interposition. Other statutes not as common in all the other southern states were also held to be unconstitutional.
During the time that the Orleans Parish case was in the courts, another controversy which has played a significant role in the process of desegregation was appearing before the lower courts. Cooper vs. Aaron, 358 U.S. 31 (1958) is representative not only of legislative intervention in the desegregation process, but of physical intervention as ordered by the state governor. This case finally made its way to the United States Supreme Court. In a public statement, Little Rock District School Board (only a short time after the first Brown decision) made it clear that they intended to comply with the Supreme Court's decision. The board, after a study of the problems that might be encountered in desegregation, told the superintendent of schools to prepare a plan for desegregation. A plan which appeared to be acceptable to the residents and in the best interest of students was adopted.

This plan was challenged by the black plaintiffs, but the district court upheld the board's plan to desegregate. The Court of Appeals affirmed the lower court ruling. The state authorities however, were not in agreement with the board's determination to comply with the Brown decision, and active efforts were being made to maintain the segregated school system.

As a result of this activity, an amendment was passed (Ark. Const. Amend. 44) which required the legislature to oppose, in a constitutional manner, the unconstitutional
desegregation decisions of the United States Supreme Court. A pupil assignment law was established (Ark. Stats., Sections 80-1519 to 80-1524). The compulsory attendance law was revoked (Arks. Stats., Section 80-1525), and a State Sovereignty Commission was established (Ark. Stats., Sections 6-801 to 6-824). During this time, the school board continued with desegregation plans. The day before the plans were to go into action, the governor sent the National Guard to place the school "off limits" to the black students who the board had designated to attend the previously all-white high school. The next day the black students were again barred from the school. The court requested that the program be discontinued temporarily, but the court denied the petition. The court enjoined the governor and National Guard from interference with the desegregation plan. [Cooper vs. Aaron, 156 F. Supp. 220 (1957).]

By this time, the people were angered and ready to rebel against desegregation, and a crowd gathered at the school and caused the black students, in the interest of public safety, to be sent home. The school board sought a postponement from the court on the desegregation program because of public hostility. The District Court granted relief on June 20, 1958, but the black plaintiffs appealed to the Eighth Circuit Court of Appeals for a stay in the District Court's decision, and the lower court was reversed. The United States Supreme Court stated that,
"The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and the Legislature." [Cooper vs. Aaron, 358 U.S. 1 (1958).]

The Orleans Parish case and the Cooper case are exemplary of litigation which is a result of legislative and political reaction to the Brown decision. These cases are the extremes, but not the only ones of their kind.

**Litigation Regarding Plans for Desegregation**

It has been clearly demonstrated by the courts that the primary responsibility of desegregation in a constitutional manner lies with the local school board [Cooper vs. Aaron, 143 F. Supp. 855 (1956).] The courts have also shown that they expect that school boards will act with deliberate speed and in good faith (Cooper, 1956). The courts do, however, appear to be willing to grant the board time to find solutions to the problems of desegregation when they determine that the board is proceeding with "deliberate speed" and in good faith (Cooper, 1956).

School board adopted plans have been found to be adequate in some cases [Carson vs. Warlick, 238 F. 2d 724 (1956)], and inadequate in others [Adkins vs. School Board of the City of Newport News, 148 F. Supp. 430 (1957)].

In regard to school boards having a plan for desegregation, Garber (1958, p. 44) states:
It seems clear that the board must have some plan -- that it must take some action looking toward the elimination of segregation as a practice. Where the board takes no action, but assumes a purely watch-and-wait attitude, the court will not stand idly by . . . the courts will require it to make some plan.

In looking at plans for desegregation, the courts will consider the administrative problems in regard to a prompt and reasonable start toward desegregation. In looking at the legality of the proposed desegregation plans, it was held in Gibson vs. Board of Public Instruction, 246 F. 2d 913 (1957) that plans could not violate the United States Constitution.

Many of the early desegregation plans revolved around the pupil assignment statutes and much litigation has occurred over these plans. Cases have been cited where the pupil plans or laws were found adequate while others were found inadequate. The courts have generally held that when plaintiffs are complaining as to the administration of the plan, they must exhaust the administrative remedies before appealing to the courts for relief [McKissick vs. Durham City Board of Education, 176 F. Supp. 3 (1959)].

Although the courts have required the exhaustion of administrative remedies, in Dove vs. Parham, 183 F. Supp. 389 (1960) it was found that relief in state courts need not be exhausted before appealing to the federal courts regarding constitutional rights. In Borders vs. Rippy, 247 F. 2d 268 (1957) it was held that when the constitutional rights
of an individual have been violated, he may seek relief
directly in federal court. It has also been held that when
the administrative remedies are inadequate or incomplete,
individuals need not exhaust them before seeking relief in
the courts [Beckett vs. School Board of the City of Norfolk,
Virginia, 185 F. Supp. 185 (1959)]. In Evers vs. Jackson
Municipal Separate School District, 328 F. 2d 408 (1964) it
was declared that where the state law required segregation
in public schools, the plaintiffs need not exhaust adminis­
trative remedies before taking the prayer to the federal
courts.

In ruling on the administration of pupil assignment
plans or statutes, the courts have held that school boards
cannot use discriminatory practices between blacks and
whites. In Norwood vs. Tucker, 287 F. 2d (1961) the Court
of Appeals found that pupil assignment laws must be applied
on a non-discriminatory basis in the making of initial
assignments of all students in the system and not just to
students seeking reassignment. In Green vs. The School
Board of the City of Roanoke, 304 F. 2d 118 (1962) the
court upheld the school board in the denial of applications
to schools on the basis of residence or a very low aptitude
score, but ordered the application of average or slightly
below or above average pupils to be reviewed and assignment
to be made non-discriminately. Applications which had been
turned down on the basis of sibling relationship were also
ordered re-examined. The court held that sibling relationships used in the assignment of pupils must be applied equally to both blacks and whites.

Another type of plan involved desegregation of particular grades with desegregation of all grades to be completed in a specific number of years. The school board of Knoxville, Tennessee had a plan which started desegregation in the first grade in 1960, and desegregated one additional grade each new school year. Upon challenge of the plan, the court approved it with an exception which applied to a technical school [Goss vs. Board of Education, 186 F. Supp. 559 (1960)]. Grade-a-year plans were approved in other cases [Brown vs. Hendrix, 228 F. Supp. (1964)]. Some plans started desegregation at the first grade [Flax vs. Potts, 218 F. Supp. 254 (1963)], while others started with the twelfth grade [Calhoun vs. Latimer, 321 F. 2d 302 (1963)].

With the passing of time since the Brown decision, the courts were becoming impatient with the school districts where a "good faith beginning" had not been made by the school boards in the implementation of desegregation plans [Adams vs. School District, 232 F. Supp. 692 (1964)]. In Hill vs. County Board of Education, 232 F. Supp. 671 (1964), the court expressed its impatience by stating:
The Court, frankly, is impatient with all the attempts by the individual defendants to ascertain how little they must retreat from their announced policy without jeopardizing judicial approval of their program.

Concerning grade-a-year plans, the Fifth Circuit Court of Appeals stated:

The grade a year plan came into rather wide use but, with the passage of years, fell into judicial disfavor mainly because of the inability to offer proof sufficient to sustain the burden, which was on the school boards, that such delay was necessary. We sent up a warning flag in Davis vs. Board of School Commissioners of Mobile County, 318 F. 2d 63 (1963) that the day was near at hand when grade a year plans would no longer pass muster. [Lockett vs. Board of Education of Muscogee County School District, Georgia, 342 F. 2d 225 (1965).]

The grade-a-year plan was further renounced in Price vs. Denison Independent School District Board of Education, 348 F. 2d 1010 (1965). Here the United States Supreme Court showed its impatience with a grade-a-year plan that had been previously approved by the District Court in Rogers vs. Paul, 232 F. 2d 117 (1965). The Supreme Court reversed the lower court's judgments and stated that the plaintiffs should be given immediate relief [Rogers vs. Paul, 382 U.S. 198 (1965)]. The court called attention to the fact that in Bradley vs. School Board of the City of Richmond, 382 U.S. 103 (1965) they had stated that delays in desegregation of school systems are no longer tolerable.
Another type of plan which appeared before the courts involved geographic zoning. Such plans were approved by the federal courts in some cases \[U.S. vs. Greenwood Municipal Separate School District, 406 F. 2d 1086 (1969)\]. Zoning has to be such that a unitary zone results rather than a dual zone based on racial considerations \[Miller vs. School District No. 2, Clarendon County, South Carolina, 253 F. Supp. 552 (1966)\]. Established zone plans which show evidence of gerrymandering to maintain segregation were not to be approved by the courts \[Wheeler vs. Durham City Board of Education, 340 F. 2d 768 (1965)\].

"Freedom of choice" is another plan which has been highly significant with regard to litigation and the presents of desegregation in public schools. Basically, these plans allow students a choice with regard to the school they wish to attend. These plans have been found by the courts to be acceptable in many cases \[United States vs. Haywood County Board of Education, 270 F. Supp. 460 (1967)\]. In regard to the administration of the freedom of choice plans, the courts have held that school boards cannot use discriminatory practices. Initial assignments must be made on a non-discriminatory basis \[Nesbit vs. Statesville City Board of Education, 345 F. 2d 333 (1965)\]. There may also be no dual zones in the freedom of choice system even though transfers are allowed. Some plans require that pupils make a choice before the initial assignment \[Betts vs. County School\]
Board of Halifax County, Virginia, 269 F. Supp. 593 (1967), and in other cases, that choice was to be binding for one year [Lee vs. Macon County Board of Education, 267 F. Supp. 458 (1967)]. In some plans, students were assigned on the basis of a geographic zone according to the residence of the student and after the initial assignment, freedom of choice could be exercised [Monroe vs. Board of Commissioners, City of Jackson, Tennessee, 244 F. Supp. 353 (1965)].

A case which is typical of criteria approved by the courts in making assignments is that of Randall vs. Sumter School District No. 2, Sumter, South Carolina, 241 F. Supp. 787 (1965). Here, in regard to transfers, the approved criteria consisted of a choice as indicated by the application, capacity of the facility, availability of space in other schools in the district, distance of the pupils' residence from the requested school, and the attendance zone in which the pupils resided. In Monroe vs. Board of Commissioners, City of Jackson, Tennessee, 299 F. Supp. 580 (1964) the lower court approved transfer procedures where uniformly applied using the following criteria: mental capacity, achievement level, and prior conduct record. This particular issue was affirmed by the Court of Appeals [Monroe vs. Board of Commissioners, City of Jackson, Tennessee, 380 F. 2d 955 (1967)].
Freedom of choice plans appeared to be in the courts' favor except in cases where discriminatory practices were evidenced. The pupil's school of prior attendance could not be used as a criteria for handling of requested transfers [United States vs. Jefferson County Board of Education, 372 F. 2d 836 (1966)]. Lack of reasonably available transportation was also rejected as a criterion for disapproval of a requested transfer [Franklin vs. Barbour County Board of Education, 259 F. Supp. 545 (1966)]. Excessive red tape utilized as an effort to delay desegregation in a freedom of choice plan also met with disapproval by the courts [Yarbrough vs. Holbert-West Memphis School District No. 4, 243 F. Supp. 65 (1965)]. Some plans incorporating both freedom of choice and geographical zoning have been approved [Brown vs. County School Board of Education of Frederick County, Virginia, 245 F. Supp. 549 (1965)].

In 1967, the freedom of choice plan was questioned in Coppedge vs. Franklin County Board of Education, 273 F. Supp. 289 (1967). The district court ruled that reasonable progress toward the elimination of a dual school system had not been made. The court found that the exercise of free choice had been inhibited by acts of reprisal and intimidation, thus desegregation had been held to a minimum. With regard to the freedom of choice plan, the court stated: "It is constitutionally impermissible and, indeed, a misnomer when the choice is not free in fact." [Coppedge vs. Franklin
County Board of Education, 273 F. Supp. 289 (1967)]. The court ordered the school board to abandon the freedom of choice plan in favor of a unitary geographic zoning plan or a consolidation of grades or school plan. This district court action was affirmed in the Court of Appeals [Coppedge vs. Franklin County Board of Education, 394, F. 2d 410 (1968)].

In Moses vs. Washington Parish School Board, 276 F. Supp. 834 (1967) the court ordered the abandonment of the freedom of choice plan and the adoption of a geographical plan which would result in pupil attendance to the school nearest his home. In Jackson vs. Marvell School District No. 2, 389 F. 2d 740 (1968) the Court of Appeals affirmed the judgment of the lower court in the freedom of choice plan of desegregation was not unconstitutional per se, but in so doing, the Court of Appeals added the warning that when particular plans prove to be inadequate and are administered in such ways as to prevent desegregation, the board will be required to adopt a new plan or procedure which will give more assurance of full desegregation.

In Kemp vs. Beasley, 389 F. 2d 178 (1968) the Court of Appeals affirmed the lower court's approval of a freedom of choice plan, but in so doing declared that:

... recognition must now be made that the only permissible plan is one that works ... where "freedom of choice" does not implement, or produce meaningful
advance toward the ultimate goal of a racially integrated school system, it cannot be said to work in a constitutional sense.

The question of the constitutionality of the freedom of choice plans was faced by the United States Supreme Court in Green vs. County School Board of New Kent County, 391 U.S. 430 (1968) where the United States Supreme Court stated:

The question for decision is whether, under all the circumstances here, respondent school board's adoption of a "freedom of choice" plan which allows a pupil to choose his own public school constitutes adequate compliance with the board's responsibility "to achieve a system of determining admission to the public schools on a non-racial basis . . . .

In 1965, in order to be in compliance with Title VI of the 1964 Civil Rights Act, the school officials of New Kent County, Virginia, adopted a freedom of choice plan. After three years, 85% of the black students were still attending all-black schools. The court found this system still to be a dual one. The court further found that instead of aiding desegregation, "the plan has operated simply to burden the children and their parents with a responsibility which Brown II placed squarely on the school board" [Green vs. County School Board of New Kent County, 391 U.S. 430 (1967)]. The Supreme Court found that even though generally the freedom of choice plans had not been effective as a means to desegregate, that the court was not ruling it
out, and in some cases, it might serve as an effective means to desegregate. The court in Green then stated:

Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such as zoning, promising speedier and more effective conversion to a unitary, non-racial school system, "freedom of choice" must be held unacceptable.

The court then clearly expressed a school board's responsibility in regard to adopted plans for desegregation: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." (Green, 1968.)

The court stated that the responsibility of the district courts had been and continued to be the assessment of the effectiveness of the board proposed plan in achieving desegregation. The Supreme Court, in Green, then did not find the freedom of choice plan to be unconstitutional, but rather to be unacceptable when it did not work, and when other means which offered more assurance of achieving desegregation were available.

On the same day as the Green decision, the Supreme Court rendered two other decisions. Raney vs. Board of Education, 391 U.S. 433 (1968) was concerned with a freedom of choice plan; and, based upon its previous decision in Green, the court found the plan to be ineffective in
converting the school district to a non-racial, unitary system. *Monroe vs. Board of Commissioners*, 391 U.S. 450 (1968) was concerned with free transfers. In this plan, students were assigned to schools according to a plan involving geographic zones, but students had transfer privileges if space was available in the other schools. The geographic zoning would have resulted in a substantial amount of desegregation, but the requested transfers resulted in re-segregation because the minority races requested transfers to schools where their race was a majority. The court found the plan inadequate and stated:

> We do not hold that "freedom of choice" can have no place in a desegregation plan. But like "freedom of choice," if it cannot be shown that such a plan will further rather than delay conversion to a unitary, non-racial, non-discriminatory school system, it must be held unacceptable. (*Monroe*, 1968.)

The *Green*, *Raney* and *Monroe* decisions rendered by the United States Supreme Court gave a new urgency to the establishment of unitary school systems in order to provide students of all races equal protection. Lower courts began to make decisions based on the principles that had emerged from these three Supreme Court cases. In *Cato vs. Parham*, 293 F. Supp. 1375 (1968) the court rejected the defendant's contention that all that was needed was an improvement of the freedom of choice plan by stating, "... it is apparent on its face that [the plan] will not work." In *Acree vs. County Board of Education of Richmond County*, Georgia, 399
F. 2d 151 (1968) the court stated that the defendant's freedom of choice plan had not been effective and could no longer be utilized. In *Adams vs. Mathews*, 453 F. 2d 181 (1968) the Court of Appeals ordered that the district courts were to give desegregation cases "highest priority." In considering these cases, the district court was to move to other alternatives if the freedom of choice plan was found to be unacceptable. In *Lee vs. Macon County Board of Education*, 267 F. Supp. 458 (1968) a state-wide order issued by the district court for the use of the freedom of choice plans throughout the state to promote desegregation was decided. The court warned that the plans must in effect meet constitutional requirements. Depending upon the effectiveness of the plan, the court stated:

> In short, the measure of the freedom of choice plans—or, for that matter, any school plan designed to eliminate discrimination based upon race—is whether it is effective. If the plan does not work, then this court, as well as the State of Alabama school officials—both state and local—is under a constitutional obligation to find some other method to insure that the dual school system of public education based upon race is eliminated. (Lee, p. 458)

**Decisive Action by the Supreme Court**

In *Alexander vs. Holmes County Board of Education*, 396 U.S. 19 (1969) the previously held principle of desegregation with "all deliberate speed" was found to be no longer "constitutionally permissible" by the United States Supreme Court.
Court. In July of 1969, the Fifth Circuit Court of Appeals had issued an order to 33 school districts in Mississippi requiring that they submit plans for immediate acceleration of desegregation for implementation in the fall of that year. The court then suspended the July order and postponed the date for submission of new plans until December 1, 1969 due to a motion made by the Department of Justice and a recommendation by the Secretary of the Department of Health, Education and Welfare. Black plaintiffs of 14 districts asked the Supreme Court to vacate the decision regarding the suspension as decided by the Court of Appeals, but the Supreme Court affirmed the Court of Appeals decision on September 5, 1969. On October 9, 1969, a petition for certiorari concerning this case was granted by the Supreme Court. The case was argued before the Supreme Court on October 23, 1969. At this time, the Supreme Court vacated the Court of Appeals decision which had allowed a delay in the submission of plans for desegregation. The court, in Alexander, held that the school districts were obligated to end the dual school systems immediately and "to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color." The Supreme Court further stated that the Court of Appeals could accept HEW recommendations and use them as they were or with modifications as deemed necessary by the court in order to establish unitary school systems. The
Supreme Court ordered that until these systems were operating as unitary systems under the Court of Appeals' order, objections or proposed amendments could not be heard in the district court. They stated that when the schools were operating as unitary systems, the district court could consider objections or amendments, but that no amendment could be put into effect until the Court of Appeals had approved it. The Court of Appeals was in this case to retain the jurisdiction for insuring that the school districts would comply with the Alexander decision.

The United States Supreme Court granted certiorari in Swann vs. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) in order that the court could review, "... 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." Other cases were argued with the Swann case, all of which originated in states which have a history of maintaining dual schools in a single school district. With regard to pupil assignment, the Supreme Court in Swann determined four problem areas:

1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;

2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;
3) what are the limits, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and

4) what are the limits, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

Regarding racial balances and quotas, the court, in Swann, stated that the remedial plan of a court or board should be "... judged by its effectiveness." The Supreme Court, in Swann, further found the use of mathematical ratios to be within the remedial power of a board of education in the formulation of an effective desegregation plan.

The Swann decision also stated that schools of a pre-dominant race in a mixed population would require careful attention to determine whether segregation was being required or maintained, but that the existence of a pre-dominantly raced or even one-raced school did not distinguish the system as one which still practiced segregation by law. School authorities must do everything possible to achieve the greatest possible degree of desegregation and the concern of authorities should be to eliminate one-race schools. However, the burden of proof in regard to non-discrimination in school assignments is upon the school authorities.

Regarding remedial altering of attendance zones, the Supreme Court in Swann stated, "We hold that the pairing and grouping of non-contiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought."
The Supreme Court also determined that transportation could be an acceptable and permissible tool of desegregation. This subject is further discussed in Chapter IV.

The Effect of the 1964 Civil Rights Act Upon the Process of Desegregation

On July 2, 1964, Congress passed the Civil Rights Act and the President signed it into law. Title VI, Section 601 of this Act states:

No person in the United States shall on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

(Title VI, Section 601, 78 Stat. 252; 42 U.S.C.A. Section 200d.)

This means that federal funds could not be used in any program in which people are discriminated against because of race or color. Consequently, as recipients of federal financial aid, de jure segregated public schools came under this law.

Title VI, Section 602 gave to federal departments and agencies who held the authority and power to disburse federal financial aid to operations, the authority to enforce the provisions of Section 601 (quoted above) by:

... issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.
The Department of Health, Education and Welfare (HEW), as a federal agency with the power to grant financial assistance to public schools, had the responsibility under this law to formulate some rules which would help toward the achievement of the objective—elimination of de jure segregation based upon race in southern school districts. Section 602 also stated the manner in which the departments could effect compliance with the requirements:

(1) by the termination of or refusal to grant or to continue assistance under such program or activity, to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failing to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

HEW, in order to put Title VI into action, established the regulation, "Nondiscrimination in Federally Assisted Programs." The regulation required that school districts (in order to receive financial assistance) would have to present a desegregation plan which would be satisfactory to the commissioner, or if the school or system were already under a court order to desegregate, to submit to the commissioner a copy of the court order and assurance that
compliance with the order would follow. The Elementary and Secondary Education Act of 1965 passed by Congress set forth an incentive to school districts to comply with HEW Guidelines under Title VI of the Civil Rights Act of 1964. It made available various forms of financial assistance to the public schools under five Titles.

HEW formulated the "HEW Guidelines" to help determine whether the school boards were able to qualify for financial assistance, and to help school boards to be informed of the Department requirements to qualify for financial assistance. The first set of HEW Guidelines were issued in 1965 and were entitled "General Statements of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools." These guidelines were general policy statements regarding desegregation of elementary and secondary schools. The target date for total desegregation, according to this set of guidelines, was the fall of 1967.

In March of 1966, HEW issued a set of revised guidelines entitled "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964, March 1966." These guidelines were intended to correct the major flaws of the previous 1965 set of guidelines which had become evident during the first year of utilization. Other revisions have been issued to these
guidelines when problems or changes in principles as stated by the courts have shown the necessity for change.

The courts' position regarding the HEW Guidelines began to become apparent in *Singleton vs. Jackson Municipal Separate School District*, 348 F. 2d 729 (1965) when it took notice of the fact that the United States Office of Education had set minimum standards for use in determining whether schools could qualify for financial assistance. The court stated that the guidelines should be given "great weight."

Judge Wisdom in *U.S. vs. Jefferson County Board of Education*, 372 F. 2d 836 (1966) described the appropriate place of the HEW Guidelines by stating:

> The only school desegregation plan that meets constitutional standards is one that works. By helping public schools to meet that test, by assisting the courts in their independent evaluation of school desegregation plans and by accelerating the progress but simplifying the process of desegregation the HEW Guidelines offer new hope to Negro school children long denied their constitutional rights. A national effort, bringing together Congress, the Executive, and Judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. The courts alone have failed.

Judge Wisdom goes on to state:

> . . . the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. The Guidelines, of course, cannot bind the courts: we are not abdicating any judicial responsibilities. But we hold the HEW's standards are substantially the same as this Court's standards . . . In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should
carefully tailor those so as not to defeat the policies of HEW or the holding of this Court.

Any doubt that Judge Wisdom may have left concerning the court's attitude toward the guidelines was eliminated by the Eighth Circuit Court of Appeals in Kelley vs. Altheimer, Arkansas Public School District No. 22, 378 F. 2d 483 (1967). In this case the court stated:

The plan approved by the District Court shall be consistent with, and in no event less stringent than, the one set forth in the H.E.W. Guidelines, heretofore affected by the appellee school district. The plan, if the trial court desires, may be identical to that set forth in the Guidelines.

Many subsequent decisions have taken into consideration the HEW Guidelines to the degree that the court felt that the Guidelines would in effect achieve their intended purpose.

The Changing Role of Courts in Education

United States Court of Appeals Judge J. Skelly Wright, in Hobson vs. Hansen, 269 F. Supp. 401 (1967) concluded his opinion with the following:

It is regrettable, of course, that in deciding this case the court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and
accept its responsibility to assist in the solution where constitutional rights hang in the balance.

The statement might better have been labeled a "prologue to the future," because of its incisive description of things that were soon to come about in education.

The Divisions of Educational Jurisprudence

Four stages in the evolution of the role of the courts in education are discernable:

1) **The stage of strict judicial lassie-faire** -- the period from 1789 to 1850 when federal and state courts ignored education. Federal courts viewed education as a state and local matter, and state courts were rarely called upon to intervene in a school matter.

2) **The stage of state control of education** -- the period from 1850 to 1950 when 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 which failed to meet federal constitutional standards and requirements (Roberts, 1849).

3) **The stage of reformation** -- the period from 1950 until today when 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 court infusion of constitutional minima into existing educational structures (Tyler, pp. 137-139).

4) The stage of "education under supervision of the courts" -- concurrent with the "reformation stage" there has been a discernable 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 [Youngblood vs. Board of Public Instruction of Bag County, Florida, 448 F. 2d 770 (1971)].

The General Government and Education

While the "classical view" held that the state controls public education, it also recognized that the general government was empowered to tax and spend money for educational purposes. This federal power was implied from the broad language of the "General Welfare" clause of the Constitution, "The Congress shall have power to lay and collect taxes, duties, imports, excises, to pay the debts and provide for the common defense and general welfare of the United States" (Article 1, Section 8, cl.1). This was interpreted by the courts to mean that Congress was not limited in the
expenditure of money to direct or express grants of legisla­tive powers found elsewhere in the Constitution [U.S. vs. Butler, 297 U.S. 1 (1936)]. Hence, Congress might tax and spend money in aid of public education (e.g., "general wel­fare"). However, state control of public education and the power of the general government to spend money for educa­tional purposes, as noted above, were to be exercised sub­ject to constitutional requirements and limitations -- thus, state or federal actions affecting education, in theory at least, must be consistent with the general provisions of the Constitution.

The most distinguishing characteristic of the "classi­cal period" was the laissez-faire attitude of the courts toward the schools, which is epitomized by the phrase "leav­ing education to the educators." It was this disinterested, hands-off attitude which resulted in the development of a body of state case law which permitted state and local educational policies and practices which failed to meet min­imal constitutional requirements under the First and Four­teenth Amendments, and which first attracted federal court attention to the schools.

Federal Court Jurisdiction Over Education

Two means for obtaining federal court jurisdiction in cases affecting education are: (1) by questioning the validity of a state or federal statute under the United
States Constitution; or (2) by alleging that some constitutionally protected right, privilege, or immunity of the individual has been violated. Otherwise, the case will normally be decided in the state courts. The "classical view" allows for cases to be raised under the first means, and in fact most of those decisions by federal courts before 1950 involved the validity of a state statute; it was only toward the end of that period that federal court cases involving the schools were brought on the basis of an infringement of constitutionally protected individual rights.

This change was made possible, in part, by a United States Supreme Court interpretation which made the "Bill of Rights" applicable to the states.

**A New Role for the Bill of Rights**

Whereas, originally, the first Ten Amendments (the "Bill of Rights") applied only to the federal government ("Congress shall make no law respecting . . .") and this was so held by the United States Supreme Court [Barron vs. Baltimore, 7 Pet. 243 (1833)]. Beginning in 1925, the freedom of speech and freedom of press provisions of the "Bill of Rights" were absorbed into the Fourteenth Amendment and made applicable not only to the Congress but to the states as well:

For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the First Amendment from abridgement by Congress -- are among
the fundamental personal rights and "liber­ties" protected by the Due Process Clause of the Fourteenth Amendment from impairment by the states. [Gitlow vs. New York, 268 U.S. 652 (1925).]

Other provisions of the "Bill of Rights" respecting the rights of individuals were subsequently made applicable to the states through the Fourteenth Amendment.

Thus, a broad new area was opened up for federal courts to regulate, and it included education -- e.g., student and teacher rights, and other school activities which involved the first Ten Constitutional Amendments; but because of the laissie-faire attitude which the court had traditionally held toward education and the schools, federal court activity in this area was only nominal until the 1950's.

Court Supervised Education

The Modern Trend. The modern trend in law is toward "education under the supervision of the courts." A new judicial function is clearly beginning to emerge; it involves supervision of the schools by the courts to assure that constitutional minima required by the First and Four­teenthe Amendments are met. Not only do courts today decide more cases affecting schools, but they issue mandates, orders, and decrees that retain jurisdiction over the cases to assure that their orders are effectively carried out [Steel vs. Board of Public Instruction of Leon County, 448 F. 2d 267 (1971)].
One need only compare the extent of court involvement in education as it existed in the 1940's with court involvement in the affairs of the schools as it has existed in the 1970's to appreciate what significant change has occurred. The roots of this new judicial function can be traced to about 1950 when erosion of the "classical view" of education as exclusively a state and local function began, and when the federal courts, the United States Supreme Court in particular, recognized that certain policies and procedures of the public schools failed to meet constitutional requirements of the First and Fourteenth Amendments.

The Scope of New Judicial Function. Recently decided cases point to the wide scope of this new judicial function, and show that basic changes are taking place in judicial thinking about the role of courts in education. Courts are now concerned with:

--- their power to reopen schools closed to avoid desegregation;

--- their powers to assign teachers and students to specific schools to achieve racial balance;

--- their powers to require special programs for the underprivileged.

The changing role of the federal courts, particularly in the southern states, in education, in the operation of public schools, can be further illustrated by a few specific examples of recent decisions:
A federal court ordered the appointment of a black assistant principal of a Louisiana high school where the student body was two-thirds white, and the order was upheld on appeal. [Smith vs. St. Tammary Parish School Board, 448 F. 2d 414 (1971).]

A federal court ruled that a state in integrating its school systems should make provisions for a plan governing the assignment and dismissal of teachers and said that such a plan should establish objective, non-discriminatory standards and procedures for evaluating teachers; the plan should contain definitions and instructions for the application of standards to give teachers and should set forth methods by which teaching is to be evaluated. [Moore vs. Board of Education of Childester School District No. 54, 448 F. 2d 709 (1971).]

There are numerous examples of federal courts ordering student and faculty assignments, such assignments to be made according to a plan which complies with the principles of Supreme Court decisions. [United States vs. Perry County Board of Education, 445 F. 2d 302 (1971).]

There are federal court decisions which restrict the transfer of students, and which hold that where there is a scarcity of space in the schools being desegregated, majority to minority transfers have priority over other transfers. [Northcross vs. Board of Education of Memphis City Schools, 444 F. 2d 1178 (1971).]

Federal courts have ordered that formerly segregated school districts must operate as "unitary systems" for several years before students may be assigned within the system on the basis of achievement test scores. [Lemon vs. Bossier Parish School Board, 444 F. 2d 1400 (1971).]

As the above summary suggests, there is already a considerable body of federal common law which affects the organization, administration, and programs of the public
schools. The primary purpose of this law was to disestablish "dual school systems" primarily in southern school districts. Since 1964 this federal common law has had applicability to education in the North and West when the federal judiciary considers de facto school desegregation.

Judges and Lawyers. There are roughly 6,000 to 8,000 judges in the United States assigned to federal and state courts which have jurisdiction over cases involving schools and education (United States Government Organization Manual, 1977/78, p. 45-53, and The Book of The States, 1977/78, Table 2, p. 121). Not all of these judges, however, have ever participated in the decision of such a case. It is a very small minority of the judiciary and an even smaller minority of the total lawyers in the country that are making the decisions which call for sweeping changes in the operation of the public schools. Their power stems, in great part, from earlier (post-1950) decisions of the Supreme Court which support, sanction and require their activity.

The Supreme Court and Education. While education as such has never been the central issue in a case decided by the United States Supreme Court, the Supreme Court since about 1950 has adopted an "activist posture" toward the schools by accepting and deciding cases which have an impact on education. Therefore, it is logical to conclude from the great stress placed on education in the Brown I decision,
and in subsequent cases, that this has not been entirely coincidental, but rather that it reflects a changing conception which the Supreme Court has of itself and education. When this tendency of the Supreme Court to include itself with educational matters first became visible, there were justices who warned about the possible problems of the Supreme Court becoming a "super school board" supervising all of the schools and school districts in the country. Thus, as long ago as 1948, Supreme Court Justice Jackson referred to the zeal shown by the Supreme Court for its own ideas of public school instruction and the danger of becoming a super board of education by stating:

To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all schools boards of the nation ... is to decree a uniform, rigid, and if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other, but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation. [State of Illinois ex rel. McCollum vs. Board of Education of School District No. 71, 333 U.S. 203, 237 (1948).]

And Supreme Court Justice Black, in 1968, warned about the problems inherent in Supreme Court supervision of the public school curriculum:
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. [Epperson vs. Arkansas, 393 U.S. 114 (1968).]

The late Justice Harlan observed that education in the public schools:

... 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 case of a clear and unmistakable disregard of rights secured by the supreme law of the land. [Cummings vs. Richmond County Board of Education, 175 U.S. 528 (1899).]

Other members of the Supreme Court, however, at other times have obviously felt otherwise, as the trend in decisions since 1950 clearly shows.

The Search for Legal Principles Applicable to Education

Many persons, including many educators, legitimately do not understand what it is that the courts are doing to public schools, and they naturally ask why it is necessary. This is done in part because they do not appreciate the constitutional reasons behind certain court decisions affecting education. In order to acquire this understanding or appreciation, one must look outside the limited circle of cases which have specifically affected the schools. One must also
look at court decisions, from whatever area, that have established general principles of law -- for education is just one subset of human activities which are governed by the Constitution.
CHAPTER IV

RACE AND EDUCATION

The Beginnings of Equality in Education

The involvement of the federal courts in education, a state matter, has come about primarily because of the race question. A closer look at the racial discrimination cases provides a further evidence of the changing conceptions of the role of courts in education, and of the emerging concept of education as a right.

The "Separate But Equal" Doctrine. As long ago as Roberts in 1849, Chief Justice Shaw summarized the facts which gave rise to the case, namely that Sarah Roberts, age five, had been excluded from the public school nearest her home solely because she was black and was forced to attend a more distant school made up of children of her own race. This school was said to be equal in all respects to the school from which she was excluded. Chief Justice Shaw asked this question: "Under these circumstances, has the plaintiff been unlawfully excluded from public school instruction?" The legal answer was that obviously she had not. Thus was born the doctrine of "separate but equal" which reigned over educational jurisprudence thereafter for
more than 100 years. Ironically, this was also the beginning of the "neighborhood school" concept for minority children, as Sarah Roberts had been excluded, by the highest court in Massachusetts, from the school nearest her home.

But did Chief Justice Shaw ask, and did not the decision of the court answer, the wrong question? History has shown that under this set of facts, the proper question for the Massachusetts court to have answered was not whether Sarah has been "unlawfully excluded from public school instruction," but rather "whether she has been denied equal protection of the laws." (The Fourteenth Amendment, of course, was non-existent in 1849.) Accordingly, Chief Justice Shaw decided the case on the basis of state law citing the state constitutional provision that all persons regardless of color, etc. are "equal before the law." Shaw felt that the provision was but a statement of broad general principle suitable and proper for inclusion in declarations of rights in constitutions, but when that principle comes to be applied in actual practice, we must look elsewhere in the law to find those rights of the individual to which it applies (Mosteller and Moynihan, 1972).

There is no provision of law, state constitutional law or otherwise, establishing the right of the individual to receive an education. Such a right was expressly repudiated by the court in Roberts:
Had the legislature failed to comply with this injunction and neglected to provide public schools in the towns or should they fail in their duty as to repeal all laws on the subject and leave all education to depend on private means, strong and explicit as the direction of the Constitution is, it would afford no remedy or redress to the thousands of the rising generation who now depend on these schools to afford them a most valuable education, and an introduction to a useful life.

There is no right to demand a public education -- the state may close all public schools, if it so chooses, and leave education wholly to private means.

The Roberts case approved of a classification drawn on the basis of race for educational purposes. This was in keeping with the thinking of the time, and since then the courts have generally held, until very recently, that constitutional requirements of equality are satisfied as long as there is a reasonable basis for the classification adopted by the law (Horowitz & Karst, p. 120). Not only the classification, blacks and whites educated in separate schools, but the increased burden which that classification placed on the black student, in Roberts, was deemed reasonable and not illegal:

The increased distance, to which the plaintiff was obligated to go to school from her father's house, is not such, in our opinion, as to render the regulation in question unreasonable, still less illegal.

In summary, Roberts either expressly or by implication, set the course for judicial thinking about race and education which was to continue for many years to come:
1. Education is a state matter, and cases affecting it are to be disposed of under state law.

2. The "neighborhood school" concept does not apply to blacks or other minorities.

3. The state may close its public schools, if it chooses, thereby leaving all education to private means.

4. Consequently, there is no right to demand a public education.

5. The constitutional provision "all persons . . . are equal before the law" states a principle and we must look elsewhere in the law to find out what rights of the individual it covers.

6. Educational classifications requiring separations of the races are reasonable and therefore permissible.

The Early Race Decisions. Plessy in 1896 set in motion a long line of race cases, many of them affecting the public schools (Hogan, 1970). These cases perpetuated the notion that "separate but equal" facilities satisfy constitutional requirements of the equal protection clause of the Fourteenth Amendment, and appeared to culminate in 1954 when the United States Supreme Court decided Brown, a de jure segregation case. Reciting the harmful effects of racial segregation on the child, supported by modern authority (the now famous footnote 11), and declaring in Brown that "any language in Plessy vs. Ferguson (1896) contrary to this finding is rejected," and the court announced that "we conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities
are inherently unequal." By this language Plessey was not expressly overruled; however, it was repudiated, thoroughly and wholly, with respect to "separate but equal"; nevertheless, the case was not overruled.

Equal Educational Opportunity. A turning point in equal educational opportunity occurred in 1938 with the decision of Missouri ex rel. Gaines vs. Canada, 305 U.S. 337 (1938) and although the case dealt primarily with separation of the races, not equality of educational programs in the law schools (there being no black law school facility then existing in Missouri for comparison), the court began to talk about a "federal right" to equal education, "discrimination" in education, substantially "equal advantages" in education, and "equality of rights" in education. The decision in Gaines contains clear enunciations of the right of the individual to receive (and the duty of the state to provide) an equal educational opportunity:

The question here is not the duty of the state to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the state upon the basis of an equality of right. The white resident is afforded legal education within the state; the Negro resident having the same qualifications is refused it there and must go outside the state to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the state has set up.
We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the state, can be justified by requiring resort to opportunities elsewhere.

... the essence of the constitutional right is that it is a personal one.

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the state was bound to furnish him within the borders facilities for legal education substantially equal to those which the state afforded for persons of the white race.

By 1950, the thrust of the court's race decisions had clearly shifted from the "separate but equal" aspects of education to the "equality" aspects. The Sweatt and Mac-Laurin cases were addressed to the question, "To what extent does the equal protection clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?" Thus, in Sweatt, Chief Justice Vinson made comparisons of the two Texas law schools and concluded that the separate law school established for blacks was "not substantially equal" to that provided whites at the University of Texas Law School, and that the equal protection clause of the Fourteenth Amendment requires that the black student involved be admitted to the all-white school. He said:
In terms of the number of the faculty, variety of courses, opportunity for specialization, size of the student body, scope of the library, availability of Law Review and similar activities, the University of Texas Law School is superior. (Sweatt)

But more important than this, the court in Sweatt said the University of Texas Law School "possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school," such as:

-- reputation of faculty,
-- experience of the administration;
-- position and influence of alumni;
-- standing in the community;
-- traditions and prestige, etc.

The Court in Sweatt further said ". . . petitioner may claim his full constitutional right: legal educational equivalent to that offered by the State to students of other races."

The constitutional right is thus defined: an educational equivalent to that offered by the state to students of other races.

In McLaurin vs. Oklahoma State Regents, 339 U.S. 637 (1950) it was put in this language: the graduate student had a "personal and present right to the equal protection of the laws" and he "must receive the same treatment at the hands of the State as students of other races."
As a basis of their complaint, the appellants in *Briggs vs. Elliott*, 342 U.S. 350 (1951) alleged that "equal facilities are not provided for Negro pupils," and the court ordered School District No. 22 of Clarendon County, South Carolina "to proceed at once to furnish educational facilities for Negroes equal to those furnished white pupils."

Thus, the stage was set for those events which careful observers of the Supreme Court might have predicted would naturally and logically follow, namely --

*Brown vs. Board of Education of Topeka* (1954)

*Brown II* (1955)

*Equal Educational Opportunity* (1966)

*Racial Isolation in the Public Schools* (1967)

*Report of the President's Commission on Campus Unrest* (1970)

*Disruption in Urban Public Secondary Schools* (1971)

*Swann vs. Board of Education* (1971)

"*Student Transportation Moratorium Act*" (1972)

"*Equal Educational Opportunities Act*" (1972)

*Keyes vs. School District No. 1* (1972)

*Bradley vs. Milliken* (1972)

-- evolution from common law to an Act of Congress which will assure equal educational opportunity. The movement for "equality of educational opportunity," as we have described it above, also lead to the present period of judicial supervision of public education. Neil Jon Bloomfield

In 1954, the Supreme Court declared that the opportunity for an education is a right which must be made available to all on equal terms. But more Negro children are in segregated schools today than in 1954, and the achievement disparity between Negro and white pupils in urban public schools has remained substantial. The pace and procedures of integration will continue to be litigated, placing the courts, at least for the immediate future, in the posture of educational administrators. Were one somehow free to select the branch of government best suited to solve these problems of quality and equality of educational opportunity, the judiciary would not be the branch chosen. But fundamental constitutional rights are involved, and the executive and legislative branches have taken very limited responsibility to date. Judicial action is presently the disadvantaged child's only hope. (Bloomfield, 1970, p. 280.)

And he adds, quoting from Kirp, "The Poor, the Schools, and Equal Protection," 38 Harvard Educational Review 635 (1968), the right of an equal educational opportunity was "derived by the Supreme Court from the guarantee of equal protection of the laws."

This, then, was the "right" referred to in *Brown* where the court spoke of the opportunity of an education: "Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."

Courts in enforcing this right have exercised their powers to reopen schools and to prohibit closing of schools,
to order taxation for the support of schools, and to order the assignment of teachers and pupils to schools to achieve racial balance.

The Fourteenth Amendment

The Anatomy of the Amendment. The Fourteenth Amendment contains five sections, one which pertains to enforcement and three which are essentially of historical interest, but it is the first section which has the greatest applicability to education and which has been described as "probably the greatest single source of the rights of persons and limitations upon the states that exists in the entire Constitution and all other Amendments" (Forkusch, 1967, p. 62). This section consists of two sentences: one concerning "citizenship and naturalization" and the other which contains three clauses: privileges and immunities, due process and equal protection. It is this latter clause which courts apply in cases affecting education, "No state shall . . . deny to any one person within its jurisdiction the equal protection of the laws" (U.S. Constitution, Fourteenth Amendment, Section 1). This language is prohibiting on the states, however, it has been said to "contain necessary implications of a positive immunity, or right, most valuable to the colored race" [Strauder vs. West Virginia, 100 U.S. 303 (1880)]. It has been customary to say that the equality guaranteed by the Fourteenth Amendment is: equal treatment of persons
similarly situated, or, that all persons within a class must be treated alike.

Interpretation and History of the Amendment. In the Supreme Court's first interpretation of the Fourteenth Amendment, the language was strictly constructed to apply solely to the situations involving racial segregation of blacks; this, the court said in Slaughter-House cases, 16 Wall. 81 (1872), was the only "evil to be remedied by this clause."

The court in Slaughter-House further said:

We doubt very much whether any action of a state not directed by way of discrimination against the Negroes as a class, or on account of their race will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

The "equal protection" concept, some say, was inserted as a clause in the Fourteenth Amendment to assure equal rights and procedures regardless of a person's race or color. Hence, many early non-racial situations were adjudicated under it. (Forkosch, 1967, p. 153.)

Will historical evidence support either one or the other of these interpretations of the clause?

The United States Supreme Court explored evidence of the original understanding and meaning of the language of the clause in the reargument of Brown. In Brown the briefs and on oral argument counsel were requested to address the following questions:
1. What evidence is there that the Congress which submitted and the State Legislature and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment:

   (a) that future Congresses might, in the exercise of their power under Section 5 of the Amendment, abolish such segregation, or
   (b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment:

   (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
   (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"Inconclusive" was Chief Justice Warren's summation of the findings of the reargument and he added that after review of all the pertinent sources in Brown that:

This discussion and our own investigation convince us that, although these sources cast
some light it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.

In another connection, the late Justice Harlan in Oregon vs. Mitchell, 400 U.S. 112 (1970) reviewed the history of the Fourteenth Amendment with respect to voting rights, and expressed "complete astonishment at the position of some of my brethren that the history of the Fourteenth Amendment has become irrelevant." Justice Harlan's astonishment was evoked by Justice Douglas' statement in his opinion in Mitchell, namely that:

In Harper vs. Virginia Board of Elections, 383, U.S. 663 (1966), . . . we stated: "Notion of what constitutes equal treatment for purposes of the Equal Protection Clause do not change." That statement is in harmony with my view of the Fourteenth Amendment, as expressed by my Brother Brennan: "We must therefore conclude that its framers understood their amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations." Hence, the history of the Fourteenth Amendment tendered by Brother Harlan is irrelevant to the present problem.

Some would argue that the Fourteenth Amendment from the point at which it started and the point at which it has arrived are on entirely different planes. Some would say that the equal protection clause was returned to its historical purpose and function with Brown. Others would disagree, saying our historical understanding of the meaning, purpose, and intent of the Fourteenth Amendment no longer supports
the court's interpretation of the language of the equal protection clause. Inquiry and disagreement about the meaning intended for the clause is thus far from being settled.

The State Action Concept. The language of the Fourteenth Amendment is a limitation on "state action," whether legislative, judicial or executive, and is not directed toward acts of individuals unsupported by state authority [Virginia vs. Rives, 100 U.S. 318 (1897)]. Formerly, it was thought that the Amendment could be infringed only by affirmative "state" as distinguished from private action [U.S. vs. Cruikshank, 92 U.S. 542 (1875)]. Thus, in the Civil Rights Cases, 109 U.S. 3 (1883) it was said:

The first section of the Fourteenth Amendment is prohibiting in its character, and prohibiting upon the states . . . It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment. It has a deeper and broader scope.

Specifically, the Fourteenth Amendment "nullifies and makes void" all state laws, legislation, and state action of every kind (e.g., acts of boards of education, school administrators, teachers, etc.) which denies to citizens of the United States "equal protection of the laws." Although the principle was established in the Civil Rights Cases that the Fourteenth Amendment refers to "state" as distinguished from "private" action, the United States Supreme Court has subsequently in many situations applied
the corollary principles that the restrictions on state action apply to the manner in which a state regulates legal relations between "private" persons. Harold Horowitz, writing in a 1957 Southern California Law Review article, maintained that in these corollary situations there is state action, and that the sole issue is whether the particular state action determining legal relations between private persons is constitutional:

The major premise of this paper is the principle that whenever, and however, a state gives legal consequences to transactions between private persons there is "state action" -- i.e., that the definition by a state of legal relations between private persons is, for the purposes of the Fourteenth Amendment, a matter of "state action." If A strikes B, and B sues A for damages, the problem is raised whether in the particular factual situation A had a duty not to strike B and B had a right that A not strike him. The law governing that right-duty relationship may perhaps be set forth in a legislative enactment, or it may be a common-law principle. The declaration of the A-B right-duty relationship by state statute or common-law may in itself arguably constitute state action. But whether or not the mere "definition" of legal relations between A and B, before there has been a judgment of a court in a lawsuit between A and B, should be said to constitute state action, it is clear that if B sues A for damages in a state court and wins, there has then been state action in adjudicating the legal relations between A and B. (This would be constitutional state action, for there would be no violation of any of the provisions of the Fourteenth Amendment in the creation and enforcement of this right-duty relationship.) What if it is determined in B's suit that because A was acting in self-defense A was therefore privileged under the circumstances to strike B -- i.e., that A did not have a
duty not to strike B, that B did not have a right that A not strike him. The state court holds for A. Is there any less state action because B loses? It would seem clearly not. (And this, too, would be constitutional state action.) There is state action in the definition and enforcement of the right-duty relationship, and there is state action in adjudicating that there is no right-duty relationship. The result reached by the court on the merits is irrelevant insofar as the presence or absence of state action is concerned. When state law is applied to determine legal relations between private persons there is "state action." (Horowitz, 1957, p. 209.)

Thus, the solution to these problems is not found in the quest for state action, but rather in the determination of whether a particular state action is unconstitutional.

The United States Supreme Court has never decided a precise formula for ascertaining the contents and limits of the state action concept. It is said that this would be an impossible task [Reitman vs. Mulkey, 387 U.S. 369 (1967)]. The non-obvious involvement of the state in private conduct becomes apparent only by "sifting facts and weighing circumstances [Burton vs. Wilmington Parking Authority, 365 U.S. 715 (1961)]. Since absolutely private conduct with no state involvement whatsoever probably rarely exists, some nexus of the state with private conduct will usually be found.

The "Public Function Doctrine." In the 1940's the United States Supreme Court began to open up and expand the concept of state action. Certain private actions, if they constituted a "public function" were subjected to

Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by statutory and constitutional rights of those who use it.

Privately owned bridges, ferries, turnpikes, and railroads are "built and operated primarily to benefit the public, and since their operation is essentially a public function, it is subject to state regulation." Company towns, shopping centers, and, in 1970, a private park left in trust to be used by "white people" was brought under the public function concept [*Evans vs. Newton, 382 U.S. 296 (1966)*].

The last Justice Harlan, dissenting in *Evans*, points to these possible future educational applications of the "public function" doctrine:

More serious than the absence of any firm doctrinal support for this theory of state action are its potentialities for the future. Its failing as a principle of decision in the realm of Fourteenth Amendment concerns can be shown by comparing—among other examples that might be drawn from the still unfolding sweep of governmental functions—the "public function" of privately established schools with that of privately owned parks. Like parks, the purpose schools serve is important to the public. Like parks, private controls exist, but there is also a very strong tradition of public control in this field. Like parks, schools may be available to almost anyone of one race or religion but to no others. Like parks,
there are normally alternatives for those shut out but there may also be inconveniences and disadvantages caused by the restriction. Like parks, the extend of school intimacy varies greatly depending on the size and character of the institution.

For all the resemblance, the majority assumes that its decision leaves unaffected the traditional view that the Fourteenth Amendment does not compel private schools to adopt their admittance policies to its requirements, but that such matters are left to the States acting within constitutional bounds. I find it difficult, however, to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts, and, at least in logic, jeopardizes the existence of denominationally restricted schools while making of every college rejection letter a potential Fourteenth Amendment question.

While this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity, the example of schools is, I think sufficient to indicate the persuasive potentialities of this "public function" theory of state action. It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching.

However, it has been noted that outside of the South, the

... need for imposing the requirements of equal protection on private schools is far from pressing, for two reasons ... most of these schools and virtually all those which are particularly sought after because of their reputation have shown little disposition to exclude Negroes. Furthermore, the interest of most Negroes in private education is now indeed academic, because high costs erect a barrier nearly as severe
as the racial barrier. Substantial integration in private education will have to wait until desegregation in employment and in public education provides the means for Negroes to attain higher economic status (Van Alstyne and Karst, 1961, p. 28).

The "twilight of state action" appears to be at hand, so states Jerry Williams writing in the *Texas Law Review* (1963), where he reaches these conclusions:

1. The sun is setting on the concept of state action as a test for determining the constitutional protections of individuals. Through developments concerning "color of state law," state inaction, private groups and organizations becoming sufficiently oriented to public concern to justify public control, and judicial enforcement of private agreements, state action is so permeating that it is present in virtually all cases.

2. A kind of analysis which resembles the state action analysis is still properly used in those cases which evaluate the extent to which a private group or organization has become oriented to public concern. But the purpose of this analysis is not to determine whether there has been state action or not, but rather to determine whether the state's compulsory constitutional interest in the elimination of discrimination if overbalanced by the desirability of permitting a right to engage in personal discrimination.

3. Personal freedom to discriminate lessens as the personal role becomes lessened, either through lack of personal interest ... or the public's concern as the person moves into a relationship with the public generally . . .

4. There is no formula. Each case must turn upon its own facts, although stare decisis will give a measure of predictability to similar cases.

5. The elimination of state action as a controlling concept does not eliminate the
role of the courts. Rather, it broadens it (Williams, 1963, p. 348).

It has been said that no modern Supreme Court decision, with the possible exception of Evans vs. Abney, 396 U.S. 435 (1970) has "rejected a racial discrimination claim because of the state action barrier," which suggests that the state action concept is now moribound (Gunther and Dowling, 1970, p. 491).

Public School Transportation

The federal court desegregation decisions have influenced school transportation policies in formerly de jure segregated school districts to a great extent. The courts have recognized that a school district's transportation system can be an aid or prohibition to achieving a unitary system; therefore, transportation has been an issue in litigation regarding the desegregation process in public schools.

Henry vs. Clarksdale Municipal Separate School District, 408 F. 2d 682 (1969) is a typical case showing the court's attitude concerning the place of transportation in a desegregation plan. Here the court stated: "An effective plan to desegregate should produce desegregated facilities, staff, faculties, transportation, and school activities along with integrated student bodies."

The courts have determined that, to be effective, transportation systems must offer equal transportation
opportunities to all pupils of a particular district [Boomer vs. Beaufort County Board of Education, 294 F. Supp. 179 (1968)]. The school districts that have offered transportation in the past will be required to reconstitute the transportation facilities to achieve a unitary system [Andrews vs. City of Monroe, 425 F. 2d 1017 (1970)]. In Kelley vs. Atheimer, 378 F. 2d 483 (1967) the court's responsibility in regard to plans that prohibit desegregation is made clear. The court in Kelley stated: "The Court of Appeals must stike down school transportation systems if their operation serves to discourage the desegregation of the school system."

Many court decisions have required the desegregation of school transportation systems. In some instances the court's decisions have been specific in regard to transportation [Franklin vs. Barbour County Board of Education, 259 F. Supp. 545 (1966)]. While in other cases the court's decisions have been more general [Coppedge vs. Franklin County Board of Education, 273 F. Supp. 289 (1967)].

In U.S. vs. Hinds County School Board, 417 F. 2d 852 (1969) this was a consolidation of 25 Mississippi school cases; the Court of Appeals remanded the cases to the district court with certain directions. One of the directions was that the district court request educators from the U.S. Department of Health, Education and Welfare (HEW) to work with school boards in the preparation of plans that would
desegregate the school systems in regard to students, faculty, transportation, facilities, activities and construction programs. This case was again called before the Court of Appeals following the decision in Alexander vs. Holmes, 396 U.S. 19 (1969), in order to effect compliance with the Supreme Court decision as rendered in that case. The court in Hinds then ordered:

. . . effective immediately, that the school district here involved may no longer operate a dual system based on race or color, and each district is to operate henceforth as a unitary system within which no person is "effectively excluded from any school because of race or color."

In relation to transportation specifically, the Hinds court further said:

The time between the date hereof and December 31, 1969 shall be utilized in arranging the transfer of faculty, transfer of equipment, supplies and libraries where necessary, the reconstitution of school bus routes where indicated, and in solving other logistical problems which may ensue in effectuating the attached plans.

In Franklin the court recognized the importance of an adequately desegregated transportation plan in the establishment of a unitary school system. The court found the transportation system to still be operating as it had under the dual segregated system, and thus to be interfering with the success of the freedom of choice plan which had been adopted as a reasonable means of desegregating the school system of Barbour County. Thus, the court in Franklin said:
Clearly, if a freedom of choice plan is to be sustained as a reasonable means by which a school system is to be desegregated in accordance with the principles of Brown vs. Board of Education of Topeka, \textit{supra}, every student must be accorded the same opportunity to apply to any school whether he previously attended that particular school or not, whether the school board thinks the choice is a reasonable one or not, whether the school board considers transportation reasonably available or not, or whether the student exercising the choice previously attended his "choice school" or not.

The court's recognition of the importance of transportation to desegregation plans can clearly be seen in their decision in \textit{U.S. vs. Jefferson County Board of Education}, 380 F. 2d 385 (1967):

Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable rules.

Chief Justice Warren Burger in \textit{Swann vs. Charlotte-Mecklenburg Board of Education}, 402 U.S. 1 (1971) authorized compulsory bussing, among other means, for the dismantling of dual school systems, made this point quite clear, namely that:
The constant theme and thrust of every holding from Brown I to date is that State-enforced separation of the races in public schools is a discrimination that violates the equal protection clause. The remedy commanded was to dismantle dual school systems.

We do not reach in the case the questions whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

In Winston-Salem/Forsyth Board of Education vs. Scott, 404 U.S. 1221 (1971) Chief Justice Burger, in referring to Swann, said that no "prior case had dealt directly with bus transportation of students in this context or the limits on the use of transportation as a part of a remedial plan, or with racial balancing." Swann was decided on April 20, 1971, and thereafter the Court of Appeals remanded Scott to the district court with instructions to obtain a new desegregation plan which would give effect to Swann. The board, under protest, submitted a revised plan designed "to achieve racial balance" throughout the school system. This new plan was accepted by the district court, whereupon the school board applied to Chief Justice Burger (sitting as Circuit Judge) for a stay. The board stated that in its application that the "average" travel time under the new plan was one hour. In denying that stay, Burger said the record was "inadequate" for him to determine whether the
lower courts correctly read Swann's holdings negating any constitutional requirements of racial balance or racial quotas and suggesting limits for student transportation. Referring to the school board's apparent misunderstanding that it was required to achieve a fixed racial balance which reflected total composition of the school district as "disturbing" the Chief Justice in Scott, declared:

It suggests the possibility that there may be some misreading of the opinion of the Court in the Swann case. If the Court of Appeals or the District Court read this Court's opinion as requiring a fixed racial balance or quota, they would appear to have overlooked specific language of the opinion in the Swann case to the contrary. Rather than trying to interpret or characterize a holding of the Court, a function of the Court itself, I set forth verbatim the issues seen by the Court in Swann and the essence of the Court's disposition of those issues.

Student assignment was the central issue in that case, and it involved four problem areas:

(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;
(2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;
(3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and
(4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

Whereupon the Chief Justice observed in Scott that "Nothing could be plainer, or so I thought, than Swann's disapproval of the 71% - 29% racial composition found in the
Swann case as the controlling factor in assignments of pupils simply because that was the racial composition of the whole school system." And he added that while the determination of racial balance is an "obvious and necessary starting point" for courts to decide whether in fact any violation exists, only "very limited use" of such mathematical ratios was within the discretion of the district in Swann.

Turning to point four in Scott, namely, the limits on the use of transportation facilities to correct state-enforced racial school segregation, the Chief Justice quoted Swann thusly:

The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case, Davis, supra . . . The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

. . . In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

An objective to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process . . . . It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students.
As noted above in *Scott*, Burger then observed that no case prior to *Swann* had dealt with bussing of students "in this context or the limits on the use of transportation as part of a remedial plan, or with racial balancing."

**Faculty Desegregation**

Faculty desegregation was not reviewed by the United States Supreme Court until 1965. Prior to that time, faculty desegregation had been questioned to some extent in various cases where the major issue was in regard to pupil desegregation plans [Bell vs. School Board, 249 F. Supp. 249 (1966)]. Lower courts tended to refuse consideration of the question of faculty desegregation until substantial progress had occurred in pupil desegregation [Rogers vs. Paul, 232 F. Supp. 833 (1964)]. However, in one 1964 case, a district court did issue an injunction against the consideration of race in the employment and assignment of new teachers. According to the court's findings in this case, discrimination had occurred. Black teachers had been assigned totally to black schools. The court also found discrimination in the hiring practices in regard to the employment of new teachers. In the consideration of teacher transfer requests, the court approved the following criteria if uniformly applied in regard to race: teacher competency and preparation, professional attitude, language factors and patterns, cultural background, personality,
initiative, acceptance of responsibility and authority, and loyalty [Christmas vs. Board of Education of Hartford County, Maryland, 231 F. Suppl 331 (1964)].

In 1965, courts generally continued to refuse to review faculty desegregation until pupil desegregation was substantial [Lemon vs. Bossier Parish School Board, 240 F. Supp. 709 (1965)]. In a Louisiana case, the court expressed with clarity its position regarding faculty desegregation:

It is further ordered, adjudged and decreed, that plaintiffs' request for desegregation of teaching personnel and other administration staff in said school system . . . are deferred and action thereon at this time is denied, pending the progress of the pupil desegregation of said system; all subject to the future orders of the court [Thomas vs. St. Martin Parish School Board, 245 F. Supp. 601 (1965)].

In Bradley vs. Board of Education, 345 F. 2d 310 (1965) the Court of Appeals upheld the district court in a decision which involved faculty desegregation. The plaintiffs wanted the courts to reject a desegregation plan because a plan for faculty desegregation had been omitted. The courts (district and Court of Appeals) did not find the absence of a faculty desegregation plan a sufficient cause for rejection of the pupil desegregation plan. Later in that same year, the Supreme Court treated the faculty desegregation question in Bradley. The Court of Appeals decision in Bradley was vacated and their decision was held to be in error in the approval of the desegregation plan without first remanding
the case to the district [Bradley vs. Board of Education, 382 U.S. 103 (1965)]. The Supreme Court in Bradley stated:

We hold that petitioners were entitled to such full evidentiary hearings upon their contentions. There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative. Nor can we perceive any reason for postponing these hearings: each plan had been in operation for at least one academic year; these suits had been pending for several years; and more than a decade has passed since we directed desegregation of public school facilities "with deliberate speed" [Brown vs. Board of Education, 349 U.S. 294, 301 (1955)]. Delays in desegregation of school systems are no longer tolerable.

In Rogers vs. Paul, 382 U.S. 198 (1965) the Supreme Court considered faculty desegregation and ordered a full evidentiary hearing on the issue. These two cases show the temper of the Supreme Court in regard to faculty desegregation.

Prior to the Supreme Court's decision in Bradley, a federal district judge expressed an opinion in a Virginia case which seemed to anticipate that that decision would be reached by the Supreme Court. The major issue in the case was pupil desegregation, but in regard to faculty desegregation among other things, Judge Michie stated:

I believe there is a great deal of truth in the statement, made before me recently, that the presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes a school a "colored"
school" just as certainly as if the words were printed across its entrance in six inch letters [Brown vs. County School Board, 245 F. Supp. 549 (1965)].

In Kier vs. County School Board, 249 F. Supp. 239 (1966) a case tried after the Bradley decision, Judge Michie ordered the desegregation of the faculties and administrative staff for the next school year. The court in Kier issued the following guidelines:

Insofar as possible, the percentage of Negro teachers in each school in the system should approximate the percentage of the Negro teachers in the entire system for the 1965-66 school session. Such a guideline cannot be rigorously adhered to, of course, but the existence of some standard is necessary in order for the Court to evaluate the sufficiency of the steps taken by the school authorities pursuant to the Court's order.

Additionally in Kier, Judge Michie made it clear where the responsibility for faculty desegregation lay:

The duty rests with the school board to overcome the discrimination of the past, and the long-established image of the "Negro school" can be overcome under freedom of choice only by the presence of an integrated faculty.

The responsibility of school administrators in faculty desegregation was made clear in various cases. In U.S. vs Jefferson County Board of Education, 373 F. 2d (1966) the court made clear the duty of the school administrators in the desegregation of faculties:

(1) as to faculty, we have found that school authorities have an affirmative duty to break up the historical pattern
of segregated facilities, the hallmark of the dual system. To aid the courts in this task, the decree requires the school authorities to report to the district courts the progress made toward faculty integration. The school authorities bear the burden of justifying an apparent lack of progress.

During the years from 1965 to 1975, more and more stress was placed on faculty desegregation. In Bradley, the Supreme Court set the judicial scene regarding faculty desegregation in holding that the lower courts had been in error in accepting a desegregation plan without a full evidentiary hearing regarding the impact of faculty segregation on the desegregation plan. Since 1965, faculty desegregation schedules have been found by the lower courts to be an integral, essential and indispensable part of a desegregation plan [Mapp vs. Board of Education, 274 F. Supp. 455 (1967)]. Faculty desegregation plans should obtain a positive commitment to an adequate plan and should also contain a statement of the program including steps to be carried out and the timetable the program will follow [Kemp vs. Beasley, 389 F. 2d 178 (1968)].

The courts grew impatient with inadequate faculty desegregation plans; their displeasure can be seen in decisions which require the elimination of pupil and faculty desegregation at the same time [Mapp vs. Board of Education, 373 F. 2d (1967)]. The court's displeasure with inadequate plans was also seen in the court's tendency to set up guidelines, quotas, timetables and involuntary transfers
especially when faculty desegregation had progressed at a slow rate (Swann).

The court's growing dissatisfaction with inadequate plans for faculty desegregation is exemplified by the Court of Appeal's statement in Yarbrough vs. Hulbert-West Memphis School District, 380 F. 2d 962 (1967):

. . . (7) we are not content at this late date with a plan which contains only a statement of general good intention; and (8) a positive commitment to a reasonable program is necessary.

Boards of Education have a legal obligation to desegregate faculties. This requires transfers on a voluntary or involuntary basis. Voluntary transfer or assignment is a preferable way to desegregate; but, if this proves ineffective, involuntary transfer or assignment of faculties is required [Lee vs. Macon County Board of Education, 292 F. Supp. 363 (1968)].

Application of the Ninth Amendment to Education

It has been customary in educational jurisprudence to look to the language of the Tenth Amendment of the federal Constitution to conclude therefrom that, since education is not one of the powers delegated to the United States, it is a power reserved to the states respectively, or to the people. Be that as it may, this section of the dissertation addresses itself to certain aspects of the Ninth Amendment
which suggest that it may have a possible future application to education and the schools.

The notion that education may be one of the fundamental or basic "rights" retained by the people under the Ninth Amendment is novel. It was suggested by Justice Douglas, dissenting, in Palmer vs. Thompson, 403 U.S. 217, 233-237 (1971):

May a state in order to avoid integration of the races abolish all of its public schools? . . . is there anything in the Constitution that says that a State must have a public school system? Could a federal court enjoin the dismantling of a public school system? Could a federal court order a city to levy the taxes necessary to construct a public school system?

Douglas in Palmer said that the Ninth Amendment "has a bearing on the present problem." It reads as follows: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." Rights, not explicitly mentioned in the Constitution, he said "have at times been deemed so elementary to our way of life that they have been labeled as basic rights" and that "rights" retained by the people within the meaning of the Ninth Amendment "may be related to those rights which are enumerated in the Constitution."

There is, of course, not a word in the Constitution concerning the right of the people to education or to work or otherwise. Those rights, like the right to pure air and water, may well be rights 'retained by the people under the
Ninth Amendment" (Palmer). Freedom from discrimination based on race, creed or color, he said, has become "by reason of the Thirteenth, Fourteenth and Fifteenth Amendments one of the enumerated rights under the Ninth Amendment that may not be voted up or voted down" (Palmer).

Justice Goldberg in Griswold vs. Connecticut, 281 U.S. 479 (1965), said that the Ninth Amendment "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight Amendments and an intent that the list of the rights included there not be deemed exhaustive. Goldberg in Griswold then added:

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.
School Desegregation Cases in the United States Court of Appeals for the Sixth Circuit

This section will briefly review recent decisions of the Sixth Circuit in school desegregation cases, including those involving Dayton and Cincinnati, Ohio; Detroit, Grand Rapids, Lansing and Kalamazoo, Michigan; Memphis, Madison County, Chattanooga and Knoxville, Tennessee; and Louisville, Kentucky. While this list is not intended to be exhaustive of Sixth Circuit school desegregation decisions, it serves to give a general indication of the recent positions taken by the Sixth Circuit.

The approach taken by the Sixth Circuit, consistent with that of most appellate courts, was stated in a full court decision in *Goss vs. Board of Education of City of Knoxville, Tennessee*, 482 F. 2d 1044 (1974):

This court has consistently upheld the decrees of the District Judges of this Circuit when properly supported by the pleadings and evidence. An appellate court simply cannot violate this settled principle of our jurisprudence, no matter how desirable a particular result may appear to be. The experienced District Judge who has lived with this case from its inception analyzed the evidence in great detail.

Court Decisions on Ohio School Systems

The two most recent decisions by the United States Court of Appeals for the Sixth Circuit in school desegregation suits arising out of Ohio urban school systems involve the public schools of Cincinnati and Dayton.
The Cincinnati Case. The first Cincinnati case was *Deal vs. Cincinnati Board of Education*, 369 F. 2d 55 (cert. denied, 402 U.S. 962 (1971). In the *Deal* case, the plaintiffs sought to show that the school board had intentionally acted to further segregation in the school system by (1) its choice of location for new school construction, (2) its use of neighborhood attendance districts, and (3) its hiring and assignment of teachers. At the original trial, Judge John W. Peck, Jr., granted the school board's motion for judgment made at the close of the plaintiff's case. He also ruled that the school board had no constitutional duty to balance the races in its schools when it had not caused the racial imbalance to exist [244 F. Supp. 572 (1965)].

The Sixth Circuit affirmed the district court's finding that racial imbalance in the Cincinnati schools was not the result of racial discrimination by the school board. It also agreed that "there mere fact of imbalance alone is not a deprivation of equality in the absence of discrimination" (*Deal*). But it remanded the case to the trial court for additional findings of fact as to the selection of school district boundaries, transportation policies, teacher selection, comparative test results, and policies of the school board on transfers and overcrowding. The plaintiffs petitioned for review by the Supreme Court but their petition was denied [389 U.S. 847 (1967)], so the case went back to the trial court.
On remand, the trial court made the following subsidiary findings of fact, among others, reported as an appendix to the Sixth Circuit's subsequent decision on appeal [419 F. 2d 1395 (1969)]:

1. That except for voluntary attendance at all black schools (a practice terminated in 1955), "since 1887 Negroes have attended neighborhood schools on the same basis as white children."

2. That the neighborhood school plan with accompanying attendance zones was established and continued in irregularly shaped patterns compelled by the unique topographical characteristics of Cincinnati combined with its man-made barriers in the form of railroads, expressways, etc.

3. That during a relatively short period of time when there were no substantial changes in attendance zones, twelve Cincinnati schools changed to a heavy concentration of Negro pupils.

4. That the only two schools not in the neighborhood system (a special college-prep high school and a technical training high school) were substantially integrated.

5. That there was no evidence showing gerrymandering of attendance zones to exclude Negroes, but to the contrary the evidence showed that where geography permitted, the school board had drawn zone lines and chosen sites for new schools which, initially, were designed in part to increase integration.

6. That in several cases where new schools were built or construction of new schools begun in neighborhoods where the school-age population was predominately white, a rapid transition in the racial composition of the areas resulted in nearly an all-black student body either at or shortly after such schools were opened.
7. That the evidence established no relationship between the racial composition of a neighborhood involved and the decision of whether or not to build a new school there.

8. That the school board had consistently and successfully defended (on the basis of the neighborhood school policy) litigation instituted by white parents who did not want their children to attend schools with black children. Applications for transfer from one school to another to avoid attendance at schools with other races have been denied.

9. That the testimony of the expert witnesses (professors from Antioch College) for the plaintiffs was of negligible probative value because (a) neither had ever set foot in a Cincinnati school or knew anything about the system, (b) neither could explain consistent with their theory of educational damage why one 100% white school was being over-achieved by every predominantly black school in the system, and (c) both conceded that any deleterious effects were just as likely the result of family and neighborhood influences beyond the control of the school board as they were from attendance in a racially imbalanced school.

10. That virtually every possible proportionate combination of white and black children exists in some school in the Cincinnati system. Five schools in the system with exactly the same median score on the Stanford Achievement Test had the following percentage of Negro pupils: 0, 8, 15, 99 and 100.

After making these and other findings of fact, the trial judge reaffirmed his judgment in favor of the school board. Plaintiffs again appealed, the Sixth Circuit affirmed, and the Supreme Court again refused to hear the case [419 F. 2d 1387 (1969)], cert denied [402 U.S. 962 (1971)]. In affirming, the appellate court referred to its earlier decision in Northcross vs. Board of Education of
City of Memphis, Tenn., 302 F. 2d 823 (1962), cert. denied 370 U.S. 944 (1962) where it outlined the minimal requirements for non-racial schools:

Minimal requirements for non-racial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right.

The Sixth Circuit then reaffirmed its view stated in its first Deal decision that there is no constitutional duty owed by a school board to bus white and black children away from their neighborhood schools to correct a racial imbalance resulting from a racially neutral neighborhood school system.

While the Supreme Court's denial of certiorari ended the Deal case, a virtually identical lawsuit has again been filed by the N.A.A.C.P. against the Cincinnati Board of Education [Bronson vs. Board of Education of Cincinnati, 525, F. 2d 344 (1975)]. On January 30, 1975, the trial judge in the new case ruled that the plaintiffs could not now re-litigate questions that had been or could have been presented in the earlier Deal case. That ruling was appealed by plaintiffs to the Sixth Circuit which ruled in September of 1975 that events occurring prior to the Deal case could not be used as the basis for finding a violation. However, the court stated that evidence of pre-Deal activities would be admissible "for background purposes" (Bronson).
The Dayton Case. The factual situation in Brinkman vs. Gilligan, 503 F. 2d 684 (1974) is considerably different from that of Cincinnati in Deal because the Dayton school board admitted, and the court so found, that racial segregation in the Dayton schools existed because of actions and inactions of the board. Further, in 1969 the Acting Director of the Office for Civil Rights, United States Department of Health, Education and Welfare notified Dayton school authorities that they were in violation of Title VI of the Civil Rights Act of 1964 because of the racially motivated assignment of teachers such that the vast majority of black teachers were assigned to predominantly black schools.

Then, in 1971, the Ohio State Department of Education presented recommendations to the Dayton School Board to further integration in Brinkman stating:

Inequality of [educational] opportunities, for minority and majority students, has characterized the Dayton public school system throughout its history.

Since the Board, as an agency of state government, has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative duty to comply with the Constitution.

In 1971, a citizens committee of the Dayton Board presented resolutions on redistricting, reassignment of students to achieve a statistical racial balance with the use of buses where necessary, and elimination of optional
attendance zones with the objective of complete desegregation within a year.

The Dayton community was enraged and in November of 1971 defeated two of the "pro-integration" school board members at the polls, replacing them with "anti-busing" candidates. On December 8, a lame duck board passed three resolutions recommended by the citizens committee by five to two votes. When the new members were sworn in on January 3, 1972, the reconstituted board immediately rescinded the three resolutions. That rescission action was found by the trial court to be part of a cumulative violation of the Equal Protection Clause of the Constitution. The Sixth Circuit in Brinkman agreed.

The cumulative effect of three factors was found by the Brinkman trial court to constitute a violation of the Constitution by the Dayton School Board: (1) racially imbalanced schools, (2) optional attendance zones, and (3) the Dayton Board's rescission of the three resolutions. That determination was affirmed by the Sixth Circuit. The evidence in Brinkman indicated that the optional attendance zones at times "embraced desires motivated by racial considerations," and as to two schools (Colonel White and Roosevelt) were "almost a classic example of segregation practice."
On appeal in *Brinkman*, the N.A.A.C.P. also pressed several other claims that Dayton Board action had unconstitutionally maintained and expanded the "basically dual school system inherited at the time of *Brown*." Contrast this with the Cincinnati situation in *Deal*, where the Sixth Circuit determined that there had been no state imposed segregation since 1887. The other areas challenged were (1) staff assignment, (2) school construction, (3) grade structure and reorganization, and (4) transfers and transportation. The Sixth Circuit in *Brinkman*, after examining the evidence in these areas, concluded that serious questions were raised "with respect to whether the District Judge's failure to include these four school practices within the cumulative violation was supported by substantial evidence." But the appellate court found it necessary to rule on that point because of its decision to remand the case for construction of a new remedy, the one set up by the district court being found inadequate. The Sixth Circuit panel in *Brinkman* stated:

Once the plaintiffs-appellates have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" (Keyes, supra, 413 U.S. 200, 93 S.C., 2693.) When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school desegregation are inadequate.
The Brinkman case was remanded for development of a new desegregation plan on August 20, 1974. Nearly a year later, the district court entered a new order, and once more it was found inadequate by the Sixth Circuit [Brinkman vs. Gilligan, 518 F. 2d 853 (1975), cert. denied, 96 S.Ct. 433 (1975)]. Without discussing details of that plan, the court found that while it would have some integrative effect, it would continue to leave most of the one-race schools identifiable as such. Because of the limited time remaining before the start of the 1975-76 school year, the case was remanded with instructions to modify the proposed plan so as to improve racial balance in as many schools as possible by September, 1975, and to adopt, no later than December 31, a plan for complete desegregation that would become effective for the 1976-77 school year. That final plan became effective in September of 1976, after being affirmed by the Sixth Circuit on July 26, 1976.

Cases Arising in Michigan. Within the last five or six years, the Sixth Circuit has considered school desegregation suits from six different Michigan cities: Detroit, Pontiac, Lansing, Benton Harbor, Kalamazoo and Grand Rapids. In every case except that of Grand Rapids, the school boards involved were found to be in violation of the Constitution in the operation of their schools -- the lower court finding, and the Sixth District agreeing, that de jure segregation existed. In every case the Sixth Circuit has
upheld fundamental findings of the the trial level court as to the existence of non-existence of discrimination.

This section will briefly review the Sixth Circuit opinions as to two of these cities: Grand Rapids and Detroit.

**Grand Rapids.** In *Higgins vs. Board of Education of the City of Grand Rapids*, 508 F. 2d 779 (1974) a district court decision in favor of the local school board and the State of Michigan was affirmed. In its opinion, the court in *Higgins* stated:

A review of the evidence and statistics in this case makes it clear not only that Grand Rapids was not guilty of acts of intentional segregation but that much progress has been made toward elimination of the de facto segregation resulting from housing patterns.

When it is considered that 50% of all middle school age blacks will attend majority white schools for the rest of their public education, and that all high schools and special schools are completely integrated, the progress which the Grand Rapids system has made despite the de facto residential segregation is notably substantial.

The Grand Rapids decision is noteworthy for the way it addressed several issues. First, it reiterated the view that a federal court has no authority to order desegregation absent a finding that the school board had acted or failed to act with the intention of creating or maintaining segregated facilities. Second, it found that while the phenomenon of "white flight" could not be used as an argument to
avoid court ordered desegregation, it was something that a school board could legally consider in attempting to formulate a voluntary plan to improve racial balance without at the same time losing the support and acceptance of the public. Third and last, the court rejected the plaintiff's contention that because the state had been found guilty of helping create de jure segregation in Detroit, it must also be guilty in Grand Rapids.

_Detroit_. *Bradley vs. Milliken*, 484 F. 2d 215 (1973) was a full court decision of the Sixth Court. Chief Judge Phillips wrote the decision for the 6-3 majority that upheld in part the trial court's order for a metropolitan desegregation plan. The trial court had found, and the Sixth Circuit agreed, that no remedy limited to Detroit city schools alone would be adequate to end segregation and that, because of state violations, the trial court was "not confined to the boundary lines of Detroit in fashioning equitable relief" (*Bradley*). But the Sixth Circuit also said that the metropolitan scope of the order must wait until the suburban schools, who were declared by the court to be necessary parties, were afforded an opportunity to be heard with respect to the scope and implementation of the remedy.

To the extent that the Sixth Circuit had agreed with the concept of a multi-district remedy in this case, it was reversed by a 5-4 vote of the Supreme Court in *Milliken vs. Bradley*, 418 U.S. 717 (1974) the court holding that
"absent an interdistrict violation, there is no basis for an interdistrict remedy . . . ." The trial court had received no evidence going to the presence of absence of an "interdistrict violation."

The Sixth Circuit in Bradley cited the following actions and situations as warranting a judgment against Detroit:

1. The use of optional attendance zones in areas undergoing racial transition residentially;

2. Busing black pupils to predominantly black schools which were beyond white schools with available space;

3. Selecting new school sites so that the vast majority of new schools [12 of 14 in the 1970-71 school year] opened as predominantly one-race schools;

4. The failure of the state to provide funds for transportation needs of students in Detroit while providing such funds for neighboring, mostly white suburban schools;

5. The approval by the State Board of Education of school site selections made by the Detroit board;

6. The state legislature's recission of Detroit's voluntary desegregation plan; and

7. In one instance during the 1950's, an arrangement with one predominantly black suburban school system whereby students in that suburb were bused into a black Detroit high school.

The Supreme Court in Bradley rejected items 4 through 7, stating that there was no evidentiary support that these actions had any racially discriminatory effect.
The district judge in Bradley had ordered the creation of a plan encompassing Detroit and 53 suburban school systems and had ordered the state to purchase 295 school buses to assist in achieving the same racial balance in every school. In its decision reversing the lower courts, the Supreme Court in Bradley stated that the Sixth Circuit and the Detroit judge had erred in assuming that because Detroit had a majority black school system that it was impossible to create a constitutionally valid unitary school system within Detroit.

The Detroit-only plan subsequently approved by the trial court was affirmed in part and reversed in part by the Sixth Circuit in Bradley on August 4, 1976. The part reversed involved the inclusion of teachers unsupported by a finding of violations involving teacher assignment and the exclusion from the plan of three virtually all-black areas of Detroit.

Cases Arising in Tennessee

Memphis. The case of Northcross vs. Board of Education, 489 F. 2d 15 (1973), cert. denied, 416 U.S. 962 (1974) has been before the Sixth Circuit Court of Appeals six times. The case first was considered by the Sixth Circuit in 1962, and in the interim was was reconsidered many times for various aspects of the litigation and planned desegregation efforts of the lower courts. The latest consideration
involved an appeal by the plaintiffs challenging the choice of the district court judge as to which desegregation plan to order implemented.

The trial judge selected the plan which would enable 83% of the students to attend school in a desegregated situation. To achieve this result, over 38,000 children would be bused to school. This plan would result in less desegregation and the trial judge explained his decision as being based upon effectiveness, feasibility and pedagogical soundness. Specifically, he stated, "those factors are times and distance traveled on buses, cost of transportation, preservation of desegregation already accomplished, and adaptability" (Northcross).

The Sixth Circuit in Northcross upheld the decision of the trial judge even though he had selected a plan that resulted in two high schools and four junior high schools continuing in existence as all black schools. The Sixth Circuit pointed out that it felt the district court's decision had been influenced by practical considerations as set forth in the Supreme Court decision of Swann.

Knoxville. After thirteen years of litigation, the Sixth Circuit in Goss vs. Knoxville Board of Education, 482 F. 2d 1044 (1973), cert. denied, 414 U.S. 1171 (1974) upheld in a unanimous full court decision a trial judge's order that a desegregation plan that permitted several identifiably black or white schools satisfied Constitutional
requirements for a unitary school system. The Circuit court pointed out that the school board had presented evidence of geographical and highway features that justified the trial judge's finding that it was unfeasible to transport pupils between non-contiguous zones for racial balance purposes. The Circuit court said that "If the result is different [from other school desegregation cases], it is only because the evidence produced in the district court required a different result" (Goss).

Chattanooga. The desegregation plan approved for Chattanooga schools presented a preplexing problem to the courts in Mapp vs. Chattanooga Board of Education, 525 F. 2d 169 (1975). Between the time a plan was tentatively approved by the trial court and the time it was ordered into effect, only 10 of 704 white high school students included in the plan re-enrolled in the Chattanooga schools. Therefore two high schools involved (out of four total) opened with a 99% black student population. The Sixth Circuit in Mapp, in upholding the trial court's decision not to further modify the plan, said:

[T]here can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board.
The Circuit Court rejected the plaintiff's argument that the school board had a duty to alter a plan when, after its implementation, a racial imbalance remains. Judge Edwards dissented, stating that he would have ordered plan modification.

Louisville, Kentucky. The suit seeking to desegregate the school systems in the Louisville, Kentucky area began as two separate lawsuits, one against the County school system for Jefferson County, Kentucky, and the other against the school district for the City of Louisville. The schools in Kentucky are structured slightly differently than those of Michigan and Ohio. In the case of Jefferson County there are basically only two school districts -- the City of Louisville and the County school system.

Initially, the trial judge dismissed both lawsuits and entered judgments on behalf of the respective school boards. This decision was reversed by the Sixth Circuit in Newburg Area Council, Inc. vs. Board of Education of Jefferson County, Kentucky, 489 F. 2d 295 (1973). In reversing the Sixth Circuit first looked at the county school system. It found that the Jefferson County School System involved 96,000 students, 4% of whom were black, and 65% of whom rode school buses to and from school. The county school board argued that the two or three elementary
schools that were predominantly black had become so because of changing residential patterns and not because of board action.

The Circuit Court in Newburg acknowledged that if the residential changes had been the sole reason for the existence of predominantly black schools within the county system, then there would be no constitutional problem. However, the court pointed out that one black elementary school had existed in the county system at the time of the Brown decision in 1954, at which time it existed as a black school because of the actions of the board. The court pointed out that if one state-imposed segregation was found to have existed as to any school in the district; then all vestiges of the state-imposed segregation were not eliminated as long as that school remained an all-black school.

The Court of Appeals in Newburg went on to examine the Louisville School District which at the time of the Brown case had operated a racially segregated system as then required by Kentucky law. It found that despite so-called "integration plans" adopted in the intervening years by Louisville Board of Education, that over 80% of the schools in Louisville remained racially identifiable. Since the effects of pre-Brown state-imposed racial segregation still remained in the Louisville school system, the Sixth Circuit also reversed the trial judge's dismissal of the suit against the Louisville Board of Education.
Subsequent to this 1973 decision, the Supreme Court came down with its Detroit decision which prohibited an order for cross-district busing absent the finding of some inter-district constitutional violations or violations by all the districts subject to the order. Because the Louisville and Jefferson County case involved an order covering all school districts in Jefferson County, the Supreme Court vacated the order and sent the case back to the Sixth Circuit for reconsideration in light of the Detroit decision. On remand, 510 F. 2d 1358 (1974), the Sixth Circuit distinguished the situation involving Louisville and Jefferson County for the situation of Detroit in the Milliken case.

The Sixth Circuit then re-entered substantially its prior opinion from 1973 and ordered the district court to formulate a remedy.

The Supreme Court in Newburg denied certiorari in April of 1975. The district court in Newburg then ordered a county-wide desegregation plan (exempting the small Anchorage Independent School district) into effect. That plan was upheld in total by the Sixth Circuit on August 23, 1976. In this case (Newburg) one of the most recent school desegregation decisions of the Sixth Circuit, the court dealt with four separate rulings of the district judge.

First, it upheld the judge's ruling that the school board's alternative proposal of "part-time desegregation" (whereby students would attend their neighborhood school
part of the day and be bused to an "away" school for the other part) was inadequate because it failed to convert schools from "white" schools or "Negro" schools to "just schools."

Second, it upheld the judge's rejection of a school board complaint that the plan ordered placed a disproportionate burden on black students. The Sixth Circuit pointed out that none of the black plaintiffs had complained of being over-burdened.

Third, it rejected a school board objection to an award of attorney's fees to the plaintiffs.

Fourth, it upheld the judge's exclusion of the virtually all-white (one black student out of 305 students) Anchorage Independent School District. That district operates a single K through 9 school with 305 students. The Sixth Circuit stated that no student had ever been excluded from that school because of race, nor was there any evidence that Anchorage had committed other racial segreatory acts or that its boundaries were drawn to exclude blacks. Citing the Supreme Court's opinion on Detroit, the Sixth Circuit held that absent such evidence "there can be no constitutionally required inter-district remedy involving Anchorage and Jefferson County."
It should be stressed that every city is different in its geography and in its school operations. It is thus difficult, if not impossible, to forecast how the Sixth Circuit will respond to an appeal from any of the cases in its jurisdiction. The record of evidence introduced at trial is crucial, for the Sixth Circuit's job will be to determine whether the trial judges' decision is supported by that evidence.
CHAPTER V

SUMMARY, FINDINGS OF THE STUDY, RECOMMENDATIONS AND IMPLICATIONS

Summary

Concepts about blacks have changed because society has progressed and changed. It is not realistic to assume that the legal structure of the United States is not affected by these changes. The decisions of the United States Supreme Court reflect the opinions of Justices as they are influenced by society as well as by their basic foundation in the Nation's legal structure.

Not only do social changes affect the Supreme Court Justices, the Justices in turn make decisions which affect more social change. The Brown I decision in 1954 has influenced the social status of blacks more than any one single event since the abolition of slavery.

Both the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution have greatly influenced the desegregation process. The 1964 Civil Rights Act may have caused more social change and less resistance to the desegregation orders of the Supreme Court than any
other legal action taken by the federal government since
the Brown decision.

It is obvious the de jure segregation in the South and
de facto segregation in the North have resulted in inferior
educational opportunities for blacks. It is likewise
obvious that such a "second rate" educational program does
in fact deny black students of their rights as afforded by
the United States Constitution and the Amendments thereto.

Although the ultimate responsibility of implementing
desegregation in public schools has been placed on local
school authorities, they have not accepted this responsibil­
ity. When this has happened, the courts have had to
force desegregation processes by direct mandate. During
the 1950's and 1960's, several states further complicated
the desegregation process by enacting legislation in an
attempt to main segregation. This attempt through legis­
lative enactments was a direct cause of litigation to
determine the constitutionality of those enactments.

The courts have said that any desegregation plan that
does not result in desegregation is not acceptable. Many
courts have required that either the plans or the proce­
dures utilized in the implementation be changed to achieve
the required result. To be acceptable, school desegregation
plans must include facilities, faculties, students, curricu­
lar, and extra-curricular activities as well as construction
programs. Additionally, transportation of students across school zone lines will be required by the courts if such transportation is essential to the disestablishment of segregation.

Based on the preceding chapters and the analysis of court decisions which have affected the organization, administration, and control of public schools on evidence collected from the social science and legal literature, the following are the principal findings, recommendations and implications which have emerged from this study.

Findings of the Study

1. There developed from 1850 to 1950 a broad body of statutory and common law at the state level which permitted and encouraged school policies and practices which did not meet minimum constitutional standards.

2. Educational classifications based on race invidiously discriminate and therefore violate equal protection of the laws.

3. In education, more than in any other field of human endeavor, "classification" is a widely used tool. And in schools, classifying factors such as I.Q., test scores, etc. are employed for the express purpose of categorizing students for unequal treatment.

4. There is no right to attend a public school, but there is a right to demand an equal educational opportunity from public schools (Roberts).
5. Education in many school districts is now being operated under the control and supervision of the courts.

6. Large scale federal court involvement in education came about primarily because of state statutes and educational policies which required separation of the races in public schools, and that such statutes and educational policies violated the equal protection clause of the Fourteenth Amendment, and were therefore unconstitutional (Brown).

7. The right to an equal educational opportunity is:
   -- an inalienable right within the Bill of Rights and the Fifth and Fourteenth Amendments of the United States Constitution;
   -- a fundamental right;
   -- a legal right;
   -- the right to be a human being.

8. The courts have not yet identified the constitutional right to demand a public school education.

9. Broad powers have been exercised by the federal courts in the enforcement of the right to an equal educational opportunity which include:
   -- opening of public schools closed by states to avoid desegregation;
   -- closing of public schools in the furtherance of desegregation;
-- invalidation of contracts for the sale of public school buildings where such sale would contribute to school segregation;
-- assignment of students and teachers to particular schools to achieve "racial balance";
-- and many other acts involving courts in the operation of public schools.

10. The equal protection clause of the Fourteenth Amendment empowers federal courts to actively intervene in a state function.

11. Federal courts in some areas of public education have tended to become and to act as the "real" administrators of the public schools thereby challenging the Tenth Amendment's concept of education as a state function.

12. Federal courts have adopted the practice of retaining jurisdiction over decided cases, thus extending their powers to act in the future if their words are not carried out by school authorities.

13. Federal courts have countermanded state legislative acts which are designed to avoid the desegregation of public schools and have ordered legislatures to take affirmative actions affecting public schools.

Recommendations of the Study

The past twenty-four years have shown that judicial decisions of and by themselves cannot bring equal
educational opportunities for all students. Only the appropriate school authorities, through proper leadership activities can accomplish this task. It is to this end that the following recommendations are made:

1. School authorities cease any delaying activities related to desegregation, implement a comprehensive quality education plan immediately, that thus concentrate all of their efforts on improving the educational program of their district.

2. Educational has always been under various legal restrictions. The complexity of these legal restrictions has grown by geometric proportions since the Supreme Court decision in Brown. And it is because of these growing complexities that it is recommended that school board members and school board attorneys need to have special training in school law, and they additionally need to keep abreast of the changing implications of the law upon education through inservice training and workshops.

3. School administrators also need to have at least a general knowledge of the implications of law upon education. Since many administrators never continue their formal education beyond the M.A. or M.Ed. level, it is recommended that colleges of education have a required course or courses in school law at the Master's level. This course should stress the complex interaction between
constitutional, legislative and judicial action and the public schools.

4. The increased attention of the courts in school affairs because of desegregation has made the general public and students more aware of the law and more concerned about their rights under those laws. Because of this, teachers need a better understanding of the law and how they are affected by it as a teacher. It is therefore recommended that this understanding can best be gained by introducing the teacher's position and the law into undergraduate education classes or by establishing undergraduate school law classes for all education students.

Recommendations and Questions for Future Research

1. What have been the legal actions when resegregation of public schools occurs.

2. Are the various differences in court rulings on public school desegregation based on legal interpretations or social norms?


4. Is public school desegregation improving the quality of public education?

5. How does public school desegregation affect community attitudes?

6. What are the positives and the negatives of public school desegregation?
Implications

The foregoing findings and recommendations can be shown to have direct relevance for the following areas of legal study in the field of education:

Personnel. School personnel policies and practices will be especially vulnerable to attack under the new equal protection standard. They are, for the most part, state mandated, they touch upon a "fundamental interest," and when challenged under the Fourteenth Amendment, they are subject to the "strict scrutiny" of the courts. The school district must be prepared to bear the burden of establishing a "compelling state purpose" which necessitates the continued use of the practices. This is true whether the practices are challenged because of their discriminatory effects or otherwise.

It probably goes without saying that personnel practices must be reasonable, otherwise they will fail even to meet the "traditional" test.

However, the traditional argument of "reasonableness" will not replace the need for the statement of a "compelling state purpose" when the courts examine with "strict scrutiny" such widely used personnel procedures as: "promotion list" and "manning tables" for advancement of employees; job assignments based on required degrees and diplomas; the "patterned interview"; teacher evaluation procedures--tests and interviews which measure teacher "skills, attitudes, and
knowledge" required for specific assignments; "cut-off" scores on employment and promotion examinations; differential salary schedules which classify on the basis of the job being done; teacher tenure and seniority systems; employee termination procedures; and compulsory retirement at a specific age. The school district's maintenance of a confidential "inventory of the skills, attitudes, and knowledge" of its teachers could be viewed as suspect, not only for its possible discriminatory effect, but also for the lack of a clearly established or self-evident "compelling state purpose" which necessitates school district collecting and maintaining such information about its employees. And it might as well be anticipated now, because it can be reasonably and logically expected to follow, that the state will eventually be required to establish the "compelling state purpose" which necessitates the requirement of the teaching credential itself.

Note also that testing and other employment practices which discriminate on the basis of race have already been enjoined by the United States Supreme Court on other grounds, i.e., "relation to job performance" [Griggs vs. Duke Power Company, 401 U.S. 424 (1971)]. This is true even in the absence of "discriminatory intent." Even though personnel tests and the requirement of degrees, diplomas, and credentials are shown to be "job related," it
may still be necessary, when they are challenged under the new equal protection standard, for the school district to show a "compelling state purpose" which necessitates the continued use of such practices.

Supervision. Supervisors will soon discover that they have a powerful ally and some new tool to assist them in their work. The ally is the courts, which are also looking with "strict scrutiny" at the practices and procedures used in the instructional programs at the schools. The new tools are court "decrees" and "mandates" which order changes made in the schools.

The supervisor's role as the instructional leader becomes even more significant and meaningful in the period of "education under supervision of the courts." He occupies the key position in effecting court-ordered change in the instructional program. As the "man in the middle" with a "court order in his pocket," the supervisor has a new form of persuasion for getting things done, and promptly too. His position, however, will still be a most difficult one.

Like personnel policies and practices described above, the procedures and techniques of supervision are not immune to "strict scrutiny" by the courts when they are challenged under the Fourteenth Amendment. A "compelling state purpose" will be required to justify those procedures used by supervisory to evaluate the performance and effectiveness of
teachers, the use of "rating indicies," the assignment of "teacher aides" and para-professionals to some schools but not to others, the unequal distribution of professional specialists (librarians, health and guidance counselors, etc.) throughout the district, equal opportunities for teacher development and growth, and so forth. For example, what "compelling state purpose" necessitates making a teacher's advancement on the salary schedule dependent upon her participation in the district in-service education program? Do we have sound evidence of the effectiveness of the particular in-service education program involved which would withstand "strict scrutiny" by the court? In staff utilization, the supervisory must begin to think in terms of the "compelling state purpose" which necessitates the various assignments of personnel and be prepared to defend his decisions under court scrutiny.

Supervisors who still use the old technique of "inspection and rating" for evaluation of teachers are especially vulnerable under the new equal protection clause, while those that employ newer techniques of "direction and guidance" will find their procedures easier to defend and more likely to withstand "strict scrutiny" when reviewed in court.

Governance. Far-reaching changes are occurring in the area of school governance. Some of these changes are
a result of federal court decisions which are silently
challenging the concept of education as a power reserved
to the states under the Tenth Amendment.

The revered concept of "local control" of public
schools has already been expressly disallowed by a number of
courts as not a valid argument for maintaining existing
school financing systems. In Serrano vs. Priest, 96 Calif­
ornia Reporter 601 (1971) the California court considered
"local control," which it assumed was a compelling interest
of the state, and then concluded that it was an insufficient
reason to justify the present fiscal scheme, noting however,
that no matter how a state finances its public schools, it
can still leave the decision-making power to the local dis­
tricts. In Robinson vs. Cahill, 287 A. 2d 212 (1972)
however, the New Jersey court took a sometimes dim view of
the value of "local control" and raised the questions as to
what extent such control is "real or mythical," described
it in one sense as "illusory" and concluded that it is
sometimes "control for the wealthy, nor the poor."

Local governance of public schools in some districts
has been critically circumscribed where it has been used by
the people to perpetuate discrimination based on race. So
fundamental a matter as the right of a school district to
sell property has been placed under the necessity for
proper court approval, as has the decision to build and
where to locate new school buildings, the appointment of
principals and other key school personnel. Other specific areas of governance which are particularly vulnerable include: school board decisions concerning student participation in the making of sensitive academic decisions; decisions affecting teacher unionization and collective bargaining with the school district; systems of teacher evaluation and accountability; state-mandated school district boundary lines; and student and teacher assignments to specific schools within the district, etc.

Finance. The "compelling state interest" test was first applied to school financing systems in August, 1971 when the Supreme Court of California announced in Serrano that education is a "fundamental interest," yet already that principle enunciated by the California court has been cited with approval and followed in courts across the country.

Since Serrano the courts in Cahill went one step further and applied the principle to another aspect of school financing, namely, holding not only that there is no compelling state justification for New Jersey's present school financing scheme, the court in Cahill further declared:

There is no compelling justification for making a taxpayer in one district pay a higher rate than a taxpayer in another district, so long as the revenue serves a common state educational purpose.
Further extensions of the Serrano principle into other areas of school finance can be expected to follow, including court scrutiny of how funds are distributed among individual schools within the district and possibly eventually with courts looking at line items in the school budget before it is approved. Having once put a critical item in the budget, can it be removed the next year by the school district with court approval and without reciting a "compelling state purpose" which necessitates the removal? Obviously, these are extreme examples which are not likely to occur very often, but they are within the realm of possibility since education is a "fundamental interest" with fiscal policies definitely touching upon that interest.

This leads us to the next logical and natural question which should be asked, namely: What limitations, if any, are there on this new judicial function, and how far down the road of court supervision and control of public schools must we travel before we encounter any of these limitations? What are the criteria which have been suggested in the literature for containment of this new judicial function? Is there some "institutional limitation" on how far the courts will be able to go in the supervision and control of the public schools? What constitutes violation of the concept of "judicial self-restraint?"
Limitations

We might perhaps begin by reflecting on the observation that "Once loosed, the idea of equality is not easily cabined" (Cox, 1966, p. 91). Gunther and Dowling (1970, pp. 1048-1049) discussing the directions and future expansion of the new equal protection in general, suggest that there are "institutional limitations" which eventually will serve as restrictions on operation of such judicial power. The fact is that a few court decisions within the school context have already acknowledged the courts' awareness of such institutional limitations. Recall Judge Wrights' regrets in Hobson about his lack of "expertise" in this area and his announced willingness to have educational matters "resolved in the political arena by other branches of government." Also relevant to this problem is Judge James P. Coleman's observation during the Memorandum Decisions, 425 F. 2d 1211 (1970) made in the midst of circuit court frustration over the lack of school district compliance with the Supreme Court's order in Brown, namely that it does no good to complain that the school people have had fifteen years in which to do something about segregation and yet have not done it:

As a matter of fact, most of the school districts now before us, if not all of them, have been under the supervision of the federal courts for as much as five years. I think it is quite clear what this proves.
When the Attorney General in Cahill expressed doubts about "the ability of the courts to grapple with an issue as large and complex as the public school system" Judge Butler, who had just "grappled" in a thirty-four page opinion with regard to the New Jersey school financing system, acknowledged that there is "merit" in this contention.

Statements, some of which have been cited elsewhere in this dissertation, have also been made by Supreme Court Justices cautioning the court about becoming a "super school board" especially the admonition by Mr. Justice Black concurring in Epperson vs. Arkansas, 393 U.S. 114 (1968), to wit:

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 of every public school in every hamlet and city in the United States. I doubt that our wisdom is no nearly infallible.

Other such cautioning dicta could be cited to support the thesis that there are "institutional limitations" which constitute a point where a system so large and so complex as the public schools will cause the court frustration and hence restrict further court activity in the area.

Finally, as a "staple diet," it is conceivable that the courts will tire of educational issues and will reasonably and rationally conclude that there are more important
problems for them to resolve, using Mr. Justice Black's words in *Karr vs. Schmidt*, 401 U.S. 1201 (1971) than "the length of the hair of schoolboys."

Notwithstanding anything that has been said above, the "state action" concept as applied to public education is not yet dead, and the Burger Court in none of its school desegregation decisions to date has shown an inclination to do away with it. "State action," then, appears to be a clear and present limitation, at this time, so far as the United States Supreme Court is concerned.

The Supreme Court's most recent decision in educational jurisprudence, *University of California Regents vs. Bakke* 76 USLW 811 (June 28; 1978) discusses the issue of "reverse discrimination." *Bakke* or the issue of "reverse discrimination" were not matters of concern in this dissertation. This dissertation is centered around such constitutional issues as "state action," education as a "fundamental interest," and de jure and de facto segregation primarily in a compulsory public school setting. *Bakke's* issues revolve around "reverse discrimination," that is a denial of college acceptance based solely upon race. Although this is a valid constitutional issue, it was not altogether pertinent to the focus of this dissertation and therefore not included.
A Final Word

"At last there emerges a rule or principle," declared Mr. Justice Cardozo in his *Nature of the Judicial Process* (1941, p. 48) "which becomes a dictum, a point of departure from which new lines will be run, from which new courses will be measured." Such was precisely the nature of the principle--education as a "fundamental interest," and from which new lines are being extended and new courses of action are being measured.

However, Cardozo cautioned that there is a "tendency of a principle to expand to the limits of its logic" (1941, p. 51), to which Chief Justice Burger expressly replied "... such expansion must always be contained by the historical frame of reference of the principle's purpose" [*Walz vs. Tax Commission*, 397 U.S. 644 (1970)]. This language makes it clear that the "historical frame of reference" intended for this new principle includes all aspects of education which have been discussed in this dissertation, namely, the organization, administration, and operation of the public schools and any activities touching thereon.
APPENDICES
APPENDIX A: CONSTITUTIONAL PROVISIONS WHICH HAVE IMPLICATIONS FOR PUBLIC SCHOOLS
Most of the decisions of the Supreme Court of the United States which have affected the operation of the public schools have involved one or more of the following Sections of the United States Constitution.

CONSTITUTION OF THE UNITED STATES

The Welfare Clause—Art. 1, Sec. 8

The Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .

Obligation of Contracts Clause—Art. 1, Sec. 10

No State shall pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The First Amendment

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

The Fifth Amendment

No person shall be deprived of life, liberty, or property, without due process of law; not shall private property be taken for public use, without just compensation.
The Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Fourteenth Amendment

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

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

It has been said that "numerous other references to education may be found in the Constitution, which empower the federal government to participate in the promotion of education (Bolmeier, 1968, p. 5).

Additionally, fourteen different excerpts from the Constitution were identified by the National Advisory Committee on Education which have in one way or another affected the development of education in the United States (Federal Relations to Education, Part II, pp. 4-9).
APPENDIX B: TABLE OF CASES
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TABLE OF CASES

United States Supreme Court Cases

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APPENDIX C

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APPENDIX D: NONLEGAL SOCIAL SCIENCE SOURCES
APPENDIX D

NONLEGAL SOCIAL SCIENCE SOURCES

The following are the nonlegal, social science sources, books and articles, cited in Brown to support the proposition that segregation of the races in the schools is harmful to the psyche of the child, namely, the now famous footnote 11, pp. 494-495:


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BIBLIOGRAPHY

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