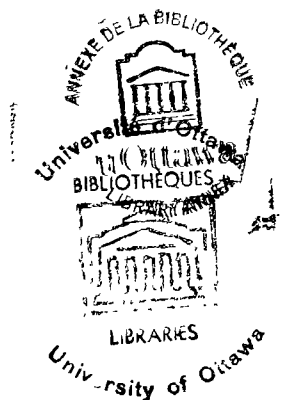


A COMPARATIVE STUDY OF PARENTAL RIGHTS IN EDUCATION
AS RECOGNIZED IN PIERCE V. SOCIETY OF SISTERS
AND SUBSEQUENT U.S. SUPREME COURT DECISIONS
UP TO 1969

by James Patrick Dooley

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CURRICULUM STUDIORUM

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INTRODUCTION

In 1922 the state of Oregon passed a referendum with its general population that had the effect of eliminating private schools as legitimate agents for the education of children between the ages of eight and sixteen. One group of private school teachers, the Society of Sisters of Jesus and Mary, brought suit with others to have the Oregon School Law overturned. After a decision favorable to the private schools by the U.S. District Court, the attorneys for the governor of Oregon, Walter Pierce, appealed the case to the U.S. Supreme Court for an overruling of the district court. The United States Supreme Court accepted the case as Pierce v. Society of Sisters, 268 U.S. 510 (1925). The Court was favorable to the private school owners in its decision and at the same time made a significant statement on parental rights in education.

From the time of the Pierce decision in 1925 up to and including 1969, the Supreme Court has made a number of decisions that bear upon parents' rights in education. All the U.S. Supreme Court cases in this area have been chosen for this study with exceptions listed later and will be compared with the Pierce doctrine. The purpose of the study will be to determine if the Court in its subsequent decisions dealing with parents' rights in education has remained

consistent with the doctrine of that found in the Pierce decision. The burden of the present study will be to demonstrate that the Court did remain consistent. The value in making such a study is both theoretical and practical. A theoretical value lies in making an analysis of the Court's decision in the Pierce case as compared to the Court's stance in subsequent parental rights cases. In this study the comparison will extend over a period of forty-four years in a restricted area of concern, parental rights in education. The practical aspect of the study will perhaps be the groundwork of research for studies on future Supreme Court decisions regarding parents' rights in education.

When surveying the literature on United States Supreme Court decisions dealing with parental rights in education, none was found that made a comparison of Pierce to all the subsequent decisions of the Court in this area. Remmlein's School Law¹ provided a source of brief comment on Supreme Court decisions pertaining to educational matters. However, her comment on the parental rights factor and Pierce was minimal. Such was also the case with Drury and Ray's Principles of School Law². Loughery, in a study made in 1952

1 Madaline Remmlein, School Law, Danville, Illinois, Interstate, 1962, vii-376p.

2 Robert L. Drury and Kenneth Ray, Principles of School Law, New York, Appleton, 1965, xv-356p.

and updated in 1957, Parental Rights in American Educational Law,³ dealt with the philosophy of parental rights from ecclesiastical teachings and the laws of various states. Included also were comments on some Supreme Court decisions including Pierce that were useful. Her thesis was basically that parental rights have had little to do with the making of court decisions.

A 1955 symposium from Law and Contemporary Problems⁴ dealt with the Supreme Court and educational decisions. The symposium was useful in that it contained some critique of the Court's decisions relative to Pierce. Its usefulness was restricted because of its date of composition.

Crowley made a brief study, "The Oregon School Case Reconsidered,"⁵ comparing Pierce to McCullum v. Board of Education, in which he held that the Supreme Court had over-turned the principles of Pierce.

Regan's study, "The Dilemma of Religious Instruction and the Public Schools,"⁶ held that the Zorach v. Clauson

3 M. Bernard Loughery, Parental Rights in American Educational Law, Washington, Catholic University of America Press, 1957, v-248p.

4 Robert Kramer, editor, A Symposium, "School Pupils and the Law," 20 Law and Contemporary Problems 1-195 (1955).

5 Joseph Crowley, "The Oregon School Case Reconsidered," St. Meinrad Essays, St. Meinrad, Indiana, 1951, 17-31p.

6 Richard J. Regan, "The Dilemma of Religious Instruction and the Public Schools," 10 Catholic Lawyer 46-54 (1964).

decision was in conflict with Pierce as were the decisions of Mc Collum, Engel v. Vitale, and Abington v. Schemp. His contention was that if the Court was going to insist on neutrality regarding religion in the public schools, this neutrality should not favor those who do not believe in God.

Even though individual studies were found, such as those mentioned above that dealt with Pierce in relationship to specific other Supreme Court decisions, none was found that traced the parental rights dimension in all the Supreme Court decisions dealing with educational cases to the present time.

This study will begin with a thorough study of the Oregon School Case, Pierce v. Society of Sisters. To accomplish this the Oregon School Law Referendum will be traced from its passage by the people of Oregon and its appeal to the U.S. District Court to its final appeal with the United States Supreme Court. The basic principle of the Court's decision will be summarized for its content regarding parental rights in education.

Chapter II will deal with seven cases decided by the Supreme Court from 1925 to 1948: 1) Farrington v. Tokushige, 273 U.S. 284 (1927), 2) Gong Lum v. Rice, 275 U.S. 78 (1927), 3) Cochran v. Board of Education, 281 U.S. 370 (1930), 4) Hamilton v. Regents, 293 U.S. 245 (1934), 5) Minersville School District v. Gobitis, 310 U.S. 586 (1940), 6) West Virginia State

Board of Education v. Barnette, 319 U.S. 624 (1943), and 7) Everson v. Board of Education, 330 U.S. 1 (1945). These cases are decisions of the Supreme Court dealing with parental rights in education. In each instance the background of the case will be summarized, the decision itself will be analysed in the light of the Pierce decision, and comments from legal studies on each case will be given.

Chapter III will follow the same procedure for the seven decisions of the Court made during the period from 1948 to 1969: 1) McCullum v. Board of Education, 333 U.S. 203 (1948), 2) Zorach v. Clauson, 343 U.S. 306 (1952), 3) two cases together, Brown v. Board of Education, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), 4) Engel v. Vitale, 370 U.S. 421 (1962), 5) Abington v. Schemp, 374 U.S. 203 (1963), 6) Board of Education v. Allen, 392 U.S. 236 (1968), and 7) Tinker v. Des Moines, 393 U.S. 503 (1969).

In both Chapter II and Chapter III only cases will be studied that dealt with parents' rights over minor children in matters pertaining to education in so far as a bona fide school was involved. Omitted will be cases involving tort or liability in as much as education was not primarily the object of such suits. Omitted also will be per curiam decisions that merely restated a former decision, and cases in a school setting involving others than parents of minor children. The burden of the study will not be per se aid to

private schools, separation of church and state, or segregation of schools although these will often be the basis for the suits before the Court.

The source for the background of each case and its argumentation will be the transcript of briefs as presented by the suing parties before the Supreme Court. The decision of the Court will be taken from the United States Reports which are the verbatim decisions of the Supreme Court justices.

The comparisons to the Pierce case will be made from a working definition taken from the principle of parents' rights as found in Pierce. Comments on the individual cases to be treated will be taken from legal studies found in the leading law school journals. These comments have taken on considerable importance for the Court in writing its decisions as is witnessed in a recent volume of United States Reports.⁷ Here numerous examples are found where Supreme Court justices have footnoted and authenticated their position with such studies.

The working definition for comparing Pierce to subsequent decisions dealing with parental rights was taken from the decision rendered in Pierce v. Society of Sisters. Here the Court said:

7 403 U.S. 1-763 (1970).

[. . .]that parents and guardians, as a part of their liberty might direct the education of their children by selecting reputable teachers and places [. . .]⁸

[. . .] we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control [. . .]⁹

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations.¹⁰

These three key quotations taken from the Court's decision in Pierce contain the basic principle of its parents' rights doctrine found therein. Three main elements seem to be found in the Court's statement: 1) parents have the right to educate their children; 2) independently of the state, and 3) free of undue force. In the instance of Pierce this meant that the Court upheld the right of parents over their children's education, that this right could be exercised outside the state school system, and that the state did not have the power to force the parents to do otherwise.

Thus the working definition for the comparison of Pierce with the cases to be studied in the ensuing chapters

8 Pierce v. Society of Sisters, 268 US. 510, 534.

9 Ibid.

10 Ibid., p. 535.

is the following: parents have the right to educate their children independently of the state and free of undue force. This principle as applied in Pierce will be the basic point of comparison. Interpreting Pierce in a manner broader than the stated opinion of the Court and the facts in the case will not be attempted in the comparison of decisions. The chief purpose of the study will be to compare the consistency of the Pierce decision with the other fourteen parental rights cases herein reviewed.

Along with the primary purpose of this study there are a number of practical and timely corollaries not only for parents but for legislators, administrators, and practitioners in the school situation.

The cases presented here will cover a wide variety of areas including not only the legal status of private schools but also such things as assignment of pupils to schools, auxiliary services to private schools, curriculum requirements, specific school regulations, and aid to religion in public schools.

A brief survey of the decisions treated will show the areas of coverage. The decisions of both Pierce and Farrington will deal with the stance of the Court regarding the legal position of private schools. The cases of Gong Lum and Brown will clarify the position of the Supreme Court with the

problem of assigning pupils to schools and specifically on the basis of race or national origin. The decisions found in Cochran, Everson, and Allen, will show how the Court viewed public aid for private school pupils. Hamilton will analyze the Court's holding with regard to required military training in the curriculum of a state university. Specific school regulations have seldom been adjudicated by the Supreme Court. But three cases revolving around specific school regulations were dealt with by the Court in Gobitis, Barnette, and Tinker on grounds of freedom of religion and freedom of speech. The problem of religion in the public schools was decided by the Court four times in Mc Collum, Zorach, Engel, and Schemp.

All the above problems are one that professional educators come in contact with in the course of functioning in the total educational situation.

Regarding future problems in parental rights it is safe to say that decisions by the U.S. Supreme Court are not finished. Since the time of the first parental rights case decided after Pierce, decisions have been made by the Court in the above area on the average of once every three years. Since the completion of the main body of research found herein, the Court has decided or agreed to review at least four cases that might be classified as parental rights problems. These cases involve the right of parents to conduct private training for their children in lieu of sending them

to approved schools, tuition grants by the state to parents of private school pupils, and the right of pupils to display on their person the flag of the Confederacy in public schools.

Preliminary research into available material on these latter cases seems to indicate that they are parental rights material. Future research will have to determine the Court's consistency with Pierce or the lack of it.

Thus, it is anticipated that although the basic research found in this study will be primarily of an analytic nature, there will also be found the element of timeliness and practically relative to the day to day affairs of education. In the conclusion to this study an attempt will be made to draw out some implications flowing from the analyses of the case presented.

In general, this study will include the presentation of the Oregon School Case, its decision by the Supreme Court, fourteen other parental rights cases decided after Pierce up to and including 1969, and a comparison of these cases with Pierce. The research will attempt to demonstrate that the Supreme Court has remained consistent with Pierce in its subsequent decisions pertaining to parental rights in education.

CHAPTER I

THE OREGON SCHOOL CASE

In order to analyze the Oregon School Case, Pierce v. Society of Sisters, 268 U.S 510 (1925), for comparison with other Supreme Court decisions in this study, the provisions of the Oregon School Law Referendum will first be presented. Next will be reviewed the appeal by the Society of Sisters to the federal district court. Thirdly, the case as presented to the Supreme Court will be studied especially with regard to its statement on parental rights.

1. The Oregon School Law Referendum

The Oregon School Case was initiated in 1923 to bring suit against Walter Pierce, Governor of Oregon, to enjoin enforcement of the Oregon School Law Referendum. This law had been passed by popular vote of the people of Oregon by a count of 115,506 to 103,685 on November 7, 1922.¹ According to the provisions of the referendum all grade school children in the state with few exceptions would be required to attend public schools. Basically, the law affected all children between the ages of eight and sixteen. Some exceptions were made for handicapped children and those that lived a long

¹ Oral Argument of Appellee, Second Day, No. 583, Oregon School Cases, Complete Record, Baltimore, Belvedere Press, 1925, p. 658.

distance from a public school. A fine or imprisonment could be imposed upon parents who refused to comply.² What private schools that could exist under these restrictions would be very few and very small.

Both in the brief of the appellee, the Society of Sisters, and in the brief of the appellant, the governor of Oregon, there were accusations of religious prejudice and cross denials. Guthrie and Hershkof, attorneys for the Sisters, said:

[. . .] it is unreasonable and unjust in the extreme to suggest obliquely and by innuendo that the religious schools of the state, Catholic, Episcopalian, Presbyterian, Methodist, Lutheran, etc., do not inculcate reverence and righteousness and are to be classed as 'red' or grouped with 'bolshevists, syndicalists and communists' as suggested at p. 46 of the brief on behalf of the Governor of Oregon!³

Chamberlain, Putney and Nyce, attorneys for Governor Walter M. Pierce, on the other hand stated:

Without any basis in fact is the charge (contained on p. 22 of the brief of counsel for the Society of Sisters of the Holy Names of Jesus and Mary), that the brief of the appellant [sic] contained an 'inexcusable and cruel libel' against the Roman Catholics.⁴

Prejudice on the part of the persons involved in the situations up to the time of the suit would be difficult to

2 The full text of the law is found in Appendix 1.

3 Brief on Behalf of the Appellee, Oregon School Cases, ibid., p. 271.

4 Brief of Appellant, ibid., p. 477-478.

determine. In any event a law of a state to require all children to attend public schools was unparalleled in United States history.⁵ A complete study of the history of education in Oregon might relieve the citizens of Oregon of prejudicial action.

Even though the new school law was not to take effect until September, 1926, it was deemed necessary to test the constitutionality of the law immediately in the federal district court. Serious dangers to the private schools in the state of Oregon were inherent in any delay in appealing the school law referendum. Kavanaugh, attorney for the Sisters, in his oral argument before the United States Supreme Court recalled:

As soon as the law was passed, private schools began to languish and decline; their patronage began to fall away; and they suffered actual and accelerating injury during all of the intervening period. So numerous were these withdrawals, due entirely to this law and to the threats to enforce it, that they would have been obliged to close their schools before the period of suspension expired.⁶

Nevertheless, the attorneys for the governor in their assignment of errors in the federal court district said:

⁵ Appendix II, State Laws Relative to Private Schools and Classified Summary Thereof, Oregon School Cases, ibid., p. 923-924.

⁶ Oral Argument of Appellee, Second Day, ibid., p. 677-678.

The court erred in failing to hold that plaintiff's suit is prematurely brought and that the injunction prayed for by plaintiff should for this reason be denied.⁷

The counsel for the Sisters in their brief denied that the suit was prematurely brought since they could not wait until the very last opportunity to arrange the settlement of the schools. They said:

Manifestly, therefore, it is in the interest of the state itself that a determination of the questions raised in the case at bar should be had as promptly as may be. Otherwise, it must be clear, irreparable damage is threatened, not alone to the appellee, but to the state as well. And there is no remedy whatever at law for the situation.⁸

For these reasons the legal counsel for the Society of Sisters of Jesus and Mary brought suit against Walter M. Pierce as governor of the State of Oregon in the federal district court, Oregon District.

2. Appeal to the Federal Court

Prior to the filing of the suit against the state of Oregon, in the federal district court, the attorneys for the Society of Sisters had obtained an injunction enjoining the enforcement of the amended Oregon School Law. This was done on November 7, 1922. Thus the case was carried to the

⁷ Assignment of Errors, U.S. District Court, Oregon District, Society of Sisters v. Pierce, 296 F 928 (1923).

⁸ Brief of Appellee, Oregon School Cases, ibid., p.244.

United States District Court, District of Oregon.⁹

Four questions were raised in the district court litigation. They were: 1) whether a corporation has the rights of a person, 2) whether the suit was prematurely brought, 3) whether there was undue exercise of police powers by the state, and 4) whether the schools were deprived of their property without the due process of law. Judge Wolverton stated the opinion of the court on these four counts. With regard to the questions of corporations having the rights of persons and the due process of law, he said:

[. . .] it is sufficient to say that it has been recognized by ample authority that, while not possessing the rights of citizens under the privileges and immunity clause of the Fourteenth amendment to the Constitution (Waters-Pierce Oil Company vs. Texas, 177 US 28,45), they do have the guarantee, along with citizens, that they shall not be deprived of their property without due process of law nor be denied equal protection of the laws.¹⁰

Thus Wolverton disposed of two of the questions, the one of rights of persons and the one of due process. He also pointed out that the ones partly affected by the enactment of the referendum law would be parents and children who were real persons by law. In explanation he stated:

⁹ Society of Sisters v. Pierce, 296 F 928. . .

¹⁰ Ibid., p. 931.

It can scarcely be contended that complainants' right to carry on their schools, whether parochial or private, is not a property right, and the rights of parents and guardians to send their children and wards to such schools as they may desire, if not in conflict with lawful requirements, is a privilege they inherently are entitled to enjoy.¹¹

Even though the Society of Sisters, an Oregon corporation, might not technically have rights as a person, at least those affected by the new school law were persons before the law.

Next was discussed whether the suit was brought to the court prematurely. It would be about two and one half years before the law went into effect from the time the complaint was entered into the court. In his decision Wolverton pointed out that with the building and maintaining of schools, there were many factors that could not be handled on short notice. Likewise, parents as well must look to the future to see whether educational services offered at the present would still be offered at a later date. The judge seemed aware of the problems involved when he stated:

The very purpose of placing the effective date so far ahead was to give ample time for the parochial and private schools to adjust themselves to the new conditions, which is really a confession on the part of the lawgivers that such schools are going to be hurt, and that seriously, if not irreparably.¹²

11 Society of Sisters v. Pierce, 296 F 928,933.

12 Ibid., p. 934.

The decision of the federal district court did not seem to consider the argument that the suit was prematurely brought a valid one. The damage to the schools was considered real now.

In dealing with the problem of whether undue police power of the state was exercised in the school law to be enacted, it recognized that the state does have some police powers. "What these powers are, the courts have not attempted to define precisely. But, without question, they relate to the safety, health, morals and general welfare of the public,"¹³ said the judge.

However, it was further pointed out that these powers cannot be used arbitrarily or in a manner detrimental to rights guaranteed by the Constitution. Likewise it was not disputed by the court that the state does have reasonable supervisory powers over schools in exercising its police powers and in some respects stands as parens patriae in preparing the child for duties as citizens. While granting these facts the court questioned:

The real test is, has the state, through its legislative functions, the power, under the guise of police regulation, to deprive parochial and private school organizations of the liberty and right to carry on their schools for teaching in the grammar grades?¹⁴

¹³ Society of Sisters v. Pierce, 269 F 928,935.

¹⁴ Ibid., p. 936.

In answer to his own question Wolverton responded that the Oregon School Law Referendum could not have been written more effectively "for utterly destroying the [. . .] complainants' schools [. . .] if it had been entitled 'An Act to Prevent Parochial and Private Schools from Teaching the Grammar Grades'".¹⁵

All through the stated opinion of the court there was evidence that it considered the new law as depriving the Society of Sisters of their property without the due process of law. Since the due process of law principle does apply to corporations generally, it was on this latter doctrine that the case was decided. In summarizing its verdict the court said:

So it is here, in our opinion, the state, acting in its legislative capacity, has, in the means adopted, exceeded the limitations of its power - its purpose being to take utterly away from complainants their constitutional right and privilege to teach in the grammar grades - and has and will deprive them of their property without due process of law.¹⁶

In summary of the questions disputed in the Federal District Court, District of Oregon, the opinion of the court held that even though a corporation does not have all the rights of persons, many of those affected by the school law were persons, i.e., parents and children. Secondly, the court determined that the suit was not brought prematurely

¹⁵ Society of Sisters v. Pierce, 269 F 928, 936.

¹⁶ Ibid., p. 938.

since there was a considerable time element involved in the operation of schools. Thirdly, it decided that there was undue exercise of police power in the proposed regulation in so far as its results were confiscatory of the property of the schools affected. Finally, it stated, that as a result of the new law, the schools would be deprived of their property without due process of law.

With this adverse decision in the district court, the attorneys for Walter M. Pierce, Governor of Oregon, on April 4, 1924, entered an appeal from the district court's order to the Supreme Court of the United States.

3. The Case Before the United States Supreme Court¹⁷

After all briefs for the appellant, the Governor of Oregon, and the appellee, the Society of Sisters of the Holy Names of Jesus and Mary, were presented, the United States Supreme Court accepted the cause for oral argument beginning on March 16, 1925.

In presenting the study of the case in the Supreme Court, first will be described the documents submitted by the appellant and the appellee, then an analysis of the argument for the appellant and the appellee. Finally, the opinion of the court will be given and the statement of parental rights will be studied.

¹⁷ Pierce v. Society of Sisters, 268 U.S. 510.

4. Presentation of the Briefs

Briefs were presented in the case on behalf of Walter M. Pierce as governor of the state of Oregon, the appellant, for the Society of Sisters, the appellee, for Hill Military Academy, and briefs of amicus curiae. Even though the case of Hill Military Academy was technically a separate one, it was heard in conjunction with the Society of Sisters because of the great similarity of the cases.

Hill Military Academy was a privately owned and operated school in the state of Oregon that would also be affected by the Oregon School Law. Briefs of amicus curiae were presented for the Domestic and Foreign Missionary Society of the Protestant Episcopal Church, for the North Pacific Union Conference of Seventh Day Adventists, and the American Jewish Committee.

a) The Briefs of the Appellant. - The appellant summarized his case on the grounds of the state's rights in education, on non-violation of the federal Constitution, and that liberty was not denied without due process. The appellant stated:

The whole matter may be summed up in the single statement that the regulation of education is a subject over which the states have exclusive control and with which the Federal Government has no authority to interfere.¹⁸

¹⁸ Brief of the Appellant, Oregon School Cases, *ibid.*, p. 464-465.

The appellant was taking the position that the state courts and the people of an individual state should settle problems of education in all its phases without any intervention from the federal government. On the question of compliance with the federal Constitution or the violation thereof the appellant claimed:

Moreover, if the new Oregon School law is declared to be in violation of the Constitution of the United States there is no legal principle on which any existing school law in the United States can be upheld. If a state cannot compel certain children to attend public schools, it cannot compel any children to do so.¹⁹

Thus, the appellant was accusing the federal district court of claiming at least by implication that some children could be compelled to attend the public schools but not all children. What the federal district court of Oregon did say was:

The right of the state to establish as its school policy compulsory education within its boundaries is conceded. Practically all the states in the Union have adopted such a policy. [. . .] but no state has ventured so far as to eliminate parochial and private schools from participating in the promotion of the policy.²⁰

The district court was not questioning the state's right to enforce compulsory education for all children but that this regulation may be fulfilled in any competent

¹⁹ Brief of Appellant, Oregon School Cases, *ibid.*, p. 475.

²⁰ Society of Sisters v. Pierce, 296 F 928,401.

institution of learning. Likewise, the appellant claimed that parent's rights in education were not within the scope of the federal Constitution. They were considered to be an area over which the individual states have control. He stated:

Another great class of rights which would appear to be just as clearly outside the scope of this clause [Fourteenth Amendment] are those arising out of family relations, including the rights of parents over their children. This is one class of rights which the Constitution leaves in its entirety to state regulation and state protection.²¹

It was the appellant's opinion, then, that the U.S. Supreme Court was without real jurisdiction in the matter, and it was only for the state of Oregon to decide how the compulsory school law was to be regulated and determined.

Further, the claim was introduced by the appellant in his brief that the Oregon School Law did not deprive any person of property or liberty without the due process of law. It was upon this question that the case was finally decided by the United States Supreme Court.

In re the depriving of persons of property without due process of law the appellant held that the high court had never applied this principle where private business was injured. In the present instance the principle was being applied to the state's role in education in relationship to the private schools of Oregon.

²¹ Brief of the Appellant, Oregon School Cases, ibid., p. 475.

The Supreme Court has never held that there was a denial of due process of law where a private business was injured or even destroyed by state competition in a field in which a state might lawfully engage. If a state may engage at all in any field, the question of the effect of state competition upon business is immaterial.²²

It might be noted that in no event could such a principle be held now even though there was some question about it at the time.²³ The attorneys for the state of Oregon recalled the case where the Prohibition Amendment to the U.S. Constitution deprived many businesses of existence.²⁴ It was also held that no persons were deprived of liberty without due process of law because it is a "well settled principle that the liberty protected by the Fourteenth Amendment is that of natural and not of artificial persons".²⁵

Schools were to be considered artificial persons by the law. But the appellant's brief also stated that the appellee could claim no interest in the liberties of children or their parents since "the compulsory attendance of all children of school age at the public schools during the relatively short hours during which these schools are in session would not deprive the parents of any just rights".²⁶

22 Brief of the Appellant, Oregon School Cases, ibid., p. 92.

23 26 LRA 498 (1910).

24 Brief of the Appellant, ibid., p. 92.

25 Ibid., p. 94

26 Ibid., p. 98-99.

Appellant was claiming that the control of minor children during the short period of the school day was not really depriving parents of their rights and liberties. He was holding that schools were the object of the suit, not parents and children.

A summary of the appellant's brief showed his defense was based on the superior rights of the state of Oregon over that of federal decision, that the United States Constitution was not violated, and that no one was denied liberty without the due process of law.

b) Briefs of the Appellee. - The appellee, the Society of Sisters of the Holy Names of Jesus and Mary, presented their brief together with the brief of the Hill Military Academy and those of the amicus curiae. Their argumentation was based on the premise that the United States Supreme Court did have jurisdiction in the case, that the new Oregon School Law was not a legitimate exercise of the state's police power and that the law was in violation of the liberty guaranteed by the Constitution.

In claiming that the federal courts did have jurisdiction, the attorneys for the appellee stated that since constitutional rights were involved, the United States Supreme Court surely was competent. They said:

The Constitution looks to the substance of things; and no amount of sophistry can alter the fact that in the case at bar the freedom of the parents, guardians and custodians to send their children to private or parochial schools is, in the strictest and elementary sense, of the very essence of the property rights of the appellee Society.²⁷

In other words, without strong patronage the schools of the appellee would surely cease to exist of necessity, and their cessation would occur as a direct result of the new Oregon School Law. Their private property was being directly affected by the statute's enforcement.

The brief of the appellee with regard to the excessive use of the state's police power stated that it had no quarrel with its reasonable application and that it was realized that liberty and property rights are not absolute. Nevertheless, the provisos of the Oregon School Law were such that if applied as a matter of principle all schools of a private nature would go out of existence.

The legislation before the court manifestly carries within itself a threat, not merely to the private elementary and preparatory schools which it now practically proscribes, but to every private or religious preparatory school and every private or religious college or university in the land.²⁸

²⁷ Brief of the Appellee, Oregon School Cases, ibid., p. 249.

²⁸ Ibid., p. 256.

The Oregon School Law was seen to be more than regulatory; it appeared also to be destructive. If it were applied with its fullest legal implications, the appellee considered that it would eventually rule out all schools which were not state schools no matter on what level of education these might be.

Violation of constitutional liberties was also considered by the appellee to be a consequent result of the proposed legislation. The appellee summed up the violation of these liberties:

This law was aimed at the destruction of the private schools by requiring parents and guardians to send their children to the public schools. The arrest and prosecution of offending parents and guardians would directly affect the persons named in the statute. It would invade the natural right of the parent to direct the education of his own. It would deprive the teachers in the private schools of the right to earn a living in a lawful calling. It would deprive children of their right to acquire useful knowledge in a private school. And, finally, it would deprive private schools of their property right in the patronage of the schools, and of their right to engage in a lawful and useful occupation.²⁹

This vast array of rights was held to be violated by the Oregon statute, and all of these rights were viewed as guaranteed by the Constitution under the Fourteenth Amendment clause.

²⁹ Brief of the Appellee, Oregon School Cases, ibid., p. 318-319.

Since the "unlawful coercion of the parents who patronize the private schools is a matter of vital interest to the appellee,"³⁰ the matter of parental rights was introduced into the briefs. Even though no parents were a party in the proceedings, they were considered as affected in that they were denied a proper place in which to exercise their option of educational facilities for their children. The appellee quoted the case of Meyer v. Nebraska, 262 U.S. 390, wherein the United States Supreme Court upheld the right of Meyer to teach German in his school and the right of the parents to avail themselves of this school contrary to the law of Nebraska.³¹

Parental rights of child control were considered of prime importance in the case. The appellee stated:

The family, with the parents' authority over and duty to care for the children, and with the childrens' reciprocal duty of obedience, existed before governments began and will perhaps outlive them. Free government is built around the family, and it cannot long endure if the sanctity of the home be not preserved and parental authority is essential to the sanctity of the home.³²

In applying this principle to the educational situation the appellee had earlier stated "that it is our view

30 Brief of Appellee, Oregon School Cases, ibid., p. 321.

31 Ibid., p. 322.

32 Ibid., p. 323.

[. . .] that the parent has a natural right to the custody and control of children, and that included therein is the right to direct and control their education."³³

Further, it was pointed out that "compulsory education laws are made for the exceptional parent who refuses to perform his duty in that respect."³⁴

Sending children to competent private schools was not considered by the appellee as a refusal to perform this duty. Nor was the competence of the private schools genuinely contested by the appellant.³⁵

In summary then, the briefs of the appellee contained claims that the United States Supreme Court was competent to hear the case at hand, that the Oregon School Law should be considered an excessive use of the police power of the state, and that the liberties of parents and children, as well as the property rights of the appellee were violated, contrary to the guarantees of the Fourteenth Amendment to the Constitution.

c) Briefs of Hill Military Academy.- Although separate briefs were submitted to the Court for Hill Military

³³ Brief of the Appellee, Oregon School Cases, ibid., p. 322.

³⁴ Ibid., p. 323-324.

³⁵ Ibid., p. 336.

Academy, they were presented at the same time as those of the Society of Sisters, and their oral argumentations were made together. The reason for dealing with the two cases as one was their almost identical nature and purpose. Hill Military Academy was a private school operating in the state of Oregon and would also be affected by the new statute.

d) Briefs of Amicus Curiae. - Three religious groups indicated support of the legal position held by the Society of Sisters by filing briefs of amicus curiae. The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America which had at least one school in the state of Oregon indicated that they were vitally interested in this legislation because they operated over one hundred schools throughout the nation. If this legislation were approved by the United States Supreme Court, it would possibly be duplicated in other parts of the country. They stated:

If this attempted amendment becomes the law, it is almost inevitable that similar attempts will be made in other states threatening the whole structure of religious education and morality. This Society will be hindered in the pursuit of its chartered purposes and many of its members will be deprived of the cherished privilege of serving God and their country by devoting their time and their means to the training of children in morality and virtue through the teachings of the Bible.³⁶

³⁶ Briefs of Amicus Curiae, Oregon School Cases, ibid., p. 584.

The second brief of amicus curiae was offered by the North Pacific Union Conference of Seventh Day Adventists. Their brief and argumentation centered around three legal points. It was claimed that the Oregon statute infringed upon constitutional rights, that the state has no right to impair contracts vested within it, and that the exercise of police power must be reasonable and necessary.³⁷

A third brief of amicus curiae was filed by the American Jewish Committee. The basic premise of their agreement with the statement of the appellee was that the Oregon statute was a denial of fundamental human rights, and that it placed excessive powers in the hands of the state. The American Jewish Committee brief pointed out that

This legislation is clearly calculated to confer upon the public schools a monopoly in education. That would tend with absolute certainty to the suppression of all religious instruction, the importance of which cannot be minimized. [. . .] Fundamentally, therefore, the questions in these cases are: May liberty to teach and to learn be restricted? Shall such liberty be dependent upon the will of the majority? Shall such majority be permitted to dictate to parents and children where and by whom instruction shall be given?³⁸

The attorneys for the American Jewish Committee considered the new law to be a violation of the above liberties.

³⁷ Briefs of Amicus Curiae, Oregon School Cases, ibid., p. 591-592.

³⁸ Ibid., p. 614

All the briefs of the amicus curiae were in fundamental agreement with the appellee in the case and were desirous of lending moral support in defense of his position.

5. Oral Arguments Before the Supreme Court

The case of Pierce v. Society of Sisters³⁹ came before the United States Supreme Court on March 16, 1925. Appearing for the appellant, the Governor of Oregon, was the Honorable George E. Chamberlain, and the Honorable Willis S. Moore, assistant attorney general for the attorney general of Oregon. Presenting the case for the appellee was William D. Guthrie, esq., and the Honorable J. P. Kavanaugh.

a) The Case for the State of Oregon. - Mr. Moore was the first to present the case for the appellant. He stated at the outset that he would not any longer discuss the questions whether the appellee had the right to bring action or that the case was prematurely brought. He recognized that these points had been decided by the lower court. The request was made by him that the Supreme Court decide only on the constitutionality of the matter. Thus, Mr. Moore stated that he would restrict his remarks to the constitutional questions, i.e., deprivation of property without the due process of law,

³⁹ 268 U.S. 510.

rights of parents to control the education of their children, the impairing of contracts, and the police power of the state.⁴⁰

Mr. Chamberlain, who appeared after Mr. Guthrie and Mr. Kavanaugh for the appellee, also pleaded at great length that there was no religious question involved such as he claimed the appellee had introduced. He also proposed the same constitutional questions as his partner, Mr. Moore.

In an interchange between Mr. Justice McReynolds and Mr. Moore the question of deprivation of property was brought clearly to point.

Mr. Justice McReynolds (interposing). Well, we do know, do we not, and are we not bound to know, that this act, if it is put in force, will shut up every parochial school?

Mr. Moore. Yes.⁴¹

The justice of the court, McReynolds, had been attempting to establish a fact in the case, and the above was the question and response. However, Mr. Moore said little on the question of the property rights and contracts. Mr. Chamberlain, his partner, did argue:

⁴⁰ Oral Argument of the Appellant, Oregon School Cases, ibid., p. 631.

⁴¹ Ibid., p. 646.

The property of the appellee is not destroyed, as insisted by counsel. The number of children in appellees' school is not large. Slight alterations in its buildings, therefore, if need be would fit them for the education of children after they get out of the public schools, or before they go there. The property is not destroyed, and it is not materially impaired.⁴²

Mr. Chamberlain further pointed out that even though the Oregon Legislature in 1915 made a law which prevented the vested interests of corporations to be impaired, he denied that in the present case any contract "was impaired or that the property was destroyed at all or was taken without the due process of law".⁴³

He made this claim on the grounds that the appellee was still able to use the property for school purposes even though it was only religious instructions and not the full elementary school curriculum. However, Mr. Justice Sutherland pressed this issue by further questioning whether the physical property was being discussed or whether it was its proper use that was concerned. Mr. Chamberlain then restated that he considered the appellees as still having the use of their property in connection with schools, meaning for the use of religious instruction before or after the regular school hours.⁴⁴ The Supreme Court justice then questioned:

⁴² Oral Argument of the Appellant, Oregon School Cases, ibid., p. 692.

⁴³ Ibid., p. 695. ⁴⁴ Ibid.

Mr. Justice Sutherland. That is only a partial deprivation? Is that your idea?

Mr. Chamberlain. Well, I would not put it as strongly as that, if your Honor please. This Court has held in a number of cases that the indirect losses which come from the exercise of the police power cannot be complained of by the parties affected.⁴⁵

The discussion on the point of property deprivation was concluded by Mr. Chamberlain for the appellant when he stated that

[. . .] there is no taking of property under the statute without the due process of law. The eminent Justice asked if I would concede that there was a partial taking of property? I do not concede that; because the property can be and is being used for school purposes.⁴⁶

When discussing the involvement of parental rights in the case, the appellant argued mainly from his proposition that the state had superior rights over the church which was governing the private schools. Mentioning the fact that Canon 1374 of the Catholic Church requires attendance at Catholic schools, Mr. Chamberlain stated:

I question the right of the Catholic, or any other church, to insist that its communicants and adherents have the absolute right to send their children wherever they please to be educated in the elementary grades, and I challenge the statement, that there is any liberty to the parents or to the children under the rules of the Church. As between the two, the church and the state, the state has the paramount right.⁴⁷

⁴⁵ Oral Argument of the Appellant, Oregon School Cases, ibid., p. 695.

⁴⁶ Ibid., p. 696.

⁴⁷ Ibid., p. 683.

This statement by Mr. Chamberlain was used to strengthen his claim that the Oregon law was actually protecting the rights of children rather than hindering them. He had earlier stated: "These rights - important, we concede - the Oregon statute does not abridge; but it protects the rights of the children in the right to free education."⁴⁸

It was also pointed out by the appellant that he did not consider the rights of parents over their children as absolute. He quoted the case of Tillman v. Tillman, 26 L.R.A. 781, where a father was restrained from bargaining away his child to another person other than its mother to become effective after his death. The court had considered this an illegal restraint upon the child.

Little further was stated by the appellant on the subject of parental rights, but he did discuss the impairing of contracts and the nature of the contractual charter of the Society of Sisters with the state of Oregon. Mr. Chamberlain indicated that the Oregon constitution which was in effect at the time of the appellee's charter was granted provided that:

⁴⁸ Oral Argument of the Appellants, Oregon School Cases, ibid., p. 682.

[. . .]'corporations may be formed under general law; but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights'⁴⁹

Mr. Chamberlain was saying that the appellee's charter to conduct schools was granted under the general laws of the state and that any provisions of their charter could not be held as "binding upon any subsequent legislature."⁵⁰

Following the original constitution in 1906, the Oregon constitution, he stated, was changed so that the legislature had the power to amend or repeal any charter. This initiative process under which the Oregon School Law was voted upon by the people was the creation of the Oregon legislature. Thus, if the people in practical effect amended a charter, it should be considered legally amended.⁵¹

Regarding the legitimate exercise of the state's police power, Mr. Chamberlain said:

I admit and it goes without saying that there must be a reasonable ground for the exercise of the police power. It must not be arbitrary and unreasonable; and there must be some relation between the evil sought to be cured, and the means adopted by the act to cure it. But I claim that that is all that exists in this case.⁵²

⁴⁹ Oral Argument of the Appellant, Oregon School Cases, ibid., p. 693.

⁵⁰ Ibid., p. 694.

⁵¹ Ibid., p. 695. ⁵² Ibid.

Earlier Mr. Chamberlain had told the Court what he considered to be the reason why the people of Oregon had voted to pass the Oregon School Law. He appraised it as reasonable and a legitimate means of curing an evil.

[. . .] my own opinion is that there was an intense feeling upon the part of the people of Oregon that there should be a greater democracy cultivated amongst the people, and for that reason the school law involved was adopted.⁵³

He also stated:

[. . .] it was adopted [. . .] not to Americanize particularly, but to democratize the children and to cut out this social and group class feeling that exists when they attend any sectarian or private school.⁵⁴

The state of Oregon was insisting that the need to "democratize the children" and the elimination of "social and group class feeling" were the good to be produced and the evil to be eliminated which warranted the exercise of police power called for by the Oregon School Law. Evidence that the appellees' school did not "democratize the children" or that they produced "social or group class feeling" seemed to be lacking except in the appellant's implication that they were extant. The appellant offered no studies or surveys from which they might draw some conclusions in this respect.

⁵³ Oral Argument of the Appellant, Oregon School Cases, ibid., p. 691.

⁵⁴ Ibid.

Mr. Moore, for the appellant, took notice of the question of whether this law was a legitimate exercise of the state's police power. He had stated that the people of Oregon surely had taken all implications of the law into consideration when they voted on it and therefore, the presumption was in favor of the law.⁵⁵ He claimed

That the presumption is that the people took into consideration the condition that existed; and they determined as a result of that, that the instruction imparted in the private schools and the parochial schools was not adequate, or that some other good and competent reason for this law existed; and as a result of that it was enacted; and that in the absence of ability on the part of this Court to say, of its judicial knowledge, that the determination was unfounded and that it constituted an unreasonable and arbitrary deprivation not based on sufficient fact. . . .⁵⁶

It was at this point that Mr. Justice McReynolds interrupted the statement of Mr. Moore and said:

Mr. Justice McReynolds (interposing). Well, we do know, do we not, and are we not bound to know, that this act, if it is put in force will shut up every parochial school?

Mr. Moore. Yes.⁵⁷

However, Mr. Moore claimed that the right to exercise the police power rested primarily with the people. If they had the power to enact the laws of compulsory education,

⁵⁵ Oral Argument of the Appellant, Oregon School Cases, ibid., p. 646.

⁵⁶ Ibid.

⁵⁷ Ibid.

then they had the right to enact the law compelling all children to attend public schools. He insisted that the limitations of the power were with the people and "it is within their power to make that conclusive and absolute [. . .]"⁵⁸

The chief justice approved the principle as stated by Mr. Moore but with a conditioned question. He said: "Unless it violates some of the rights secured by the Constitution?"⁵⁹

Mr. Moore countered the question of the chief justice by saying he would agree with him if they were not rights surrendered by the people to the state.

In summary, the oral argument for the appellant, the governor of the state of Oregon, contended that the property of the appellee was not being deprived without the due process of law since he could still use it for religious purposes. Secondly, the appellant held that parents' and children's rights were not impaired but rather protected by the Oregon School Law. Thirdly, the charter of the appellee to conduct schools was legitimately restricted by the voters of the state of Oregon. Finally, he opined that the exercise of the police power was not arbitrary or unreasonable since the exercise of it was left to the determination of the people.

⁵⁸ Oral Argument of the Appellant, Oregon School Cases, ibid., p. 646.

⁵⁹ Ibid., p. 649.

b) The Case for the Society of Sisters. - The case for the Society of Sisters, the appellee, was argued principally on the constitutional questions involved. However, much emphasis was placed on two of these, the alleged misuse of the state's police power and the violation of parental rights.

William D. Guthrie proposed at the outset in his oral argument five constitutional points for the Court's consideration. These five contentions were: (1) the appellee Society was a corporation and was entitled to sue in its own right; (2) even if not entitled to sue in its own right, the Society could complain of a law destructive to its patronage; (3) the contention was made that the private school was entitled to protection of liberty and property under the Fourteenth Amendment to the United States Constitution; (4) the power of regulation does not extend to the power of prohibition, and (5) the rights of parents and guardians to the choice of education for their children is a fundamental liberty and guaranteed by the federal Constitution.⁶⁰

The power of regulation and parental rights were most discussed by the appellee. Mr. Guthrie also emphasized that the state of Oregon was alone and exceptional in making a law that did not recognize private schools "as proper substitutes,

⁶⁰ Oral Argument of the Appellee, Oregon School Cases, ibid., p. 651-653.

either eo nomine[sic]; or under terms that clearly include them" in fulfilling compulsory school law requirements.⁶¹

He further pointed out Oregon's position was unique on compulsory education in so far as "Oregon alone prohibits parents from sending their children to private or religious schools, striking at Catholic and Protestants alike".⁶²

It was his contention that the other states in the union had a more tolerant law regarding the freedom of choice in education, when he said:

All other states have recognized the philosophy of this subject, and that is that the end and goal of the state, the legitimate end and the legitimate goal of the state, should be and really is education, and not the particular form in which the education shall be imparted.⁶³

Thus, Mr. Guthrie held that Oregon stood alone in its refusal to permit private schools to act as educational agents fulfilling compulsory school laws.

Mr. Kavanaugh, attorney for the appellee, contended that the Oregon School Law was not regulatory but destructive. He said:

It was never intended as a regulation. It was intended as a complete elimination of all private primary schools in the State of Oregon, and that would be its inevitable effect. That was conceded by the Attorney General today.⁶⁴

61 Oral Argument of the Appellee, Oregon School Cases, ibid., p. 657.

62 Ibid., p. 658. 63 Ibid. 64 Ibid., p. 675.

In reality Mr. Kavanaugh was introducing the question of how far the police power of the state should be permitted to extend. Mr. Guthrie had earlier questioned where the police power would stop if completely unlimited. He contended with regard to the Oregon School Law

[. . .] if held constitutional by this Court, the decision in these cases would necessarily recognize a legislative power in the several states to suppress every private, every denominational, every parochial, and every religious private school in the country.⁶⁵

Obviously, Mr. Guthrie considered the new law eventually destructive of private schools in greater extension than the law itself provided.

Mr. Kavanaugh reinforcing his partner's argument pleaded that the police power not be permitted to destroy.

Now, this kind of a measure is not a legitimate exercise of the broad and undefined police power of the state. Schools are subject to reasonable regulation, on account of the nature of their service.

But the power to regulate is not the power to destroy. There is no evil that could possibly develop in these schools that could not be remedied or corrected by regulation. It is admitted that there are none now, but even if there were, regulation could control them.⁶⁶

In addition to claiming that reasonable regulation could control problems in the schools, Mr. Kavanaugh pleaded that regulations had successfully controlled businesses and

⁶⁵ Oral Argument of the Appellee, Oregon School Cases, ibid., p. 661.

⁶⁶ Ibid., p. 675.

other such enterprises, and he failed to see why they could not control real or alleged abuses in schools.⁶⁷

Both attorneys for the appellee emphasized their position further on the legitimate use of police power, but it was summarized by Mr. Kavanaugh:

And if there be the power in the state to destroy the private primary school; that same power could later destroy the great private universities, and require all children to attend state conducted schools. Once that power is conceded, who will shorten its arm? It is a dangerous power, a power that was never contemplated by our constitutional guarantees.⁶⁸

The appellee seemingly felt the state of Oregon had already gone beyond constitutional bounds in its use of the police power in dealing with the schools.

The question of parental rights in education occupied a prominent position in the constitutional argumentation of the appellee. Mr. Guthrie considered the rights of the parents sacred and of long standing when he argued:

First and foremost, the law involves the sacred rights of parents in the discharge of their duty to educate their children, a truly sacred right and duty, which Blackstone declared 150 years ago, and Puffendorf long before him, was the greatest of all the rights and duties of the parents.⁶⁹

67 Oral Argument of the Appellee, Oregon School Cases, ibid., p. 675.

68 Ibid., p. 676.

69 Ibid., p. 664.

Even though he was pressing strenuously for the recognition of the parental rights in this case, Mr. Guthrie argued that the people of the state did not have to choose between two conflicting liberties since the

[. . .] liberty of parents to send their children to private schools does not abridge or interfere in the slightest or remotest degree with liberty of other parents to send their children to public schools.⁷⁰

By denying liberty to one group none was added to the other group nor would recognizing the liberty of the private school or parents deny any liberty of the public schools or parents.⁷¹

Mr. Kavanaugh had indicated his position on parental rights in education in his opening remarks by claiming:

The rights here involved are vital and fundamental. They are inherent, and not derivative. These natural rights existed before constitutions were made; and they will exist after constitutions are dissolved. They were not created by constitutions, but they are certainly secured and protected by them.⁷²

The appellee apparently had no intention of yielding the point that these rights could be bargained away, even by law.

⁷⁰ Oral Argument of the Appellee, Oregon School Cases, ibid., p. 666.

⁷¹ Ibid.

⁷² Ibid., p. 673.

The two principal arguments in favor of parental rights in education were these. First, the rights of the parents are basic rights which the state had no right to destroy or compromise to the point of near destruction. It was the contention of the appellee that the Oregon School Law brought these rights to the brink of annihilation. Secondly, it was held that in recognizing the rights of the private schools and their patronage, the parents, there was no denial of liberty to any other group and specifically public school parents.

In summary the case for the Society of Sisters included a defense of the appellee's constitutional rights, and an allegation that Oregon was the only state in the union not recognizing the private schools as satisfactory to fulfill compulsory school law regulations. The appellee also pleaded that the use of police power invoked by the Oregon School Law was excessive. It was further contended that said law also denied the basic right of parental determination in educational affairs. These were rights which constitutions did not create, but did protect.

With the presentation of briefs from both the appellant and the appellee and with their oral argumentation completed, the case was ready for a decision by the United States Supreme Court.

c) The Decision of the Supreme Court. - Mr. Justice McReynolds delivered the opinion of the Court in the case of Pierce v. Society of Sisters, 268 U.S. 510. After restating the facts in the case, he indicated the allegations and contentions of the appellee. He further indicated what he considered to be the results of the Oregon School Law. He based his decision on the doctrine of Meyer v. Nebraska, 262 U.S. 390 (1923), and affirmed the denial of property rights without due process of law as ruled by the lower court. The latter case had defended German language usage for instruction in schools.

The facts in the case were indicated to be these. The Compulsory Education Act adopted November 7, 1922, under the initiative provisions of the Oregon State Constitution required all children between the ages of eight and sixteen to be sent to the public schools by parents, guardians, and others having charge of a child. A few insignificant exceptions were provided by the act. Mr. Justice McReynolds said what he considered was the purpose of the act.

The manifest purpose is to compel general attendance at public schools by normal children, between eight and sixteen, who have not completed the eighth grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.⁷³

73 Pierce v. Society of Sisters, 268 U.S. 510, 530.

The results of the law seemed clear. The appellees' schools would be greatly harmed by the law, and Justice McReynolds recognized that such harm was already taking place. He further indicated that the appellants had "proclaimed their purpose strictly to enforce the statute".⁷⁴

The justice of the Court took cognizance also of the fact that the Society of Sisters was a long established corporation in the state of Oregon with power to care for and educate children and that "there is nothing in the present records to indicate that they failed to discharge their obligations to patrons, students or the state".⁷⁵

In its decision the Supreme Court took note that the appellee Society alleged conflict between parental rights and the new enactment. Further, it was noted that unless enjoinderment of the act was decreed, the business and property of the corporate Society would suffer major harm. The same allegations were accepted in the case of the appellee, Hill Military Academy. The claims of the appellee in the words of the Court were

74 Pierce v. Society of Sisters, 268 U.S. 510, 532.

75 Ibid., p. 534.

[. . .] that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, [. . .] and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of the measure is enjoined, the corporation's business and property will suffer irreparable injury.⁷⁶

The Court had accepted two allegations of the appellee, the one regarding parental rights, and the other regarding protection of property.

The Supreme Court also pointed out that the decision of the federal district court of Oregon had already ruled in favor of the appellee against the deprivation of property and patrons' free choice.⁷⁷

No question was raised concerning the power of the state reasonably to regulate schools and their personnel. Nor was there any problem as to the right of the state to require such academic subjects and training as to insure good citizens and citizenship or to prevent those elements "manifestly inimical to the public welfare."⁷⁸

It was admitted by the Supreme Court, however, that the appellee was a corporation and as such had no strict right to relief under the provisions of the Fourteenth

76 Pierce v. Society of Sisters, 268 U.S. 510, 532.

77 Society of Sisters v. Pierce, 296 F 928.

78 Pierce v. Society of Sisters, 268 U.S. 510, 534.

Amendment of the Constitution. But since they did have both business and property they were entitled to claim protection. The decision of the Court stated with regard to the appellee:

But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this Court has gone far to protect against loss threatened by such action. (Truax v. Raich, 239 U.S. 33; Truax v. Corrigan, 257 U.S. 312; Terrace v. Thompson, 263 U.S. 197).⁷⁹

The Court was accepting the plea of the appellee for relief from the Oregon statute in regard to their business and property but it was not granting the appellee as a corporation liberty under the Fourteenth Amendment. The Court ruled that the appellee could not claim relief for themselves as such.⁸⁰

There were two constitutional principles upon which the United States Supreme Court based its decision. It was "liberty" and the "due process of law" provisions of the Fourteenth and Fifth Amendments to the U.S. Constitution.⁸¹

⁷⁹ Pierce v. Society of Sisters, 268 U.S. 510, 535.

⁸⁰ Ibid.

⁸¹ U.S. Constitution, Article V. "No person shall be deprived of life, liberty, or property, without the due process of law."

Article XIV, Section 1. "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."

Regarding the "due process of law" principle, the Court indicated that no business has such an interest in prospective patronage that it could cause to be restrained any "proper power of the state" so as to protect its patronage.⁸² However; it indicated that here the state's exercise of its power was not "proper." The Court's decision said:

But the injunctions here sought are not against the exercise of any proper power. Appellees ask protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan and Terrace v. Thompson, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers.⁸³

As stated earlier, the Supreme Court affirmed the decision of the federal district court of Oregon which had declared that the Oregon statute deprived appellees of their property without due process of law. Now the Court was declaring why it agreed with the lower court, that is, because there was "arbitrary, unreasonable and unlawful interference with their patrons."

The Supreme Court concluded its decree on the alleged injuries by stating that it considered them "real" and "present."

82 Pierce v. Society of Sisters, 268 U.S. 510, 536.

83 Ibid.

The injury to the appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity.⁸⁴

It must be noted that the Court was basing its decision on an inequity caused by "unlawful" action. Earlier in the decision Mr. Justice McReynolds said that "there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education."⁸⁵ As a result there was no reason for this school law which would cause serious damage to the appellee or deprive him of his property without due process of law.

The other principle upon which the Court based its statement, and more important for this study, was the rights of parents in the education of their children. The precedent case upon which Pierce was based, the Court indicated, was Meyer v. Nebraska, 262 U.S. 390. The statement in the Meyer case was not spelled out as much as was done in Pierce. But the principle was clear. In Pierce the declaration of the Court was firm and pointed. It included a statement on the liberty of parents in educating their children, a broad principle on the relationship of government to the parents

84 Pierce v. Society of Sisters, 268 U.S. 510, 536.

85 Ibid., p. 534.

within its domain, and the position of the child and the state.⁸⁶ This was the statement of the U.S. Supreme Court.

Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the states to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations.⁸⁷

The Supreme Court also pointed out that they were reaffirming the decision of the lower court when they added a summarizing dimension to the above statement. The Court said "that parents and guardians, as a part of their liberty, might direct the education of their children by selecting reputable teachers and places."⁸⁸

These statements of the Supreme Court seemed to have three important elements in them: 1) the parents were considered as having the right to direct the education of their children; 2) this education could take place

⁸⁶ Pierce v. Society of Sisters, 268 U.S. 510, 534-535.

⁸⁷ Ibid., p. 534, underlining mine.

⁸⁸ Ibid.

independently of the state; and 3) it should be free of undue force. In the Pierce decision the Court was declaring that the Oregon School Law "unreasonably" interfered with the rights of parents to educate their children. It did not go so far as to say that parents would be allowed to educate their children in any manner whatsoever, or that no restrictions could be placed on them. No contention, however, was made in this case against the reasonable use of the police power of the state. Plainly though, the right to direct their children's education was considered by the Court to be part of parents' liberty.

In stating that "the child is not the mere creature of the state" and the parents might select "reputable teachers and places," the Court seemed to be recognizing both that the private schools were suitable for fulfilling the requirements of compulsory education laws, and that education could legitimately take place independently of the state. Again, there was no judgment on the part of the Court whether a school even of dubious or harmful nature would suffice, but the question before the bar did not seriously contest the quality of education being provided in the private schools. In any event the Court took no cognizance of it.

That parents should be free of undue force was indicated by the Supreme Court decision in its statement of judicial theory, viz., that the power of the states excluded

the concept of standardization of "its children by forcing them to accept instruction from public teachers only." This statement would also seem to indicate some freedom of curriculum as well as teachers. Even though the curriculum of the private schools was for the most part the same as the public schools, it did vary at least in its inclusion of religious teaching. The Court did not rule on whether a totally deficient curriculum would still suffice, but this point was not under contention.

The Supreme Court's decision, then, pointed clearly to the following doctrine. Parents have the right to direct the education of their children independent of the state and free of undue force. It is this doctrine of the Court which the present study will compare to subsequent United States Supreme Court decisions on educational matters. Some of the cases cited Pierce v. Society of Sisters; others did not, even though parents' rights or those of minor children were involved.

A summary of the Supreme Court's decision showed that it accepted the facts in the case as not controverted. The Court rejected the appellant's contention that no parental rights or property rights were violated contrary to constitutional guarantee. It affirmed the decision of the federal district court enjoining the enforcement of the Oregon statute. Likewise, the Court held that the exercise

of the state's police power was not proper and that both the property rights of the appellee and of the appellee's patrons, the parents, were violated. In so stating the Court indicated that there was ample precedent to warrant its protection of the business and property rights of the appellee. Such was held even though the appellee as a corporation was not strictly entitled to protection under the Fourteenth Amendment to the Constitution. The greatest emphasis in the Court's decision, however, was centered on the appellee's plea for the protection of parental rights. The Court went to considerable lengths to spell out its theory on parents' rights and their application in educational matters. It held that even though parents were not a direct party to the suits, it was their rights which inevitably would suffer from the enforcement of the law's provisos. The Court's conclusion, then, was that parents' rights in general were prior to those of the states.

d) Opinions on the Oregon Case. - Since the Oregon School Case decision, there have been many opinions expressed about it by members of the legal profession and others. In general they have considered the case historical and far reaching in its implications. Stephens said in 1928, a short time after the decision:

[. . .] this case is a landmark in constitutional law and political philosophy, and is a bulwark to the American and Christian theory of government. [. . .] the Oregon case asserts in no uncertain terms the fundamental Christian concept [. . .] that the state is not an end in itself and the people its creatures, but the state is a means of guaranteeing to the people certain inalienable rights [. . .]⁸⁹

Lovelace indicated that it was unreasonable for Oregon to try to impose public education on all children, and that it was significant that the Supreme Court handed down a unanimous decision to remand the law.⁹⁰

Seitz stated an opinion on the Oregon Case decision: "The high priority of a parent's constitutional right to make a choice between private and public schools seems very clear."⁹¹

Fellman indicated that the Court had faced squarely an important decision in educational policy where it touched upon religious conscience.⁹² Nolte and Linn classified it as

⁸⁹ Harold M. Stephens, "School, Church, and State," 12 Marquette Law Review 206, 230-231 (1928).

⁹⁰ James B. Lovelace, "Oregon School Law Case," 12 Virginia Law Review 146, 150 (1925).

⁹¹ Reynold C. Seitz, "Supervision of Public Elementary and Secondary School Pupils through State Control Over Curriculum and Textbook Selection," 20 Law and Contemporary Problems 104, 122 (1955).

⁹² David Fellman, The Supreme Court and Education, New York, Bureau of Publications, Teachers College, Columbia University, 1960, p. xi.

the "most famous of the cases concerned with compulsory attendance at school."⁹³ Loughery said that in this decision the United States Supreme Court further developed the doctrine of Meyer v. Nebraska by directly relating the parental rights to the rights guaranteed by the Fourteenth Amendment to the Constitution.⁹⁴ Warren commented that the case held the word "liberty" to include the rights of parents in the education of their children, but, that since no parents were a party to the case, it was decided on the basis of denying property rights to the corporation of the Society without the due process of law.⁹⁵ Gardner's interpretation of the high Court's decision was broad. He said that

'Liberty' [. . .] must include the right to exert one's will upon the course of history, not only by speaking one's mind to one's children, but by imparting one's mind to one's children; and the Supreme Court has three times affirmed this right [. . .] against all the authority of the State. [Footnoted, 262 U.S. 390; 268 U.S. 510; 319 U.S. 624.]

93 Chester Nolte and John Philip Linn, School Law For Teachers, Danville, Ill., Interstate Printers & Publishers, Inc., 1963, p. 221.

94 M. Bernard Loughery, Parental Rights in American Educational Law, Washington, Catholic University of America Press, 1957, p. 124-125.

95 Charles Warren, "The New Liberty Under the 14th Amendment," 39 Harvard Law Review 431, 455 (1926).

96 George K. Gardner, "Liberty, State, and the School," 20 Law and Contemporary Problems 184, 186 (1955).

Pierce v. Society of Sisters was one of the cases that Gardner considered to have protected the rights of the parents against invasion of the state.

The above opinion seemed to be representative of the feeling on the Oregon decision. None was found that considered it contrary to the spirit or the letter of the Constitution.

e) Overview of the Oregon School Case. - The Oregon School Case, as the basic case for this study, has been seen as originating with the passage of the Oregon Compulsory Education Law in that state. Its provisions required practically all children between eight and sixteen to attend the public schools.

Since the Oregon law affected most of the private schools in the state, the Society of Sisters of the Holy Names of Jesus and Mary, who conducted a number of schools in Oregon, along with the Hill Military Academy, also conducting a private school, filed a suit in the federal district court in Oregon to stay the enforcement of the law.

The federal district court handed down judgment favorable to the Society of Sisters and Hill Military Academy, and it enjoined enforcement of the Oregon School Law. It did so on the grounds that the law violated rights guaranteed by the Constitution. The appellant, the Governor of

the state of Oregon, then appealed the decision to the United States Supreme Court.

The appellant in his presentation of briefs to the Supreme Court contended that the Oregon School Law did not violate the federal Constitution, nor was any liberty denied without due process of law. The appellee contended in his briefs that the law did violate rights protected by the Constitution and that it was not a legitimate exercise of the state's police power. Hill Military Academy also filed briefs along with several briefs of amicus curiae.

The oral arguments of the appellant and the appellee polemically emphasized the position presented by their briefs. The appellant stressed non-violation of the U.S. Constitution, while the appellee emphasized denial of parents' rights to free choice of education. Both the appellant and the appellee agreed that the case should be decided on the constitutional grounds alone, and not on any other side issues.

The decision handed down by the Supreme Court was based on the doctrine of Meyer v. Nebraska and was in favor of the appellee, the Society of Sisters. The Court declared it considered property rights to be violated as well as parents' rights to freedom of choice regarding schools. The decision emphasized that the parents did have the right to direct the education of their children independently of the

state and free of undue force from the state.

Comments from professional legal sources and others considered the decision as significant in defining the position of parents in education and in determining the extent to which the Constitution could be construed in clarifying parents' rights.

CHAPTER II

CASES OF FARRINGTON TO EVERSON COMPARED WITH PIERCE

Within twenty years after Pierce v. Society of Sisters the Supreme Court of the United States handed down seven important decisions dealing with parental rights in education. The cases were Farrington v. Tokushige, 273 U.S. 284 (1927); Gong Lum v. Rice, 275 U.S. 78 (1927); Cochran v. Louisiana, 281 U.S. 370 (1930); Hamilton v. Regents, 293 U.S. 245 (1934); Minersville v. Gobitis, 310 U.S. 586 (1940); Board of Education v. Barnette, 319 U.S. 624 (1943); and Everson v. Board of Education, 330 U.S. 1 (1945). These seven cases dealt with rights of parents through minor children in the area of education. It seemed clear that the Court recognized them as such. The concern for parents' rights as stated in Pierce seemed apparent even though the contentions in the cases varied widely from Pierce. The force of Pierce as a precedent case was not invoked in each decision. Its doctrine, on the other hand, was neither denied nor reversed.

This chapter will include a background summary of each case, its legal presentation to the U.S. Supreme Court through the briefs, the decision of the Court in the light of Pierce v. Society of Sisters, and opinions from professional legal studies.

1. Farrington v. Tokushige

The case of Farrington v. Tokushige, 273 U.S. 284 (1927), was brought to the Supreme Court because of an allegation that parents' rights were denied by a law which prevented them from sending their children to a foreign language school. The facts in the case showed that a 1925 Hawaiian School Law forbade the teaching of the Japanese language to those who had not yet completed the eighth grade in elementary school. Tokushige, a Japanese parent, obtained an injunction against the law in a decision handed down by the United States District Court of Hawaii. The Circuit Court of Appeals affirmed this decision.¹

To obtain a writ of certiorari the plaintiff, Tokushige, appealed the case to the Supreme Court of the United States.

a) The Case for the Appellant. - The appellant was the territory of Hawaii in the person of Governor Wallace R. Farrington. The appellant stated that the purpose of the Hawaiian School Law was to regulate the Japanese Language Schools in such a way as to prevent them from providing anti-American and un-American ideals and incentive to the large foreign and American Japanese population. The statement

¹ 11 Fed (2d) 710 (1925).

of the attorneys for the appellant indicated the purpose of the law as they saw it:

If the judgment of the Circuit Court of Appeals stands, its substantial effect is to free the numerically preponderant element in the Territory, that is, aliens from any restraints in the education of their children - American citizens - in a way that will destroy their understanding and sympathy for American institutions and their allegiance to the Territory and to the United States.²

The appellant considered the Hawaii School Law a necessary measure to insure americanization of the citizen children born to Japanese parents living in the Territory of Hawaii. It was claimed by the appellant that allegiance to Japan and the Japanese emperor was taught in the language schools.³

A further claim was made that the children attending the language schools did so both before going to the public school and after the regular school hours with the resultant tiring of the children and lowering of the quality of their daily work.⁴ The appellant also alleged that regulating the Japanese Foreign Language Schools was not a violation of the U.S. Constitution and cited Pierce v. Society of Sisters to

² Petitioners Brief for Certiorari at 2, Farrington v. Tokushige, 273 U.S. 284 (1927).

³ Ibid., p. 3

⁴ Ibid., p. 4.

back his claim. The appellant said that in the Oregon case the state had "prohibited attendance of children between the ages of eight and sixteen years at any school other than a public school [. . .]"⁵ In passing it must be noted that the Oregon law did not state such; it stated that children must attend public school during the regular hours to fulfill the compulsory school law.⁶ The results of the alleged reading of the law could have been entirely different. Religious schools could still have met before or after the regular school hours. The appellant also used the Pierce case to point out that the Supreme Court was not in opposition to the reasonable regulation of all schools.⁷

b) The Case for the Appellee. - The appellee in the case was Tokushige, a Japanese parent of a minor child. The attorneys for Tokushige stated that the various regulations of the Hawaii School Law ruled out of existence the kindergarten sections of the language schools and restricted the other sections of the schools to a one hour a day operation.

5 Petitioners Brief for Certiorari at 23, Farrington v. Tokushige, 273 U.S. 284 (1927).

6 Biennial Report and Opinions of the Attorney General of the State of Oregon, State Press, Salem, Oregon, p. 199.

7 Petitioners Brief for Certiorari at 23, Farrington v. Tokushige, 273 U.S. 284.

This fact plus many inspections, controls, and fees, made the operation of the language school an intolerable burden.⁸

It was further alleged by the appellee that the Hawaiian school statute unreasonably interfered with parents' rights in the upbringing of their children. He cited Pierce in making this allegation. The appellee stated:

As we understand the decisions of this Court in the case of [. . .] Pierce vs. Society of Sisters, etc., 268 U.S. 510 [. . .] the fundamental principle as therein laid down, is that parents and guardians have the right, guaranteed by the Constitution, to direct the upbringing and education of children under their control, and this right or liberty may not be interfered with by legislative action that is arbitrary or without reasonable relation to some purpose within the competency of the state to enact.⁹

The problem of the case seemed to revolve around the question of whether the action of the Hawaii legislature was unreasonable and whether the provisos of the law were an excessive use of the territory's police power. It was upon these points that the U.S. Supreme Court was to render its decision.

c) The Decision of the Supreme Court. - Mr. Justice McReynolds, who had handed down the Pierce v. Society of Sisters decision, also gave the opinion of the Court in

⁸ Respondents Brief for Certiorari at 1-18, Farrington v. Tokushige, 273 U.S. 284.

⁹ Ibid., p. 19.

Farrington v. Tokushige.

The facts in the case based on the Hawaiian School Law provisions were not significantly disputed. These were restated by the justice of the United States Supreme Court.

As in the Pierce case, here again the justice made a statement of parental rights. He said:

Enforcement of the Act probably would destroy most, if not all, of them [language schools]; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.¹⁰

Mr. Justice McReynolds clearly elicited the Court's concern about the rights of parents to oversee the education of their children, but he also added a note about the property rights of the schools. He cited three precedent cases to uphold this position:

The general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents, and children in respect of attendance upon schools has been announced in recent opinions. Meyer v. Nebraska, 262 U.S. 390; Bartels v. Iowa, id., 404; Pierce v. Society of Sisters, 268 U.S. 510.¹¹

In both the Meyer and Bartels cases an injunction had been obtained restraining enforcement of state laws

¹⁰ Farrington v. Tokushige, 273 U.S. 284, 298.

¹¹ Ibid., p. 298-299.

forbidding the teaching of German in elementary schools. The Supreme Court had upheld these injunctions. In each of the three cases parental rights were considered by the Court as infringed upon.

The similarity of the Farrington decision and Pierce seemed quite apparent. In both cases the Supreme Court emphasized the rights of parents to guide the education of their children and to do so without undue interference on the part of the state. Similarly, in both cases the right of parents to use private schools was defended against the regulatory power of the state.

d) Opinions on the Case. - Legal publications were relatively silent in commentating on this case, perhaps because it was decided in a way that might be expected and in line with Pierce which had been only recently decided.

Ihrig, favoring the decision, stated that the "Supreme Court of the United States has added a fourth rock to the foundation of parental right to control the education of their children."¹²

Ihrig's "fourth rock" was a reference to the three cases cited in the Supreme Court decision together with Farrington. The Michigan Law Review, echoing the same

¹² H. William Ihrig, "Constitutional Law," 11 Marquette Law Review 158 (1927).

opinion, said:

This case is analogous to those of Meyer v. Nebraska, 262 U.S. 390, 43 Sup. Ct. 625 and Pierce v. Society of Sisters, 268 U.S. 510, 45 Sup. Ct. 571, the essential difference being that in the Meyer and Pierce cases the Fourteenth Amendment was applied as a limitation on the states, while in the principal case, the Fifth Amendment was similarly applied to the federal government.¹³

The above comment considered the Farrington decision as extending the doctrine of Meyer and Pierce to the federal government as well as to the states. At the time of the Farrington decision in 1927 Hawaii was not a state but one of the territories directly under the federal government.

In summary of the case of Farrington v. Tokushige, it seemed that the case was decided on the ground that the constitutional rights of Tokushige were violated by the Hawaii School Law. The Supreme Court also took into consideration the property rights of the foreign language schools. The decision compared closely with respect to parental rights to the previous case of Pierce v. Society of Sisters. Legal opinion also was found to be in accord with the decision of the Supreme Court.

¹³ James Barker Waite, editor, "Constitutional Law - Foreign Language Schools - Due Process under Fifth Amendment," 25 Michigan Law Review 906 (1927).

2. Gong Lum v. Rice

Because of alleged violation of parental rights in assigning a child to a specific school on grounds of race alone, the case of Gong Lum v. Rice, 275 U.S. 78 (1927), was decided by the Supreme Court of the United States. The case was carried to the high Court in an attempt to obtain overruling of the Supreme Court of Mississippi which had upheld the school board action.

Gong Lum was the father of Martha Lum, a minor child of the Chinese race but born a United States citizen. She was classified as a Negro for the sake of assignment to a Negro public school in the state of Mississippi.

According to Mississippi constitutional law whites were to be separated from Negroes in the schools. No separate school was provided in Martha Lum's district for Chinese students, and she was assigned to a Negro district for schooling.

Gong Lum, her father, a resident of the United States and the state of Mississippi, brought suit and obtained an injunction against the trustees and school board of Rosedale Consolidated High School, Bolivar County, Mississippi. The Supreme Court of Mississippi reversed this court judgment, and the petition against the trustees and the school board was dismissed. The case was then appealed to the United

States Supreme Court and accepted for review by it.¹⁴

a) The Appellant's Argument. - The appellant in the case was Gong Lum for his minor daughter, Martha Lum. An unusual line of argumentation was presented by the attorneys for Gong Lum. They did not see segregation of races as a factor in the case at bar. The objection of the appellant was that Martha Lum had been classified as a Negro which they claimed denied her equal protection of the law. The attorneys for Lum claimed that it was legitimate enough for the white race to protect themselves against social intercourse in schools with Negroes, but that this same protection against association with Negroes was denied to Martha Lum. The appellant stated that: "If there is danger in the association (with Negroes), it is a danger from which one race is entitled to protection just the same as another."¹⁵

The attorney pursued the same argument in claiming that the white race was taking an advantage which it was denying to the Chinese race:

The white race may not legally expose the yellow race to a danger that the dominant race recognizes and, by the same laws, guards itself against. The white race creates for itself a privilege that it denies to other races; exposes the children of other races to risks and dangers to which it would not expose its own children. This is discrimination.¹⁶

¹⁴ Brief and Argument for Plaintiff in Error at 3-5, Gong Lum v. Rice, 275 U.S. 78 (1927).

¹⁵ Ibid., p. 10

¹⁶ Ibid.

The principal question was not stated to be one of segregation of races but that Martha Lum of the Chinese race was not receiving equal rights with the white race. The problem of segregation per se was not even called into question. It was not the point for judication. It was only because Martha Lum was being forced to associate with Negroes in the school situation that she was considered to have been denied equal protection of the law.

The attorney for Gong Lum further indicated his concern for protecting his client from the adverse effect of association with Negroes because of the alleged racial peculiarities. He also indicated that white people did not involve themselves in social intercourse with Negroes and neither should the Chinese be forced to do so. The attorney stated his case thus:

But has not the Chinese citizen the same right to protection that the Caucasian citizen has? [. . .] Can we arrogate to ourselves the superior right to so organize the public school system as to protect our racial equality without regard to the interests or welfare of citizens of other races?¹⁷

Here again the appellant was not questioning the validity of segregation as such, but that Martha Lum was not being protected against influences of the Negro race in the same way that the white race was protected. His main thesis

¹⁷ Brief and Argument for Plaintiff in Error at 14, Gong Lum v. Rice, 275 U.S. 78.

was that the daughter of Gong Lum, of Chinese race, was a victim of discrimination and unequal protection, because she was classified as "colored" for school placement purposes. The attorney did not recognize that classifying Negroes as "colored" for this same purpose was discrimination. His brief said:

Color may reasonably be used as a basis for classification only in so far as it indicates a particular race. Race may reasonably be used as a basis. 'Colored' describes only one race and that is Negro.¹⁸

Mr. Flowers, attorney for Gong Lum summarized his case by indicating his opinion that the Mississippi Supreme Court erred in refusing to uphold appellant's demurrer, because Martha Lum was not "provided for equally with the children of the more favored race."¹⁹

b) The Case for the State. - The appellee, the Board of Rosedale School District, Rice et al., defended the decision of the Mississippi Supreme Court in denying admission of Martha Lum to Rosedale Consolidated High School on a definition of white race and the constitutionality of segregation. Parenthetically, it is to be noted that at this time the United States Supreme Court had not yet decided

¹⁸ Brief and Argument for Plaintiff in Error at 14, Gong Lum v. Rice, 275 U.S. 78.

¹⁹ Ibid., p. 21.

that segregation could no longer legally be held. The year was now 1927. Brown v. Board of Education, 347 U.S. 483, in 1954 abolished segregation as a principle.

Rush H. Knox, attorney general for Mississippi, stated in his brief approval for the Mississippi Supreme Court decision:

If children of Chinese birth are of the white race, the judgment of the Supreme Court of Mississippi should be reversed; otherwise it should be sustained.

Or if it is a violation of the Constitution of the United States to segregate the races in the public schools of the various states, then Section 207 of the Constitution of Mississippi is repugnant thereto and should be stricken down.²⁰

On the first question of who belongs to the white race, Knox's brief said:

[. . .] no one includes the white or Caucasian with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race.²¹

Citing the cases of Ozawa v. United States, 260 U.S. 178, and Yamashita v. Hinkle, 260 U.S. 198, the appellee claimed that the federal courts have held the meaning of white persons to include only those of the white race, the implication of the above being that white people are of all

²⁰ Brief and Argument for Defendants in Error at 2, Gong Lum v. Rice, 275 U.S. 78 (1927).

²¹ Ibid., p. 3-4.

different shades.²²

Even though the appellant, Gong Lum, had made no plea against state rules requiring segregation, the appellee for the state did introduce the question and requested that his case rest partially upon it.

He noted that the rule of segregation had been upheld by many courts on a variety of occasions.

This Court and a large number of state courts of last resort having upheld the right of the states to separate the races in the schools, we are unable to see wherein the refusal of the school authorities to permit plaintiff in error to attend a particular white school has deprived her of any right, privilege, immunity, or property.
[.]
Her only complaint being that she was not permitted to attend a particular school set apart for the education of white children alone, and that as a result she was deprived of the association of white children.²³

The appellee had rested his case on two points: what the law meant by white person and whether segregation was valid according to law and court decision. He was well aware that up to the time of the present case the United States Supreme Court relied upon the decision of Plessy v. Ferguson, 163 U.S. 537. In the latter case it was held that segregation of Negroes at least in transportation facilities

²² Brief and Argument for Defendants in Error at 9, Long Lum v. Rice, 275 U.S. 78 (1927).

²³ Ibid., p. 35-36.

was not contrary to the Constitution as long as the facilities were equal even though separate.²⁴ The subsequent decision of Brown v. Board of Education, 347 U.S. 483 (1954), stated that the principle of separate but equal was no longer satisfactory.

c) Decision of the Supreme Court. - In giving the decision of the U.S. Supreme Court, Mr. Chief Justice Taft made no statement of parents' rights although the parent of a minor child under his custody was involved. The chief justice said:

The case then reduces itself to the question whether a state can be said to afford a child of Chinese ancestry, born in this country and a citizen of the United States, the equal protection of the laws, by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.²⁵

In response to his own statement of question the chief justice indicated that this Court had already held the "right and power of the state to regulate the method of providing for the education of its youth at public expense is clear."²⁶

24 Brief and Argument for Defendants in Error at 26, Gong Lum v. Rice, 275 U.S. 78 (1927).

25 Gong Lum v. Rice, 275 U.S. 78, 85.

26 Ibid.

The second question to which the chief justice was responsive referred to whether equal protection of the law was denied in classifying a Chinese race citizen as among the colored race.²⁷ In responding to this question the Court said:

Were this a new question, it would call for very full argument and consideration; but we think it is the same question which has been many times decided [. . .] without intervention of the federal courts under the federal Constitution.²⁸

In neither of the two questions did the chief justice make a full review of the validity of segregation of the races, nor did he consider it to be the basic issue brought before the Court. Neither the appellant nor the appellee had raised the question. His decision was that Mississippi was within legal bounds in classifying Martha Lum as a Negro for assignment to a Negro school. The other question regarding segregation, not being contested, was not decided in this case.

When Gong Lum is compared to Pierce, it could be seen that although the parents of Martha Lum did not obtain the decision from the Court they desired, they still had the option open to them that was available to the parents in

27 Gong Lum v. Rice, 275 U.S. 78, 85.

28 Ibid., p. 85-86.

Pierce. These latter parents were recognized by the Court as having the right to send their children to private schools where their preferences could be sustained. The Lum parent could have sent his child to a private school where her Chinese origin would not have been a deterrent to being associated with white or any other color of children. This method of avoiding the regulations of the public schools might seem somewhat extreme and certainly would be classified as such after the Brown decision. Nonetheless, the parents in Pierce were sending their children to private schools presumably at some sacrifice and expense to themselves. What the Court had held in Pierce was that parents had a right to do this in order to have the desired teaching and conditions.

The Court in its Gong Lum decision did not take a broader stance than Pierce. Neither could it be said to overrule Pierce in its practical application since the private school option was still open to parent, Gong Lum.

d) Legal Response to the Case. - The weight of opinion about the Gong Lum case seemed to be that the Court should have made a complete review of segregation even though the Court's decision could be justified in the light of past Court decisions.

The California Law Review contended that many questions were left unsolved by this Court decision.

Directed deduction may allow the conclusion reached by the Supreme Court of Mississippi. Yet, it might reasonably be concluded that the many basic problems surrounding the question of separate schools have not been solved, and that the ultimate expediency of a system of completely separate schools is, to say the least, questionable.²⁹

This editorial opinion written in 1928 would scarcely need be expressed since the Brown v. Board of Education decision of 1954. However, on the other hand, segregation per se was not under legal review in Gong Lum v. Rice.

Raising an even more strenuous objection to the Supreme Court decision was the St. John's Law Review. It stated:

In the light of the advanced and progressive spirit of our western states, which do not deny scholars admission to any common school on the ground of color, the holding in the principal case is deplorable.³⁰

This writer's above objection was based on his belief that the Mississippi law was contrary to the spirit of the United States Constitution. In the same vein he said:

29 Evan Haynes, editor, "Constitutional Law: Schools and School Districts: Power to Classify Chinese as Colored Persons," 16 California Law Review 346,347 (1928).

30 J.M., "Racial Segregation in Public Education; Gong Lum v. Rice," 2 St. John's Law Review 215, 216 (1928).

Is not the statute of Mississippi, which has been held constitutional, hostile to the full spirit and law of the Constitution of the United States? If laws of like character should be enacted in every state of the Union [. . .] there would remain a power in the states [. . .] to interfere with the full enjoyments of the blessings of freedom [. . .]³¹

The Supreme Court was criticized and its decision deplored, because it had not completely reviewed the whole problem of school segregation. The Court could possibly have done so, and eventually would do so, but it was not the specific problem presented for its judgment in Gong Lum v. Rice. The narrow question was whether it was unconstitutional to classify Martha Lum with Negroes for school assignment. The Court said that it was not unconstitutional basing its decision on Plessy v. Ferguson, 163 U.S. 537, wherein it was decided that separate but equal facilities were not contrary to the Constitution. By lack of contention the school facilities where Martha Lum was assigned were considered equal to the ones where her parent wished her to be assigned. The Court was aware of a parent and a minor child being involved in the case. It did not invoke the specific doctrine of Pierce. But the Court on the other hand did not consider any basic rights of Lum being violated in such an assignment to a school. Its subsequent decision revoked or advanced from Plessy v. Ferguson not Gong Lum v.

31 J. M., op.cit., p. 216-217.

Rice. Brown v. Board of Education ruled out race as a basis for assignment to schools but it would not necessarily affect the assignment of Martha Lum to a predominantly Negro school because "negro" would no longer be a descriptive means of determining the classification of schools.

On the other hand after the Brown case Gong Lum would probably never have been brought to the Court. A question that could still be considered open is whether children may be assigned to a certain school for any cause against the wishes of the parents. Thus far it has not been brought to the Supreme Court. In fact, children are frequently assigned to various schools for various reasons against their parents' wishes.

In summary, it was seen that the Supreme Court in Gong Lum v. Rice made no outstanding contribution to the parental rights doctrine of Pierce v. Society of Sisters. But contrariwise, it could not be stated that the Court abandoned the doctrine elicited in Pierce. Neither did it claim that parents were not free to educate their children independently of the state and free of undue force. The Court in Gong Lum did not abrogate Pierce.

3. Cochran v. Louisiana

The case of Cochran v. Louisiana, 281 U.S. 370 (1930) dealt with the constitutionality of the state giving textbooks for the benefit of children who were not in the public schools of the state. The Supreme Court based its decision on the principle that the children and the state were the chief beneficiaries in the textbook grants and that no private organization thereby was assisted.

a) Background of the Case. - The general assembly of Louisiana in 1928 appropriated a sum of money sufficient to purchase school textbooks for the children of the state excluding those in colleges and universities. These funds were not to be delivered from the general funds but from a specifically applied Severance Tax imposed upon all natural resources severed from the land or water, such as, minerals, timber, oil, etc. All children, whether in public or private schools, were to benefit in the form of textbooks from the accrument of the Severance Tax.

Emmett Cochran, et al., all taxpayers and residents of the state of Louisiana attacked the constitutionality of said acts of the legislature of Louisiana. The supreme court of the state of Louisiana upheld the constitutionality of the acts of the state legislature and denied motions for rehearing. Thereupon the case was appealed to the Supreme

Court of the United States.³²

b) Argument of the Appellant. - The appellant, Cochran, alleged the unconstitutionality of the Louisiana Act. No. 100 and Act No. 143 which allowed tax money for the provision of school textbooks to all school children including those in private schools.

Two main arguments were presented by the appellant: 1) private schools do not come under the category of public use, and 2) furnishing free textbooks to private school children is an aid to private schools.

The appellant's first argument pursued the allegation that the private schools do not come under the category of public use because the private schools may restrict their patronage in any manner they desire and that the state is very restricted in the manner of control over the private schools. They held that even though education of children as such could be considered of some public concern, generally the support of schools by the state has been restricted to public schools.³³

³² Brief for Appellants at 1-3 and Brief on Behalf of Appellee at 1-8, Cochran v. Louisiana, 281 U.S. 370 (1930).

³³ Brief for Appellants at 19-20, Cochran v. Louisiana 281, U.S. 370.

Secondly, it was contended that the furnishing of textbooks to children attending private schools where tuition is charged was basic aid to these schools. Textbooks must be considered part of the equipment for such schools. Thus, this aid allowed by Act 100 and Act 143 of the Louisiana legislature was at least indirect aid to the private schools. Among these schools were ones that were operated for profit as well as ones that were sectarian.³⁴ So held the appellant.

The above argument was extended by the claim that even if the provision of free textbooks was not a benefit to the schools as such, at least it was aid to private individuals. Thus, they held that public funds would be taken for the benefit of private persons.

The attorneys for the appellants summarized their contention that public funds were being allotted for private use and alleged unconstitutionality for the Louisiana Acts by saying:

In the case of private schools, whether sectarian or not and whether run for profit or not, there is lacking this element of public control and common and equal rights of the public use. As regards the constitutional question, therefore, private schools stand on precisely the same footing as a privately owned manufacturing industry or any other private enterprise, and they have been so considered by this Court in the cases cited.³⁵

³⁴ Brief for Appellants at 20-21, Cochran v. Louisiana, 281 U.S. 370.

³⁵ Ibid., p. 26.

The appellant's allegation, then, was that aid to the private schools did not fall under any public use category and thus public aid to private schools as to individuals was invalid.

c) Argument of the Appellee. - The appellee in the instant case was the Louisiana State Board of Education et al. Their argumentation was threefold. It claimed that no taxpayers were being improperly deprived, that education of private school pupils was of a public character, and that the state had in the past given aid to private individuals when it partook of a public nature.

In pursuit of their first argument, the appellees alleged that no suing taxpayers were deprived of property without due process of law. It was pointed out that Cochran et al. were not paying the Severance Tax, but that it was paid by businesses engaged in marketing the natural resources of the state. None of those engaged in such business or paying the Severance Tax was party to the suit, and thus, Cochran et al. were not entitled to suit in the present case.³⁶

Secondly, the allegation was made that the monies used from the Severance Tax partook of a public nature in

³⁶ Brief on Behalf of Appellees at 3-5, Cochran v. Louisiana, 281 U.S. 370.

so far as they were used for the education of all the children of the state. The public benefit character of even the private schools was indicated by the claim that the state makes rules governing such schools. They said:

That the duty of the parent is to send his child to school, and the state may even coerce him by laws to compel child's attendance in school. There is no question but what the jurisprudence of the entire Nation is that the parent cannot be compelled to send his child to any particular school but rather to the school of his choice, whether it be private, parochial or sectarian.³⁷

This statement indicated appellees belief that even private schools are controlled to some extent by the police power of the state while respecting the parents' right to some free choice. The last part of their statement seemed an obvious reference to Pierce v. Society of Sisters decided five years previously. The appellees cited the following statement from Pierce v. Society of Sisters to strengthen their argument:

'The fundamental theory of liberty upon which all governments of this Union rest excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.'³⁸

³⁷ Brief on Behalf of Appellees at 8, Cochran v. Louisiana, 281 U.S. 370.

³⁸ Brief on Behalf of Appellees, ibid., p. 9 quoting Pierce v. Society of Sisters, 268 U.S. 510, 535.

The obvious implication of the appellees was that although the law allowed freedom for parents with regard to the choice of a public or private school, yet the public good was involved and so was the state. The state was considered within its rights in demanding compulsory education for all children.

Thirdly, the appellee showed numerous examples where the state of Louisiana in actual practice did assist private individuals from tax funds in areas where the public good was concerned. Such items were the dipping of cattle to remove ticks; vaccines for persons of all creeds, sects, and races; transportation of children to school; free passage of children over toll bridges and ferries; and dozens of others, all cases involving and affecting, as the appellee said, "health, morals or public policy [. . .]"³⁹

The question was then raised why there should be any complaint about the state providing textbooks to children.

Why, then should the state be condemned for supplying to the school children of the State those books which are needed under the educational system of the State, and how unreasonable, even illegal and unconstitutional, would it be to say, that only those who attend the public schools shall be supplied with the facilities of learning?⁴⁰

³⁹ Brief on Behalf of Appellees at 19, Cochran v. Louisiana, 281 U.S. 370.

⁴⁰ Ibid., p. 19-20.

The providing of textbooks to all children was considered a state act of a public nature as much as sprinkling the streets, lighting them, or providing parks.⁴¹ Upon this theory the appellees rested their case.

d) The Decision of the Supreme Court. - The United States Supreme Court in handing down its decision on Cochran v. Louisiana, 281 U.S. 370, made no specific statement whatsoever on parents rights. But since the whole decision dealt with matters of benefit to minor children, it was reasonable to suppose that parents' rights in education were directly affected.

Mr. Chief Justice Hughes affirmed the decision of the Louisiana Supreme Court in upholding the validity of Louisiana Acts 100 and 143, which allowed tax money to provide textbooks for all the children of the state. The chief justice contended that the children and education in the state were the primary beneficiaries of these acts. He stated:

⁴¹ Brief on Behalf of Appellees at 30, Cochran v. Louisiana, 281 U.S. 370.

The contention of the appellant under the Fourteenth Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose [. . .] The operation and effect of the legislation were described by the Supreme Court of the State as follows (168 La., p. 1020):

[. . .] The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries '[. . .] What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools.'

[.]
Its interest is education, broadly, its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.⁴²

The closing statement of the Chief justice's decision indicated succinctly his doctrine in the case. His position that the "individual interests are aided only as the common interest is safeguarded" implemented the Pierce decision. It fitted well with the principle held therein that parents may direct the education of their children without undue influence of the state. As in the Pierce case, the Cochran decision did not violate in the opinion of the Court "the common interest".

The Court's feeling in the Cochran statement seemed to be that although parents were exercising their right to free choice in education for their children, the Louisiana

42 Cochran v. Louisiana, 281 U.S. 370, 374-375 (1930).

statute was not seen unconstitutional in granting these same children the benefits of educational materials that were granted to all the public school children.

Even though no theory of parent-state relationships was explicitly spelled out in the decision, the Court in accepting the position of the Louisiana State Supreme Court accepted the opinion that the grant of textbooks by Louisiana statute was not to be denied just because parents were exercising the option of sending their children to a non-public school.

e) Opinions on the Decision. - Comment on Cochran v. Louisiana was scarce in the legal journals and what there was seemed to question the decision on how far it might eventually be carried. Law Notes posed a brief question about the extent to which the statement of the Court could be pursued. It said:

It is interesting to speculate to what extent, following the reasoning of the court, the state might go in making appropriations for the 'benefit' of the school children. Would athletic equipment, for instance, be prohibited?⁴³

Perhaps the author was writing facetiously, because at the time of this study athletic equipment is frequently furnished by one agency or another of the government on the

⁴³ M.B. Wailes, editor, "Cases of Interest," 34 Law Notes, 233-234 (1931).

local level. But Bruce questioned similarly and seriously about the reasoning of the Court.

There is, of course, much in this reasoning. How far, however, is it to extend? Are not other things necessary to an education as well as books? [. . .] May it pay the salaries of instructors on the theory that the gift is not made to the school but to the children therein? [. . .] The policy, in short, may be a questionable one.⁴⁴

The author did not seem to question the legality of the decision, but he questioned the wisdom of it and the extent to which it could be carried using the same principle.

Remmlein considered the child-benefit theory involved in the case.

As usual, much depends upon the language of a statute [. . .] At any rate, the statute was so stated that, on the ground of the child-benefit theory, the courts found nothing unconstitutional in it.⁴⁵

Child benefit was also parent benefit in that parents were relieved of the cost of books. The Court considered that giving the same benefits to parents' minor children in private schools in the form of textbooks as were given to public school pupils, at least, not contrary to the Constitution of the United States. Such was the case even though the

44 Andrew A. Bruce, "The Furnishing of Free Textbooks to Private Schools," 25 Illinois Law Review 547, 549 (1931).

45 Madeline Remmlein, School Law, New York, McGraw-Hill Book Co., 1950, p. 322.

parents were using the choice of sending their children to a private school.

Loughery also considered the action of the Court to be based on a child-benefit theory.

[. . .] the Child Benefit doctrine (has been) upheld by the United States Supreme Court in two historic instances.⁴⁶ Briefly this doctrine holds that legislation intended to facilitate the opportunity of children to get a secular education is for the benefit of said children and the resulting benefit to the State; hence it serves a public purpose.⁴⁷

The author seemed to find no cause for objection in the decision of the Supreme Court. The two cases of child-benefit of which she spoke were the instant case of Cochran and Everson v. Board of Education in which the high court considered it constitutional to transport children at the taxpayers expense to private schools.

Objections to Cochran presented no serious legal grounds even though some studies were dubious about the wisdom of the Supreme Court decision. Others recognized in the decision the theory upon which it seemed to be based, a child-benefit theory. This principle allowed aid to the child without giving it directly to the private school.

46 Footnoted by Loughery, Cochran v. Louisiana, 281 U.S. 370; and Everson v. Board of Education, 330 U.S. 1.

47 M. Bernard Loughery, Parental Rights in American Educational Law, Washington, D.C., Catholic University of America Press, 1957, p. 151.

Cochran v. Louisiana in review was seen to be a case challenging the constitutionality of a Louisiana law permitting the use of tax funds to purchase school textbooks for private school children of the state as well as the public school children. The law's proviso concerning the private school children was in contention. Allegation was made that the Louisiana statute was unconstitutional because it would use public tax funds for private purposes. The Supreme Court of the United States upheld the decision of the Louisiana Supreme Court. The Court approved the law on the grounds that the funds were for educating the children of the state and not for the benefit of the private schools themselves.

4. Hamilton v. Regents

The case of Hamilton v. Regents, 293 U.S. 245 (1934) brought to the U.S. Supreme Court an allegation that constitutional rights were denied in requiring minor students at a university to take courses in military training. Parents sued in the legal stead of their minor children. The Supreme Court, while defending the rights of parents in education, denied that these rights were absolute and refused to strike down the curriculum requirements of the university as unconstitutional.

a) Statement of the Case. - Two students of minor age, Albert W. Hamilton and W. Alonzo Reynolds, were dismissed from the University of California in October, 1933, for refusing to attend classes in military training. The University of California had been requiring courses in military training since 1868. The university was a land grant college and had received properties from the United States government under the Morrill Act of 1862. This act required training in military affairs as a condition for the free grant of land.

Hamilton and Reynolds petitioned the regents of the University of California for exemption from the military training classes on grounds that it violated their conscience as members of the Methodist Episcopal Church. This request was denied as well as the plea to make military training courses optional.

It was further indicated by Hamilton and Reynolds that the University of California offered courses they could not obtain except at another university which they said they could not afford.

Relief by writ of mandate was sought by the adult parents, Hamilton and Reynolds, from the regulations of the regents of the University of California. This writ of mandate was denied by the Supreme Court of California. After the denial of the California court, the case was appealed to the U.S. Supreme Court.

b) Arguments of the Appellants. - Two principal arguments were presented in the briefs by the attorneys for the appellants, Hamilton and Reynolds. First of all, it was claimed that the regents of the University of California could not impose a condition for education that would surrender the rights of the appellants guaranteed under the Constitution of the United States. The allegation was that a conscientious objection to military training on religious grounds was such a right. No question was raised whether the board of regents was permitted to regulate, to administer, or even to dismiss as long as the cause for doing so did not deny rights allegedly guaranteed by the Constitution.⁴⁹

The second argument pursued the belief that compulsory military training imposed upon religious and conscientious objectors violated their religious freedom without due process of law.⁵⁰ In the following statement the appellants claimed that being forced to take military training at the university violated their freedom of religion. Appellants called upon the weight of Pierce to sustain their position that religious freedom had been upheld in a school situation.

⁴⁹ Brief of Appellant at 22, Hamilton v. Regents, 293 U.S. 245.

⁵⁰ Ibid., p. 23.

Certainly freedom of religion means something more than the right to worship according to the dictates of one's conscience. No law or constitutional guaranty is necessary to protect that right. The principle must afford protection to outward manifestation of religious belief. This Court has sustained such manifestations in Meyer v. Nebraska, 262 U.S. 390, 399, and in Pierce v. Society of Sisters, 268 U.S. 510, 535, [. . .]⁵¹

Freedom of religion was alleged to be involved both in the military training requirement of the university as well as in the refusal of the California court to remand the regents' decision not to void the requirement of such training. The introduction of the Meyer and Pierce cases in the appellants' arguments seemed a bit questionable. Even though there was some general similarity in the cases with Hamilton, they were different in so far as the former cases dealt with the freedom to attend whatever school was desired. The Hamilton attorneys did not want their clients to exercise this option but desired the university to change its curriculum to suit the clients.

In any event, the request was made by the appellants that the case be decided by the Supreme Court solely on constitutional grounds.

c) Arguments of the Appellee. - The appellee in the case of Hamilton v. Regents was the board of regents of the

⁵¹ Brief of Appellant at 24, Hamilton v. Regents, 293 U.S. 245.

University of California. They accepted the facts in the suit as substantially true. The acceptance was qualified by an indication that there were matters which deserved different emphasis. It was likewise pointed out that the board of regents of the University of California had the full powers of organization and control of the university subject to the legislature of the state but only when necessary to insure compliance with terms set up for the protection of the university's funds.⁵²

The appellees, board of regents, presented three main contentions in their argument. First, the case should be dismissed for lack of a federal question. Secondly, the requirement of military training does not violate the due process clause of the Fourteenth Amendment. Thirdly, the requirement of military training does not abridge the rights of citizens of the United States or any immunity they may have.

That there was no federal constitutional question involved was held by the appellees. They admitted that the University of California prescribed a course of studies but in the manner in which they were authorized by state laws. Such scholastic regulations were commonplace they contended,

⁵² Brief for Appellees at 2-3, Hamilton v. Regents, 293 U.S. 245.

and these regulations were fulfilled by all other students. The students did so not by reason of compulsion but by free choice in attending the university. The regents considered that no federal question was involved in so far as no one was compelled to attend the university.⁵³

The second argument of the appellees was that the military training requirement of the University of California did not violate the due process clause of the Fourteenth Amendment to the U.S. Constitution. This argument was also pursued on the grounds that no federal question was involved. The appellees pleaded that there was no guarantee in the Constitution regarding freedom from military training; that Congress had passed laws requiring military service and had made exceptions at times for conscientious objectors. But no military service was being required by the university. It had no jurisdiction to require such. Those taking its training program were free to engage in military service at a later date or free not to do so.⁵⁴

The third argument of the appellees was that the university's requirement of military training did not abridge rights of citizens guaranteed by the Fourteenth Amendment.

⁵³ Brief for Appellees at 8-9, Hamilton v. Regents, 293 U.S. 245.

⁵⁴ Ibid., p. 12-19.

Appellees pointed out that members of the Reserve Officers Training Corps, the means of providing military training in the university, was not a part of the federal military forces, and membership in the ROTC did not require at any future date military service. Thus, appellants desire to be considered conscientious objectors to military service was not violated.⁵⁵

The case presented by the appellees, then contained the allegation that no federal questions were involved because no pressure was placed on appellants to attend the university. It was held that no rights of the appellants were abridged by the board of regents' military training requirements. Hamilton and Reynolds were minor sons and suit had been made by their parents to protect rights considered as belonging to their children.

d) The Decision of the Supreme Court. - The decision of the United States Supreme Court took cognizance of whether there was any federal question, whether any citizen's rights were violated and then made a statement on parental rights. The opinion of the Court was given by Mr. Justice Butler.

⁵⁵ Brief for Appellees at 22,26, Hamilton v. Regents, 293 U.S. 245.

The appellees, the board of regents, had contended that the case should be dismissed because of lack of federal question. But Mr. Justice Butler indicated that allegations of the appellants, Hamilton, etc., were not without merit. He stated:

And the appellees insist that this appeal should be dismissed for want of a substantial federal question. But that contention cannot be sustained for we are unable to say that every question that appellants have brought here for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance.⁵⁶

The justice viewed the case as having sufficient merit to deserve a decision by the Court. He was possibly hinting at an earlier case, similar to the instant one, Cole v. Pearson, 290 U.S. 597 (1933), which the Supreme Court did dismiss for want of a federal question. This per curiam decision has been omitted from the present study for the above reason.

Regarding the problem whether the military requirement of the University of California violated the rights of citizens guaranteed by the Fourteenth Amendment, the Court said:

⁵⁶ Hamilton v. Regents, 293 U.S. 245, 258.

The 'privileges and immunities' protected [by the Constitution] are only those that belong to the citizens of the United States as distinguished from citizens of the states - those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources.⁵⁷

The Court in explanation of this statement said that the privilege of attending the university comes not from any federal constitution but from the state of California and thus "is not within the asserted protection"⁵⁸ of the U.S. Constitution.

For that reason, the question to be decided by the Court was considered by its own statement to be "whether by state action the 'liberty' of these students has been infringed."⁵⁹

The Court proceeded to recall that no one was forcing the appellants to attend the university.

California has not drafted or called them to attend the University. They are seeking education offered by the state and at the same time insisting that they be excluded from prescribed courses [. . .]⁶⁰

Force was not being used on the appellant students. And the fact that the students were unable to pay their way

57 Hamilton v. Regents, 293 U.S. 245, 258.

58 Ibid., p. 261.

59 Ibid., p. 262.

60 Ibid.

at another institution had no significance regarding a constitutional question according to the Court.⁶¹

It was further stated by the Court that citizens had an obligation to come to the defense of their country and that the conscientious objector receives his privilege from the acts of Congress and not from the Constitution. Thus, the privilege cannot be argued on constitutional grounds.⁶²

The Court in summarizing its decision stated:

Plainly, there is no ground for the contention that the regents' order [. . .] to take the prescribed instruction in military science and tactics, transgresses any constitutional right asserted by these appellants.⁶³

The statement of the Supreme Court indicated clearly that it was its opinion that no rights guaranteed by the Constitution of the United States were being violated by the regulation of the University of California board of regents.

However, the Court did not pass decision without making a brief statement on parental rights.

There need be no attempt to enumerate or comprehensively to define what is included in the 'liberty' protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles, and to teach the doctrine on which these students base their objections to the order prescribing military training. Meyer v. Nebraska, 262 U.S. 390, 392; Pierce v. Society of Sisters, 268 U.S. 510 [. . .]⁶⁴

61 Hamilton v. Regents, 293 U.S. 245, 262.

62 Ibid.

63 Ibid., p. 265

64 Ibid., p. 262.

In effect the Court was saying that it agreed with the principles laid down in Pierce et al., and that even though the state of California did not have to abide by the opinion of each and every private citizen, the individual citizen was within his rights in so holding these opinions and acting upon them.

The principle stated by the Court was considered as based on Meyer and Pierce and was not basically different from them. Hamilton was not being hampered from making a free choice in education as was defended in Pierce. The Court, however, did not consider it Hamilton's right by the Constitution to require the state to abide by all his preferences in regard to courses offered or required by the University of California. There was no law in the state of California requiring his attendance upon this particular university, but it was the result only of the free choice of the appellant.

e) Legal Opinion on the Case. - Considerable comment was available on the decision of Hamilton v. Regents. Two legal studies upheld the Court simply by pointing out that the students involved were at the university on a completely voluntary basis and that they were obliged in no way to attend. But if they did attend freely, they must abide by and obey the regulations of the school among which regulations

was one requiring the study of military tactics.⁶⁵ Bond, in defending the decision of the Court, pointed out that personal rights are not absolute. He further noted that such rights are subject to the reasonable power of the state:

The appellants then were wrong in their assertion of an absolute right of personal liberty. No one has such a right. All personal liberty is subject to a proper exercise of the police power. [. . .] A reasonable relationship must exist between the character of the legislation and the policy to be subserved. That relationship has been expressed in various forms. In Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, the court said, "The state cannot exercise its police power arbitrarily and despotically, nor unless there exists a reasonable relationship between the character of the legislation and the policy to be subserved."⁶⁶

Bond accepted the decision on the same grounds upon which the Court had proffered it, viz., that it was a reasonable exercise of the power of the state. The University of California's regulations compelling attendance at training in military affairs were exercised with state authority.

A study of the Hamilton case by Zucker held that constitutional rights of the appellants were not denied.

⁶⁵Allen J. Levin, editor, "Constitutional Law," 83 University of Pennsylvania Law Review 529, 530 (1935); Earl F. Simmons and Sidney Zatz, editors, "Religious Freedom - Compulsory Military Training," 2 University of Chicago Law Review 331, 332 (1935).

⁶⁶Charles Z. Bond, "Compulsory Military in Land Grant Colleges," 10 Indiana Law Journal 361, 364 (1935).

No doubt the Constitution does guarantee religious freedom and liberty of thought. But the appellants in the instant case are in no way compelled to attend the State University; their liberty is in no wise affected.⁶⁷

The above study along with the current legal opinion at the time of the Supreme Court decision offered only agreement. No studies were found that presented any serious objection to the outcome of the Court's findings.

Opinions from legal sources generally held that even though the appellants, represented by their parents, did not receive a decision which they considered concomitant with their rights, nonetheless, they were not denied any rights they could absolutely claim according to the Constitution of the United States.

In a backward glance Hamilton v. Regents was found to be a case whereby minors through their parents unsuccessfully sued to obtain writ of mandate from the University of California regents' requirement for all students to take classes in military training. The writ was sought on grounds of religious belief but was denied both by the Supreme Court of California as well as the United States Supreme Court. The argument of the U.S. Supreme Court hinged around

⁶⁷ Sidney Zucker, "Compulsory Military Training,"
15 Boston University Law Review 332, 336 (1935).

its holding that no constitutional rights had been denied the minor children or their parents.

5. Minersville School District v. Gobitis

In 1940 the United States Supreme Court decided a case, Minersville School District v. Gobitis, 310 U.S. 586 (1940), which the Court itself reversed three years later in Board of Education v. Barnette, 319 U.S. 624 (1943). Parental rights were involved in so far as minor children were required to salute the U.S. flag against their father's religious conviction. The Supreme Court agreed to review the decision of the Pennsylvania Supreme Court which had earlier upheld the Gobitis parent. Even though the U.S. Supreme Court would restate its earlier doctrine of parental rights in education, it held that in this specific instance these rights must be weighed against the higher law of the common good. The decision itself would rest on the narrow grounds of refusal to enter the jurisdiction of the state's law-making bodies.

a) Background of the Case. - The case of Minersville v. Gobitis arose from a school district law in the state of Pennsylvania requiring children in public school to salute the U.S. flag at the beginning of each school day. Two minor Gobitis children, under the direction of their father,

a member of the Jehovah Witness sect, refused to salute the flag. The refusal was based on the religious conviction of the Gobitis children's father who claimed that by saluting his children were forced into an act of idolatry. The Supreme Court of Pennsylvania upheld the religious convictions of Gobitis.

The school district of Minersville appealed the decision of the Pennsylvania high court to the United States Supreme Court. The Supreme Court reversed the state court decision and upheld the school district regulation requiring the flag salute by the children. The Court did so on grounds that it considered the state as having the right to set up certain acts to maintain national unity. The U.S. Supreme Court said that it was sometimes necessary to subordinate individual rights to the authority of the state, but that parents' rights are hereby defended in the long run by such patriotic actions as a flag salute.

b) The Case for the Respondent. - The respondents, Gobitis and minor children, in defending their position before the U.S. Supreme Court alleged that the enforced flag salute of the Minersville School District was a violation of the Fourteenth Amendment to the Constitution. The claim was made that they were deprived of liberty of conscience by being forced to salute the flag of the United

States. This act they considered idolatry according to their interpretation of the bible in the twentieth chapter of Exodus.⁶⁸

The briefs of the respondents presented many religious arguments for their cause.⁶⁹ These have been omitted because they were not considered pertinent to any legal or constitutional question in this study.

However, the attorneys for Gobitis reminded the Supreme Court that in Meyer v. Nebraska, 262 U.S. 390, and Pierce v. Society, 268 U.S. 510, the Court had upheld the rights of parents to choose the education they desired for their children. In a non sequitur argument the respondents used the two above cases to show that their children were denied the "right to have an education in the public schools."⁷⁰

The respondents cited little else in their brief except a multiplication of further arguments from their religious convictions and interpretations of the bible according to their allegations. It was possible that their lack of legal argumentation and preponderance of religious interpretations had some influence on the unfavorable decision

⁶⁸ Respondents Brief for Certiorari at 5, 13, Minersville v. Gobitis, 310 U.S. 586.

⁶⁹ Ibid., p. 6-20. ⁷⁰ Ibid., p. 25-26.

they received from the Supreme Court.

The crux of the religious problem involved in the case stated by the attorneys for Gobitis centered on whether or not the Witnesses of Jehovah were mistaken in their beliefs. They clearly stated:

Petitioners, in support of the School Board rule say: 'While the members of the Jehovah's Witnesses may mistakenly believe that saluting the flag contravenes the law of God, as set forth in the twentieth chapter of Exodus, it does not follow that such pupils' refusal to salute the flag is based on a religious belief.'⁷¹

Obviously, the respondents did not think their beliefs mistaken, but in earlier evidence presented to the Court the superintendent for the Minersville School District had claimed that saluting the flag could not in any way be construed as a religious ceremony. He had claimed that the U.S. flag was not a religious symbol and did not take any precedent over the supreme being.⁷²

In answer to the superintendent's statement, the attorneys for Gobitis held that saluting the flag did disobey the divine law of God. In the following statement they described their position.

⁷¹ Respondents Brief for Certiorari at 13, Minersville v. Gobitis, 310 U.S. 586.

⁷² On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit at 91-93, ibid.

Respondents sincerely believe the Word of God and conscientiously believe that saluting a flag is a violation of His law. Any wilful disobedience to the divine law to them means complete and eternal destruction.⁷³

The respondents further insisted that the flag salute was a form of religion, and hence the enforcement of the school district's rule on flag saluting was a violation of their conscience and the Fourteenth Amendment to the Constitution.⁷⁴

Gobitis' attorneys summarized their case by claiming that children were forced by law to attend public schools, that the children were forced to engage in a religious ceremony contrary to their conscience, and that the state was interpreting the scriptures contrary to the Witnesses' beliefs, but that they, the Witnesses of Jehovah, had the real meaning of the bible. The respondents rested their case with these arguments.⁷⁵

c) The Case for the Minersville School District. - The attorneys for the Minersville School District presented first what they considered to be the facts in the case and presented their two chief arguments, namely, that there

⁷³ Respondents Brief for Certiorari at 17, Minersville v. Gobitis, 310 U.S. 586.

⁷⁴ Ibid., p. 19.

⁷⁵ Ibid., p. 28-33.

was no federal question here involved, and that the flag salute was not a religious matter in any way.

The facts in the case were accepted to be as follows. The board of education of the Minersville School District adopted a resolution requiring the daily salute to the flag by teachers and pupils, and to refuse to do so would be considered an act of insubordination. The Gobitis children refused to salute the flag declaring that it was against the law of God. They were then expelled until conformity to the rules of the school would be forthcoming.⁷⁶

The petitioners, Minersville School District, based their arguments on two premises: 1) the expulsion of the Gobitis children did not violate any constitution, and 2) the refusal to salute the flag is not founded on any religious belief.⁷⁷

The prime argument of the petitioners alleged that the Minersville School District regulation violated neither the constitution of Pennsylvania nor the federal constitution. The attorneys cited four flag salute cases dealt with by the U.S. Supreme Court where the Court either refused to hear the case for want of a federal question or it affirmed the

⁷⁶ Petition for Writ of Certiorari and Brief in Support Thereof at 2-3, Minersville v. Gobitis, 310 U.S. 586.

⁷⁷ Ibid., p. 7-13.

lower court's decision in favor of the flag salute without a full review of the case. The four cases were Leoles v. Landers, 302 U.S. 656 (1937); Hering v. State Board of Education, 303 U.S. 624 (1938); Gabrelli v. Knickerbocker, 306 U.S. 621 (1939); and Johnson v. Deerfield, 306 U.S. 621 (1939).⁷⁸

It was also contended by the petitioners that the case of Hamilton v. Regents, 293 U.S. 245 (1934), treated elsewhere in this chapter, supported their cause in so far as the Court refused to recognize religious scruples as a reason for excuse from required military training in a public university.

Prior to the decisions of your Honorable Court in the four above mentioned 'flag cases', Your Honorable Court held that minor plaintiffs who had been suspended from the University of California because they refused for alleged religious reasons to take a required course in military training could not compel the regents of the university to reinstate them as students without their taking the prescribed courses in military training.⁷⁹

The petitioners, therefore, in the light of other cases handled or decided by the U.S. Supreme Court, considered the present flag case as not in violation of the Constitution.

78 Petition for Writ of Certiorari and Brief in Support Thereof at 8-9, Minersville v. Gobitis, 310 U.S. 586.

79 Ibid., p. 9.

As a supporting argument the attorneys for the school district proposed that refusal to salute the flag was not founded on a religious belief.

There is nothing in saluting our flag which approaches any religious observance. No religious word whatsoever is uttered in the pledge which only excites patriotic fervor and loyalty. The saluting of the flag is no more than an acknowledgment of the temporal sovereignty of this nation and has nothing whatsoever to do with a person's religious feelings and is no way an acknowledgment of the spiritual sovereignty which the members of Jehovah's Witnesses ascribe to Jehovah God.⁸⁰

The flag salute was considered purely a temporality and not of spiritual or religious significance. Petitioners failed to see anything more than recognition of the state in the flag salute.

But as the respondents had done earlier, the attorneys for the Minersville School District also called upon the scriptures to strengthen their case.

The commandments of Jehovah, as set forth in the Bible, do not prohibit the saluting of a national flag but on the contrary approve of that practice. [. . .] "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."⁸¹

⁸⁰ Petition for Writ of Certiorari and Brief in Support Thereof at 13, Minersville v. Gobitis, 310 U.S. 586.

⁸¹ On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit at 30-31, ibid.

With the above and other quotations from scripture of similar meaning and significance, the petitioners rested their case. There were two points of evidence they had offered, viz., that the flag salute regulation did not violate the Constitution nor did it come under the category of a religious ceremony.

d) Decision of the Supreme Court. - In handing down its decision the Court took cognizance of parental rights in education, of the conflict between individual rights and the common good, and of the problems in making such a decision.

Seemingly, the decision of the Court was arrived at with considerable difficulty. The Court itself so stated. What the Court called liberty of conscience made the decision especially sensitive.

A grave responsibility confronts this Court whenever in the course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is the liberty of conscience, and the authority is to safeguard the nation's fellowship, judicial conscience is put to the severest test. Of such a nature is the present controversy.⁸²

Mr. Justice Frankfurter seemed completely aware of the problems he faced in rendering a decision, and the problems now appeared even greater in the light of the Supreme Court's reversal of its own decision three years later in

82 Minersville v. Gobitis, 310 U.S. 586, 591.

West Virginia State Board of Education v. Barnette, 319

U.S. 624 (1943).

Frankfurter was also aware of the parental rights problem that was involved and he discussed it.

Great diversity of psychological and ethical opinion exists among us concerning the best way to train children for their place in society. Because of these differences and because of reluctance to permit a single iron-cast system of education [. . .] we have held that, even though public education is one of our most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools. Pierce v. Society of Sisters [. . .]⁸³

The Court attempted to emphasize that rights which properly belong to the parent must be protected. But the decision now fell upon the Court to decide whether in the present case the ceremony of a flag salute "exacted from a child who refuses upon sincere religious grounds" does deny such rights.⁸⁴

Mr. Justice Frankfurter pointed out, however, that in the protection of freedom where there is a conflict, certain characteristics of free society must be reinforced to insure the continuation of a free society.

In a number of situations the exertion of political authority has been sustained, while basic considerations of religious freedom have been left inviolate.⁸⁵

⁸³ Minersville v. Gobitis, 310 U.S. 586, 599.

⁸⁴ Ibid., p. 593. ⁸⁵ Ibid., p. 595.

Frankfurter then added:

In all these cases the general laws in question [. . .] were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable.⁸⁶

Frankfurter's opinion seemed to be holding a principle that religious freedom would not exist at all if free government were not protected at its roots, and he upheld the flag salute as symbolic of this freedom.

The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presupposes the kind of orderly society which is summarized by our flag.⁸⁷

With the indication of the freedom pointed to by the flag salute, the justice of the Court reasoned that a nation had a right to use ordinary means to protect this kind of society.

A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty whatever may be their lesser differences and difficulties.⁸⁸

The point being made was that the state must at times make firm efforts to protect those principles which aid in

⁸⁶ Minerville v. Gobitis, 310 U.S. 586, 595.

⁸⁷ Ibid., p. 600.

⁸⁸ Ibid.

signifying its stated values. The justice was considering the flag as significant of the government's dedication to freedom.

In concluding his decision, Mr. Justice Frankfurter had indirectly held that the restriction of the freedom of the Gobitis children was of a lower order than restriction of those things proper to safeguarding freedom for all. He reversed the decision of the Pennsylvania supreme court in favor of the flag salute regulation of the Minersville School District.

In reversing the decision of the Pennsylvania court the justice had in reality only committed the Supreme Court to a narrow area of decision. Only one point had been definitely decided. That was whether the U.S. Supreme Court should intervene in local, educational policies which were previously determined by legislative bodies. Mr. Justice Frankfurter indicated this in the decision.

The precise issue, then for us to decide is whether the legislatures of the various states and the authority in the thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can be no liberties, civil, or religious.⁸⁹

Although Frankfurter had been patently aware of the parental rights involved in the case and did reemphasize

⁸⁹ Minersville v. Gobitis, 310 U.S. 586, 598.

them, he did not consider these rights so much violated as protected in the long run by the Minersville flag salute requirement. He took approving cognizance of the Pierce doctrine, but did not consider it decisive in any way in favor of Gobitis.

As compared to Pierce, the statement on parental rights was broad, but it also indicated that such rights were not above some restriction even as the Pierce doctrine had stated. There was always the possibility that the Gobitis parent could have enrolled his children in private schools where the flag salute regulation did not hold. This would not have been significantly different from the parents in Pierce whose right to use private schools had been earlier defended. Part of the reason for the private schools had been the option to have certain conditions different from the public schools especially in the area of religious choice.

Thus the present case was not a broader interpretation of parental rights than Pierce but neither was it a denial of them.

Even though Mr. Justice Stone dissented in the Gobitis decision, Mr. Justice Frankfurter and the majority of the Court did not consider parental rights improperly restricted at this time.

e) Reaction to the Case. - The repercussions following the U.S. Supreme Court decision of Minersville v. Gobitis were many and varied. An unusually large number of students of law took up the pen. In general, criticism was unfavorable to the Court's decision although not totally so. A mild but questioning opposition was made in a study by Levene who asked:

In the principal case, the Court says the object of national solidarity is a justifiable end. [. . .] Assuming that such an emergency exists to-day, is a rule requiring a child to commit what he considers to be a sin an effective method of teaching love of country?⁹⁰

Even though agreement could be found for Levene's line of thought, his argument was merely polemic and did not present a legal or constitutional foundation. But he also held that the reasoning of the Court was just so much verbiage in stating that the liberty of the children was not infringed because they were not obliged to attend public school.⁹¹

Flynn, in an analysis of Gobitis, recognized what he considered the Court's proper stance in making the present decision. But he castigated the Court for not using the same

⁹⁰ Louis Levene, "Constitutional Law: Compulsory Flag Salute: Interference with Religious Freedom," 26 Cornell Law Quarterly 127, 129 (1940).

⁹¹ Ibid., p. 129.

principle in controlling free speech regarding the U.S. Communists' advocacy of overthrowing the government.

The precise question determined in the Gobitis case was presented to the Supreme Court on four occasions within the past three years and in each case a regulation or statute similar to that involved in the Gobitis case had been upheld in per curiam opinions. In Gabrielli v. Knickerbocker, 306 U.S. 650 (1939), Hering v. State Board of Education, 303 U.S. 624 (1938), Leoles v. Landers, 302 U.S. 656 (1937), appeals from courts of last resort in the states of California, New Jersey, and Georgia, where requirements to salute the flag were held reasonable and constitutional, were dismissed by the Supreme Court for want of a substantial question. This amounted to implied affirmation of the state court decisions. Then in Johnson v. Deerfield, 306 U.S. 621 (1939), the Supreme Court expressly affirmed a judgment of the United States District Court of Massachusetts wherein a resolution requiring pupils to salute the flag was held to be constitutional.⁹²

Although Flynn obviously accepted the Court's decision herein, later in his comment he objected to the Court because it had not in other decisions applied some restriction upon allegedly Communist literature that was passed out in schools. His objection was that the Court had not taken a universally strong stand against activities subverting patriotism.

Also, in upholding the Court's decision, Wingerd said that

⁹² Thomas F. Flynn, "Constitutional Law - Religious Liberty - Saluting Flag," 29 Georgetown Law Journal 112, 113 (1940).

[. . .] what the school authorities are attempting to do is assert the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parents. That the flag salute is not clearly an unreasonable means of doing this can be argued [. . .] However, the courts point out that it is a matter for legislative discretion and unless clearly connected with the purpose, it is not within the judicial power to declare it null and void.⁹³

In the present instance, as Wingerd stated, the Supreme Court did refuse to declare the school authorities' statute null and void.

Another study by Andersen grasped the reasoning of the Court's decision but doubted its wisdom.

In the principal case the development of sentiment in favor of national cohesion and unity was considered to be sufficient to override the claim to freedom of conscience. But is it desirable to allow the liberties, usually considered to be so basic in our political system, to be brushed aside so easily?⁹⁴

Andersen's theory was that even though the Court could muster reasons for doing what it did, nevertheless, there were times when it was not wise to make a decision in such a way even though reasons could be found for it.

Tinnelly and Carpenter opposed the Supreme Court decision indicating that there was not sufficient danger to the

93 Sheldon Wingerd, "The Compulsory Flag Salute in Schools," 9 Journal of the Bar Association of Kansas 279 (1941).

94 William F. Andersen, "Constitutional Law - Due Process Freedom of Religion and Conscience - Compulsory Flag Salute," 39 Michigan Law Review 149, 151 (1940).

state in the Gobitis children's refusal to salute the flag.⁹⁵

Howard questioned why the Court upheld property rights in the Pierce case but refused to uphold religious rights in Gobitis.⁹⁶

Holmes, on the other hand, pointed out that five state supreme courts had held that the flag salute was not a religious ceremony and that a democracy did not have to wait until it was on the verge of collapse to do something about the dangers that destroy it. He further noted that there was ample legal precedent for the U.S. Supreme Court to have decided the way that it did.⁹⁷

Many of the comments on the instant case seemed to ignore the fact that the Court had only decided one small area. The decision only dealt with the right or propriety of the federal court's involving itself in matters belonging to the state legislatures. Loughery brought out this point

95 Joseph T. Tinnelly, "Constitutional Law in Flag Salutes in Public Schools," 15 St. John's Law Review 95 (1940); Charles E. Carpenter, "Current Constitutional Law Decisions of the United States Supreme Court," 14 Southern California Law Review 56, 58 (1940).

96 Fred L. Howard, "Constitutional Law - Freedom of Religion Compulsory Flag Salute," 6 Missouri Law Review 106, 109 (1941).

97 Warren W. Holmes, "Constitutional Law-Religious Freedom-Compulsory Flag Salute by School Children," 14 Temple University Law Quarterly 545, 546-547 (1940).

in a study made on parental rights in American law.

Diverse and conflicting opinions were handed down even after the decision of the United States Supreme Court in the Minersville School District v. Gobitis case, 1940. This confusion resulted mainly because the Supreme Court in handing down its decision, had ruled on only one phase of the question: the propriety of the federal court's passing on an educational policy.⁹⁸

Since educational policy was determined by the legislature of the state or the locale, the Supreme Court considered itself conveniently or inconveniently out of jurisdiction. It was also noted that in the above study the Court did not pass judgment on the other areas involved, such as, religious freedom of the First Amendment, whether the children or the parents could be punished, or whether the children could be considered delinquent.⁹⁹

In reviewing the various professional legal opinions it must be noted that no one brought serious legal objection to bear in argumentation. Objections centered principally around the prudence of the Court in making the decision it made. Opinions also were cognizant of the ample precedent the Court had in making its decision. The claim, too, was made that the danger was insufficient to the state for the Court to continue upholding the flag salute requirement, and

98 M. Bernard Loughery, op.cit., p. 140.

99 Ibid., p. 141.

that confusion resulted because the Court had really decided so little.

6. West Virginia Board of Education v. Barnette

The Barnette case, which followed three years after Minersville v. Gobitis, 310 U.S. 586 (1940), and reversed it, also dealt with the problems of compulsory flag salute. Walter Barnette, et al., sought and obtained an injunction against the West Virginia State Board of Education to enjoin them from enforcing the flag salute law in public schools of the state. After the injunction was allowed, petition was granted for appeal by the state board of education to the United States Supreme Court. Upon hearing the Supreme Court upheld the complaint of Barnette and reversed the decision in Gobitis.

a) Facts of the Case. - After the Gobitis case West Virginia had amended its statutes so that the state board of education ordered among other things the flag salute in all public schools. Non-compliance would be considered insubordination on the part of the refusing student. His parents could be fined and imprisoned. A student could be expelled until compliance was obtained. Members of the Jehovah's Witnesses sect refused to salute the flag because they considered it an image whose worship is forbidden by

the bible. The case had been brought to the Supreme Court on direct appeal.¹⁰⁰

b) Argument for the Appellants. - Two basic arguments were presented by the appellants, the West Virginia State Board of Education, 1) that the suit should be dismissed for want of a federal question in so far as the case had already been decided in Minersville v. Gobitis, 310 U.S. 586 (1940), and 2) that the flag salute regulation of the school board was not inimical to the public safety and good order. Thus, they alleged that it could not be construed as hindering rights guaranteed by the U.S. Constitution at the state level.¹⁰¹

The first argument, that the instant case should be dismissed for want of a federal question, brought the allegation that no new questions had here been raised which should change the earlier Gobitis flag salute decision.

That case has not been modified or reversed and the contentions of appellees herein are but re-iterations of the contentions made and overruled by this Court therein.¹⁰²

The appellants also contended that there was no difference between the previously decided Gobitis case and the

¹⁰⁰ Appellees' Brief at 1-7, Board of Education v. Barnette, 319 U.S. 624 (1943).

¹⁰¹ Brief for Appellants [sic] at 8-12, ibid.

¹⁰² Ibid., p. 9.

present case.

They are similar in each and every respect. We are so impressed with the thorough consideration and sound disposition by this Court, in that case, of the principles applicable to the controversy herein that appellants [sic] feel that it is imperative that they rest the case at bar upon that decision.¹⁰³

No difference was seen by the appellants in the case of Gobitis and the present appeal. As a result they saw the question to be decided by the Court, if it even granted continuance, as one concerning the validity of the local school board's educational policy. It was on this narrow ground that Gobitis had been decided three years previously, and the hope was that the Court would use this same reasoning for the present dismissal.¹⁰⁴

The second argument of the appellants was founded on the allegation that the school board's flag salute requirement was not inimical to the public safety and the good order of society. The appellants quoted the Gobitis decision reminding the Court of its earlier statement that the required flag salute regulation was on the other hand for the good of society.¹⁰⁵

¹⁰³ Brief for Appellants [sic] at 10, Board of Education v. Barnette, 319 U.S. 624.

¹⁰⁴ Ibid., p. 11.

¹⁰⁵ Ibid., p. 12

Partlow and Wooddell, attorneys for the appellants, concluded their brief with the request that their motion for dismissal be sustained. They alleged that the West Virginia flag salute regulation did not violate the U.S. Constitution and that the Gobitis decision had already settled the significant questions.¹⁰⁶

c) Arguments for the Appellees. - Alleging double violation of the United States Constitution, the attorneys for Barnette et al., presented their case against the West Virginia flag salute statutes. The appellees claimed that the flag salute required in the public schools of West Virginia violated their conscience contrary to the guarantees of the First and Fourteenth Amendments of the Constitution.

Secondly, they held that said flag salute regulation deprived their children of attendance at free public schools by demanding an act contrary to the due process and equal protection clauses of the Fourteenth Amendment.¹⁰⁷

As in Gobitis many religious arguments based on the bible had been brought forth, such was the pattern in the instant case. These were introduced along with religious

¹⁰⁶ Brief for Appellants [sic] at 14-15, Board of Education v. Barnette, 319 U.S. 624.

¹⁰⁷ Appellees' Brief at 15-49, ibid.

sources and authorities. The gist of this argumentation, even if possibly useless in law, at least made clear that the Witnesses of Jehovah in fact did object to the flag salute on personal religious beliefs. With a more legal approach the appellees did invoke the force of Pierce v. Society of Sisters, 268 U.S. 510 (1925), to indicate that the Court had held that parents possessed the right to direct the education of their children. They concluded from Pierce that

[. . .] if the state does not have the authority to compel a child to attend a public school to the exclusion of private schools, then the state does not have the authority to compel a child to perform a public ceremony involving the national flag contrary to his private conscientious belief.¹⁰⁸

It is to be noted that Pierce had indeed guaranteed the right to choice of school, public or private. However, the attorneys for Barnette did not explain the similarity between permitting children to attend the school of their parents' choice and refusing to abide by the regulations of given public schools which they were not forced to attend. Appellees could have chosen to attend private schools if they so desired and thus would not be bound by the regulation. It was doubtful, at least, if such a conclusion as stated above by appellees could be drawn from Pierce.

¹⁰⁸ Appellees' Brief at 47, Board of Education v. Barnette, 319 U.S. 624.

The appellees dealt briefly with the crux of the three year old Gobitis decision. That decision upheld the flag salute regulation in Pennsylvania on grounds that the federal courts should not interfere in the legislative acts of the states when no rights guaranteed by the U.S. Constitution were violated. The Supreme Court had held in Gobitis that requiring a flag salute did not violate any guarantee of the Constitution.

Attorneys for Barnette on the contrary held that the rights guaranteed by the First Amendment to the Constitution were violated in the flag salute requirement in so far as the state was not being immediately and seriously harmed by the refusal to salute.¹⁰⁹ Appellees considered refusal to salute the flag as being guaranteed by the First Amendment under its freedom to worship clause.

The second argument dealt with the alleged denial of the right of appellees to send their children to free public schools. This question was not before the Court for decision but the appellees claimed that their attendance at the public school was being conditioned by the requirement to salute the flag, which act, when forced, they considered to be contrary to the rights of the Fourteenth Amendment guarantee.

¹⁰⁹ Appellees' Brief at 55, Board of Education v. Barnette, 319 U.S. 624.

One of the liberties guaranteed by the Fourteenth Amendment is that of the parents to direct the education of their children. This liberty cannot be infringed by making the enjoyment of a civil right, i.e., the right to have their children attend the free public schools, conditioned upon an unconstitutional requirement. See Pierce v. Soc. of Sisters.¹¹⁰

The unconstitutionality of the flag salute requirement was not yet at this point determined. The Court would make the school board regulation the focal point of its decision. But at this point the appellees alleged violation. They held that the state may not compulse education and then hinder the fulfillment of this compulsion by a regulation involving the denial of civil rights.

Covington, the attorney for Barnette, et al., concluded his argumentation with a seemingly irrelevant allegation that the flag salute was part of a conspiracy to bring harm upon the Witnesses of Jehovah.

The compulsory flag salute regulation is being used as a part of the totalitarian conspiracy for world domination to 'get' Jehovah's Witnesses in the same manner as Daniel was framed, while the great mass of the people are otherwise being regimented.¹¹¹

While it would be impossible to prove that no prejudice existed against the Witnesses of Jehovah at that time, the Court in its decision even though favorable to their cause

¹¹⁰ Appellees' Brief at 86-87, Board of Education v. Barnette, 319 U.S. 624.

¹¹¹ Ibid., p. 89.

took no cognizance of the above allegation.

The case for the appellees rested on two arguments, viz., that the flag salute regulation violated their conscience, and secondly, that it deprived their children of the right to free public schools.

d) Decision of the Court. - The Supreme Court of the United States rendered a decision favorable to Barnette et al., appellees, and their refusal to salute the flag. In doing so the Court overturned the earlier flag salute decision in Gobitis. Mr. Justice Jackson in delivering the majority opinion took note of the fact that the earlier Gobitis decision had relied upon compulsion to bring about the desired effect of national unity.

[. . .] this is the very heart of the Gobitis opinion, it reasons that 'national unity is the basis of national security', that the authorities have 'the right to select appropriate means for its attainment', and hence reaches the conclusion that such compulsory measures toward 'national unity' are constitutional.¹¹²

The question as Mr. Jackson saw it was whether a governmental agency could constitutionally be permitted to use regulations and statutes to compulse national unity. The Supreme Court justice had responded to his own query at an earlier point in the decision when he declared the issue

112 Board of Education v. Barnette, 319 U.S. 624, 640.

to be the conflict between the state and the individual.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. [. . .] The sole conflict is between authority and the rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parents and child.¹¹³

The conflict described by Mr. Jackson as between the state and the individual was clear. The obscurity in his statement centered around the "coerced attendance" at public schools with which he did not deal except to make the statement. Mr. Jackson did not explain how the appellees were forced into the public schools. However, Mr. Justice Frankfurter in giving his dissenting opinion pointed out that the Pierce decision prevented any enforced attendance at public schools.¹¹⁴ The West Virginia flag salute rule had not been placed upon the private schools.

Mr. Justice Jackson advertantly or inadvertantly did not address himself to the above problem and what future ramifications could develop in dealing with the private scruples of individuals or minority groups. The problem remained unanswered by the decision. The earlier Gobitis

¹¹³ Board of Education v. Barnette, 319 U.S. 624, 630-631.

¹¹⁴ Ibid., p. 658.

decision had considered it possible that those choosing not to accept the flag salute could attend private schools of their own free choice and thus avoid the encounter involved in the present case.

In any event, Mr. Jackson reversed the Gobitis decision on grounds that constitutional rights of the appellees in the case were violated by being forced to salute the flag.¹¹⁵

Although no specific statement of parental rights in education was made by Mr. Justice Jackson in delivering the opinion of the Court, Mr. Justice Frankfurter in a dissenting opinion made extensive remarks about rights of parents as based on Pierce.

He held that the Court should not have overruled Gobitis, that parents, if they so wished could have sent their children to private schools where they would have been under no obligation by statute to salute the flag. The line of reasoning followed by Justice Frankfurter was that the state did not need to restrict itself as much as it had in Barnette and that numerous scruples of various sorts could come up in the future that would need judgment. He was of the opinion that the state had already recognized parental

¹¹⁵ Board of Education v. Barnette, 319 U.S. 624, 642.

rights in education as in Pierce but did not need to bow to every wish of every parent.¹¹⁶

In the majority opinion however, the Court made no statement contrary to parents' rights as defined in Pierce. Mr. Justice Jackson expressed his belief that the problem was one of conflict between the state and parents and that freedom was best served by assuring true freedom.

Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.¹¹⁷

The Court apparently was saying that the flag salute requirement was an unnecessary restriction on the freedom of the youth involved and thus their parents.

The question of force being used by the state and at the same time demanding an act contrary to personal conscience was here being challenged. Mr. Justice Jackson had previously stated in the decision that individual rights must be honored.

The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stands on a right of self determination in matters that touch individual opinion and personal attitude.¹¹⁸

¹¹⁶ Board of Education v. Barnette, 319 U.S. 624, 657, 661.

¹¹⁷ Ibid., p. 641. ¹¹⁸ Ibid., p. 630-631.

The criteria of parental rights in Pierce, i.e., that parents may direct the education of their children independent of the state free of undue influence seemed to be defended in Barnette even more broadly than had been done in Pierce. In Pierce the Court decree had certainly determined that children could be educated in private schools independent of the state. Barnette went further in defending additional independence from state pressure even though the children were attending public schools. The seeming undue force of the state in the flag salute requirement in Gobitis was overridden in Barnette even though the parents in the Barnette case could have exercised their option for private schools where the statute did not hold.

The U.S. Supreme Court in handing down the decision of West Virginia State Board of Education v. Barnette did not deny the Pierce doctrine but seemed to have added a broader dimension to parental rights.

e) Response to the Decision. - The favorable acceptance of Barnette among the legal profession was in contrast to the earlier unfavorable response to the Gobitis decision.

Howson's study indicated that the present decision seemed to be based more on reason than the earlier Gobitis case and was a sound interpretation of the Constitution.

Undoubtedly the stress of the times, and the fear possessing everyone at the time of the Gobitis case [. . .] was a factor in the decision [. . .] The instant case discards such thoughts as trivial; places its decision on a higher plane and rests its results, not on the balancing of the competition between state and the individual parent [. . .] but on the fact that the Constitution is an expression of faith which the government itself must honor if it is to maintain the justice and moderation necessary to the existence of free government.¹¹⁹

The casual observer could notice during the early part of World War II when Gobitis had been decided that patriotism and fear of subversion was intense. That these factors influenced the Gobitis decision would be impossible to verify. But Howson seemed to think they did influence it. In Barnette the Court reversed Gobitis without denying the necessity of patriotism but ruled against an enforced patriotic gesture.

Bover was critical of the Court for allowing itself to be in a position where it had to reverse Gobitis.

The Gobitis and Barnette decisions make mockery of any consistency in legal growth. Only the broad-minded approach and the sound result reached by the Court, in the Barnette case, can mitigate the unfortunate impression which its vacillating precedents convey.¹²⁰

¹¹⁹ Walter Y. Howson, "Constitutional Law," 17 Temple University Law Quarterly 465, 466 (1943).

¹²⁰ Thomas A. Bover, "Constitutional Law," 32 Georgetown Law Journal 93, 99 (1943).

Despite Bover's criticism of the Court's change of position, infallibility has never been one of its claims. In each case, Gobitis and Barnette, the Court pointed out its desire to protect the nation as its basic motivation while at the same time attempting to protect the rights of the individuals involved in the total picture.

Remmlein suggested that the controversy over the flag salute and similar cases might not be over.

There are in the United States two hundred fifty-six religious sects, of which thirty-nine are reported, as having a total membership of less than five thousand. If each of these minority groups were to protest, successfully, whatever in the schools offends their peculiar belief, no controls of public education could be maintained [. . .]¹²¹

The same fear was expressed by Mr. Justice Frankfurter's dissenting opinion in the Barnette decision.¹²² However, the studies on Barnette seemed to indicate that the Court had made the right decision and that its reversal of Gobitis was leading the Court in the right direction.

The Barnette case in retrospect was seen as a decision where the Supreme Court ruled as unconstitutional the action

¹²¹ Madaline Remmlein, "Constitutional Implications of Compulsory Flag Salute," 12 George Washington Law Review 70, 78 (1943).

¹²² West Virginia Board of Education v. Barnette, 319 U.S. 624, 658.

of the West Virginia State Board of Education in requiring the flag salute in all its public schools. In so doing the Court reversed its earlier decision of Minersville v. Gobitis. The appellants had argued for no case in so far as this issue had been decided by Gobitis. The appellees on the other hand had claimed the flag salute regulation violated their rights contrary to the First and Fourteenth Amendments. When the case had been decided by the Court favorable to the appellees, legal comment favored the Court's decision. The overall effect of the decision seemed to be an extension of the rights guaranteed by Pierce.

7. Everson v. Board of Education

Public funds for the bus transportation of private school children was the basis of contention in the case of Everson v. Board of Education, 330 U.S. 1 (1945). The Court decided in favor of the constitutionality of the New Jersey practice which provided public funds for transporting private school pupils.

a) Background of the Case. - The board of education of Ewing Township, Mercer County, New Jersey approved the payment of bus transportation to the parents of several pupils attending Catholic schools in Trenton, New Jersey. Upon request and suit of taxpayers of the state, injunction was

sought and obtained to withhold such payments. Appeal was made by the board of education to the New Jersey Court of Errors and Appeals. Judgment was made by the above court upholding the constitutionality of the Ewing Township board of education acts. Appeal was made from this court in the name of the state's prosecutor, Arch N. Everson, to the United States Supreme Court for reversal.¹²³

b) Arguments for Appellant. - The appellant, taxpayers of the state of New Jersey, through the prosecutor of the state, advanced two basic arguments against the payment of bus transportation for private school pupils. They claimed that taxes levied by the state must be for a public purpose as distinguished from a private purpose. Secondly, appellant held that the use of a public tax for said transportation to private schools and, in this case, religious Catholic schools, constituted a use of funds for a religious purpose in violation of the First Amendment's establishment of religion clause.¹²⁴

In the case at bar, we have the simple fact that public funds, raised by taxation were [. . .] handed over directly to A,B,C, and D private persons not in need, or requiring public charity, in amounts of cash required to pay the fare on means of transportation to private institutions [. . .]¹²⁵

¹²³ Brief for Appellant [sic] at 2-5, Everson v. Board of Education, 330 U.S. 1.

¹²⁴ Ibid., p. 23.

¹²⁵ Ibid., p. 17.

The point was emphasized that monies were given outright to private individuals in contradistinction to the Cochran case wherein the U.S. Supreme Court approved the state of Louisiana merely loaning textbooks to private school pupils. In that instance, the books remained the property of the state, whereas in the present instance monies were given directly to private school parents.¹²⁶

The second argument of the appellant was that the payment of bus transport for religious schools was an assist to religion and contrary to the Constitution.

As the freedoms of the First Amendment are to be imported into the Fourteenth, the Constitution of the United States requires that the religious shall be the rule of the states; but there is not to be implied from this that the Constitution either requires or permits the exercise of or choice in the exercise of religious liberty to be subsidized by the state. Such implication would impair the outstanding characteristic of religious liberty - the separation of church and state.¹²⁷

The charge was that the First Amendment was here violated in giving money to aid religion. The appellant did not make clear how the money given to the parent aided religion. This became the issue as the Court saw it in its decision.

The Pierce case was called upon by appellants to defend the right of parents to opt for private schools if they

¹²⁶ Brief for Appellant [sic] at 12-13, Everson v. Board of Education, 330 U.S. 1.

¹²⁷ Ibid., p. 22.

so wished. This principle of Pierce, however, did not, according to Everson, prejudice the argument in favor of giving aid to private school pupils from public monies.¹²⁸

The twofold argument of Everson then was that although parents had the right to educate their children free of the state, the state should not take public monies to aid private school pupils and it should not do so in the case of religious school pupils, because such aid constituted a violation of the First Amendment.

c) Argument for Appellees. - The chief arguments for the appellees, the Board of Education in Ewing Township, were that if the state could provide free textbooks, as decided in Cochran v. Board of Education, 281 U.S. 370 (1930), a fortiori it could provide bus transportation to the same pupils; and secondly, that the use of public tax money in this case was for a public purpose, i.e., aid to education for all pupils whether in public, private, or religious schools.¹²⁹

The appellees in order to stress parental rights in education called upon the Pierce doctrine seven times in

¹²⁸ Brief for Appellant [sic] at 25-26, Everson v. Board of Education, 330 U.S. 1.

¹²⁹ Brief on Behalf of Appellees at 8-58, Everson v. Board of Education, 330 U.S. 1.

their plea before the Court.¹³⁰

In attacking the first argument of the appellants that in the Cochran case textbooks were only loans to pupils whereas transportation money was given outright to parents in the instant case, the appellees pointed out that there was no real difference.

This is a distinction without a difference. In the first place, the transportation furnished to the children is not sectarian transportation. It has no use whatever in the private schools, but is in fact the same transportation used by the pupils of the public schools. In the one case the children are furnished the use of books [. . .] in the other, they are furnished the use of the bus[. . .].¹³¹

The difference between furnishing books and transportation was considered by the appellees as insignificant and seen as a "distinction without a difference." The children and parents were the beneficiaries not the school, and all children of the area benefitted without prejudice to any.¹³²

Allegation was made further that payment of the transportation expense was for a public purpose not a private one. The doctrine of Pierce was called upon to support this.

¹³⁰ Brief on Behalf of Appellees at 2, 22, 23, 30, 32, 33, 71, Everson v. Board of Education, 330 U.S. 1.

¹³¹ Ibid., p. 2-3.

¹³² Ibid.,

The public school, as the statutes of New Jersey and the decision of this Court in Pierce v. Society of Sisters, supra, alike recognize, is not the sole medium through which the public purpose of compulsory education may be fulfilled.

[.]

If a State has power to enact that all children must be educated, and that education may be obtained in a private school as well as a public one [. . .] then it is strong medicine [. . .] to say that it has no power at all to spend 'money to transport a single child to any but a State school.'¹³³

Exercising the free right to use whatever school the parents desired was not considered by appellee a sufficient reason to deny aid to the child in the form of bus transportation since this was of no aid in itself to the private school.

Appellees' argument rested on the contention that if textbooks could be provided as allowed in Cochran so could transportation to schools for all children and that such transportation grants were not in any technical sense a grant to private persons or schools of religion, but for the educational aid of all children.

d) Decision of the Court. - The decision of the Court as handed down by Mr. Justice Black ruled that the bus transportation statute of New Jersey was not in conflict with the U.S. Constitution. However, even though he used much polemic to defend the separation of church and state, on the

¹³³ Brief on Behalf of Appellees at 23, Everson v. Board of Education, 330 U.S. 1.

other hand he was ready to point out that the state is not to be inimical to the church.¹³⁴

Mr. Black's statement on parental rights reiterated the position of Pierce but added the dictum that parents could be helped in the general area of aiding their children's education and safety even though opting for private schools.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has the power to impose. See Pierce v. Society of Sisters [. . .]¹³⁵

The specifics of this statement were then applied to the New Jersey bus case.

It appears that these parochial schools meet New Jersey's requirements. The State [. . .] does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.¹³⁶

Parents' rights were defended in that free bus transportation for private and religious school pupils was not contrary to the Constitution as alleged by appellants. The Court did not state whether such aid came by right but only that New Jersey was not wrong in so providing.¹³⁷

134 Everson v. Board of Education, 330 U.S. 1, 8-18.

135 Ibid., p. 18.

136 Ibid.

137 Ibid., p. 16.

The Court seemingly had extended Pierce by ruling at least that auxiliary service to private schools was not unconstitutional nor was it contrary to the First Amendment to give such aid to religious school pupils. In Cochran it had ruled the legality of loaning textbooks to both public and private school pupils. Now in Everson the Court had gone a little farther or at least extended on the same level aid for bus transportation.

In Pierce the Court had held that parents may control the education of their children independent of the state. In both Cochran and Everson the Court could have ruled against both books and buses and still have remained within its stated principle of Pierce. In each case parents could have chosen private schools and been free of a certain amount of state control but would also have been devoid of state aid had the Court so contrarily ruled. The Everson case, however, seemed to demonstrate that the Court was not taking a totally unbeneficent stand against private and religious schools and the parents who used them. That transportation aid given to pupils attending such schools was not aid to religion and contrary to the establishment clause of the First Amendment was decided in Everson.

e) Reaction to the Case. - Some commentators on the law were unfavorable to the Court's decision, because it

seemed to them a breach, even though small, in the separation of church and state.

A number of studies, however, seemed to recognize in the Everson decision an extension of a "child-benefit" theory as elucidated in Cochran where books were loaned to parochial school students.

Joseph and Silvers claimed that the Court might take a different stand if confronted with further aid.

Insofar as the majority attempts a predicative principle, it is based primarily on the child-benefit theory. This theory, however, is open to [. . .] virtually any aid to sectarian schools, [. . .] Nevertheless [. . .] should the Court be confronted with aid obviously more direct than transportation, it may still invoke the First or the First and Fourteenth Amendments.¹³⁸

These writers apparently realized little connection existed between transportation and the religious affiliation of the schools. The rest was speculation for the future.

Even though the Court did not consider the present aid as aid to the schools proper but to children and parents, several law analysts feared that the state would go too far in aiding sectarian schools. This action allegedly would eliminate or minimize separation of church and state in violation of the First Amendment of the Constitution and the

¹³⁸ Leonard Joseph and Herbert R. Silvers, "Public Funds for Sectarian Schools," 60 Harvard Law Review 799, 800 (1947).

Fourteenth as applying the First to the states.¹³⁹

A legal study by Fahy saw a different dimension in the Everson case; that it was a protection of parents' rights in education.

[. . .] constitutional protection of the parental right was at the heart of the notable decision in the Oregon school case, [. . .] The unanimous opinion in that case has never been questioned by the Supreme Court. It was recently cited with approval in the majority opinion written by Justice Black in Everson v. Board of Education.

[.]
The parental right to guide the education of the child is thus protected [. . .] whether the child is educated, in the discretion of the parent, in a public school or in a private school [. . .]¹⁴⁰

Fahy's study was similar to the Court's decision in that the benefit was seen as directed to the child and parent, not to the school.

In the Everson case the main issue had been whether it was constitutional to permit the state of New Jersey to provide bus transportation to children attending private and sectarian schools. Appellants had claimed that in doing so

139 Daniel R. Ohlbaum, "Establishment of Religion Clause Applied to the States," 33 Cornell Law Quarterly 122 (1947); Henry Dowst, Jr., and John F. Sullivan, "Aid to Parochial School Students," 27 Boston University Law Review 281 (1947); Frank H. Strickler, "Laws Affecting the Establishment of Religion," 15 George Washington Law Review 361 (1947); Joseph Levine, editor, "Aid to Religion," 22 New York University Law Quarterly 331 (1947); Harvey Levin, "Public Aid to Establishment of Religion," 96 University of Pennsylvania Law Review 230 (1947).

140 Charles Fahy, "Religion, Education and the Supreme Court," 14 Law and Contemporary Problems 73, 74-75 (1949).

the state was taking tax money and giving it to private citizens not in special need. In doing so, the appellants alleged that the private and religious schools were also aided contrary to the First Amendment. Appellees, on the other hand, argued that the case was not significantly different than the Cochran case where textbooks were loaned to private school pupils; and further, that no aid was given to private or religious schools as such. The Court upheld the New Jersey statute in claiming no violation of the First Amendment and stated that parents had the right to choose private schools. In so doing they should not be deprived of auxiliary aid to their children. Even though legal commentators recognized in the Court's decision an extension of benefits for the sake of the child, there was also the fear that the Court might go too far in aiding religious schools in violation of the First Amendment and its establishment of religion clause. Everson was also seen as in agreement with the Pierce doctrine but an extension of it in the same sense as the Cochran textbook case.

f) Review of Farrington to Everson. - Seven major education cases were decided by the United States Supreme Court dealing with parents and their minor children in the twenty-three years after Pierce v. Society of Sisters. Farrington v. Tokushige, 273 U.S. 284 (1927); Gong Lum v. Rice,

275 U.S. 78 (1927); Cochran v. Louisiana, 281 U.S. 370 (1930); Hamilton v. Regents, 293 U.S. 245 (1934); Minersville v. Gobitis, 310 U.S. 596 (1940); Board of Education v. Barnette, 319 U.S. 624 (1943); and Everson v. Board of Education, 330 U.S. 1 (1945). Each dealt with parental rights over minor children in educational matters.

Each case was analyzed with its argumentation before the Supreme Court, the decision of the Court, its comparison to the Pierce case, and the reaction to the case as found in legal studies.

In the preceding chapter it was seen that the Court in Pierce v. Society of Sisters had stated a significant doctrine of parental rights in education. Basically, it contained three elements: 1) parents have the right to direct the education of their children, 2) this education may take place independently of the state, and 3) it should be free of undue force.

None of the cases studied seemed to deny these principles as stated in Pierce. In several cases the Court went beyond the prescriptions of Pierce and permitted benefits to children that their independence in private schools did not demand. In the cases where special privilege was sought and denied by suing parents, the Court did not deny the right of the special privilege sought, but declared that

the state was not required to provide it.

Shortly after Pierce the Court handed down the decision on Farrington v. Tokushige. It dealt with parents having children in foreign language private schools teaching a language and culture deemed by some inimical to the United States. The Supreme Court decided in favor of Tokushige and the foreign language schools. Mr. Justice McReynolds stated that his decision was based on Pierce and pointed out that the "Japanese parent has the right to direct the education of his own child without unreasonable restrictions."¹⁴¹

The parallel between Pierce v. Society of Sisters and Farrington v. Tokushige was obvious since in Pierce the right of the private school's existence was also challenged, and the decision in both cases was in favor of the parents with children in the private schools.

In the same year as Tokushige, 1927, the case of Gong Lum v. Rice was decided. A girl of Chinese origin was assigned to an all Negro public school against the protest of her father, Gong Lum. The United States Supreme Court held that no constitutional rights were violated in such an assignment. In the light of the Court's later decision of Brown v. Board of Education, 347 U.S. 483 (1954), such an

¹⁴¹ Farrington v. Tokushige, 273 U.S. 284, 298 (1927).

assignment to a school based on race would be considered unconstitutional. However, this study has noted that Gong Lum could have opted for a private school and in that way have had the choice of a school that did not segregate on account of race. Mr. Chief Justice Taft held that the pupil had been provided

[. . .] the equal protection of the laws, by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow, or black races.¹⁴²

The parent in question could have exercised his freedom in the same sense as Pierce if he had placed his child in a private school as all the parents in the Pierce case had done. But as long as he chose to send his daughter to the public school, the parent was not free of some control. In light of the later Court decision, however, Brown v. Board of Education, studied in the next chapter, this amount of control by the state would not be tolerated by the Court. The later case of Brown would take the Court's stance beyond Pierce.

In Cochran v. Louisiana the Court decided in favor of a Louisiana state regulation which provided textbooks to all children whether in public or private schools. Even though the Pierce doctrine of parental rights was not stated

142 Gong Lum v. Rice, 275 U.S. 78, 85 (1927).

and perhaps had no direct effect on the decision, the results were seen as being in harmony with the Pierce principles or even an extension of them. The parents of children in private schools were aided by the state even though they were exercising their free choice of such schools.

Parents of minor children in Hamilton v. Regents brought suit to have the Supreme Court overturn a University of California regulation requiring that all its students take courses in military training. The Court refused to remand the university regulation. The Court pointed out that the parents were free to send their children wherever they wished for schooling, but even if they chose to avail themselves of the university's facilities, they still would not be deprived of any constitutional rights or guarantees.

The Court held that the parents had the right "to entertain the beliefs, to adhere to the principles, and to teach the doctrine on which these students base their objection to the order prescribing military training,"¹⁴³ and cited Pierce as its precedent. The Court, however, did not accept the demands of the suit enjoining the University of California to adjust its curriculum to the wishes of students, who were not being forced in any way by the state to attend. The Court did not deny the principles of Pierce nor did it

143 Hamilton v. Regents, 293 U.S. 245, 262 (1934).

deny the parents in the instant case the right to hold their position. But, on the other hand, the Court did not require the state to provide support for these beliefs. There seemed to be no indication of the Court going beyond Pierce in the Hamilton case, nor restricting it either.

The case of Minersville v. Gobitis was brought to the Supreme Court upon suit of Gobitis desiring to prevent the enforced flag salute regulation of Pennsylvania public schools. The Court decided in a manner not upholding the parent's wishes. In Gobitis as in Hamilton, supra, the children were not forced into the public school where the flag salute regulation obtained. No law was demanding that the Gobitis children attend public school, but the Court upheld that if they did, they must abide by the flag salute rule in effect in that locale. The Court did not hold that the plaintiffs could not refuse to salute the flag. However, if they chose the public school over the private school, they would have to abide by the regulations of that school area. As in Hamilton the Court did not extend the rights of parents beyond those stipulations of Pierce, but it did not seem to restrict them either.

In the case of Board of Education v. Barnette following three years after Gobitis, the Court withdrew its holding of Gobitis and reversed its decision with regard to the flag

salute regulation. It now held that the required flag salute in the public schools of West Virginia did violate the constitutional rights of parents and pupils. The Court in Barnette held that the spirit of patriotism sought in the former Gobitis case was well and good but that it should not be patriotism that was enforced. The decision in the instant case seemed to extend the principles enunciated in Pierce in so far as the parents were not required to use the private school as a means of avoiding the flag salute regulation.

Everson v. Board of Education witnessed the Court deciding that the New Jersey practice of providing free bus transportation to school children whether in private or public schools was not contrary to the Constitution. Two elements were involved. One was the contention that such a practice gave public funds to private citizens, not in need, and secondly, that such free transportation when provided to sectarian schools gave assistance to religion contrary to the First Amendment. The Court held that neither proposition obtained. In making its decision the Court restated the principle in Pierce with regard to parental rights and stated that the choice of private schools did not hinder receiving aid that really did not assist the religious schools, qua religious schools.

In summary, the Court held the identical doctrine of Pierce with regard to the foreign language schools. It went beyond the doctrine of Pierce regarding textbooks, transportation of private school pupils, and the second flag salute case. The Court maintained Pierce, but did not go beyond it with regard to placement of children in schools by race, enforced military training in a state school, and the first flag salute case.

CHAPTER III

CASES OF McCOLLUM TO TINKER COMPARED WITH PIERCE

From 1948 to 1969 seven cases dealing with parents' rights in education were decided by the U.S. Supreme Court. These cases were Mc Collum v. Board of Education, 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952); two cases together, Brown v. Board of Education, 347 U.S. 483 (1954) and Brown v. Board of Education, 349 U.S. 294 (1955); Engel v. Vitale, 370 U.S. 421 (1962); Abington v. Schemp, 374 U.S. 203 (1963); Board of Education v. Allen, 392 U.S. 236 (1968); and Tinker v. Des Moines School District, 393 U.S. 503 (1969).

Each of these cases will be concerned with the rights of parents in educational matters. The results of each decision will be compared with the Pierce case to determine if the Supreme Court remained consistent with it. This study will attempt to show that the Court was consistent in holding Pierce in the above decisions.

As in Chapter II each of the above cases will be discussed. The background of the case from the briefs and the pleadings of both contestants in the suit will be presented, the decision of the Supreme Court will be analyzed in the light of Pierce, and legal opinions will be reviewed.

1. Mc Collum v. Board of Education

In the case of Mc Collum v. Board of Education, 333 U.S. 203 (1948) the Supreme Court held that religion classes

conducted on public school property and with the accompanying facilitation were an aid to religion and violated the First Amendment to the Constitution.

a) Facts in the Case. - The McCollum case as brought to the Supreme Court involved a local Illinois school board in Champaign County and the people of the state of Illinois in the person of Vashti McCollum. The school board had permitted students to be released from regular classes upon written request of parents to attend classes in religion. The classes were taught by religion teachers not paid by the school board but held on school property using the buildings at no cost. Students not attending such classes continued their regular classes.

Taxpayer Vashti McCollum, and parent of a pupil in the Champaign County school system, brought suit against the practice of teaching religion in the public schools. The lower courts of Illinois upheld the action of the school board against McCollum. The case was then appealed to the United States Supreme Court for remanding of the Illinois courts.¹

b) Argument for Appellant. - The basic argument of the appellant, McCollum, through her attorneys, was that the

¹ Brief for Appellant at 6-12; Appellees' Brief at 12-19, McCollum v. Board of Education, 333 U.S. 203 (1948).

teaching of religion in public schools was a violation of the First and Fourteenth Amendments to the Constitution and that the state thereby "makes a law respecting the establishment of religion."²

Most of the facts presented were to illustrate in some way that the school board was assisting directly religious education by the aids provided in connection with the religion classes held on public school premises during regular school hours. Allegedly, such assistance consisted of approval of religion teachers by the superintendent of schools, permission cards distributed by public school teachers, schedules printing the time of such religious instructions, teachers making absentee reports, classroom use, and such various items as light, heat, and janitor service.³

The appellants called upon Pierce to show that parents had the right to make use of private schools and upon Cochran to show that the state could pay for services that were non-religion oriented. However, in the instant case, the claim was made that the state monies assisted religion directly.⁴

² Brief for Appellant at 14, McCullum v. Board of Education, 333 U.S. 203 (1948).

³ Ibid., p. 6-22.

⁴ Appellant's Reply at 11-12, McCullum v. Board of Education, 333 U.S. 203 (1948).

The services provided by the school were alleged by the appellant as being aid to religion and thus savored of establishment of religion by the state.

c) Argument for Appellee. - The argument of the appellee, the Board of Education of Champaign County, Illinois, centered around the claim that the establishment of religion clause of the Constitution did not prevent the free and non-discriminatory use of public property for religious education classes.⁵

It was further argued that no forbidden expenses were involved in the use of the school facilities so as to deprive appellant McCollum of property without due process of law.⁶

The board of education, appellees, attempted to extend the implications of the Pierce case in the present instance.

The argumentation was that in the instant case children were being withdrawn from the regular classes for religious instruction and to a lesser degree than the total withdrawal to a private school.

⁵ Appellees Brief at 20-23, McCollum v. Board of Education, 333 U.S. 203 (1948).

⁶ Ibid., p. 23.

[. . .] in Pierce v. Society of Sisters, 268 U.S. 510 (1925) [. . .] the Court held unconstitutional a law of the State of Oregon, the purpose of which was to require all able-bodied children in the state to attend public schools.

[.]

The Court has thus held unconstitutional any interference with the right of parents wholly to withdraw their children from the public school system and to educate them at private or parochial schools [. . .]

Basically, what is involved in the instant case is the right of parents [. . .] to exercise a much more limited right in the furtherance of their children's welfare and religious culture. The greater right exists to withdraw children wholly from the public school system for education in private or parochial schools. The lesser right is to direct the children's release for a short period each week. It would seem clear beyond argument that since parents have the greater right, they also have the lesser [. . .]⁷

The challenge of the appellees rested with the conclusion that if the parents could justifiably exercise the greater right of withdrawing children from the public school, they could exercise the lesser right of partially withdrawing them for religion classes. Appellees, however, did not explain how the children were withdrawn from the public school facility while at the same time they remained there and used existing buildings and other accutirements.

d) Decision of the Court. - The decision in McCollum v. Board of Education, 333 U.S. 203 (1948), was based entirely on the Court's interpretation of the First Amendment

⁷ Appellees' Brief at 122-123, McCollum v. Board of Education, 333 U.S. 203 (1948).

and its application to the states by the Fourteenth. Separation of church and state was the issue as the Court saw it. Parents' rights in education were not discussed in the majority opinion.

Mr. Justice Black summarized his opinion by stating that aid was actually given to religion in the Illinois situation.

Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrine. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the use of the state's compulsory public school machinery. This is not separation of Church and State.⁸

Plainly, the stance of the Court was based on the establishment of religion clause of the First Amendment to the Constitution. The decision did not discuss any specific rights of parents with pupils in the religious education programs in public schools. The U.S. Constitution does not per se guarantee any such right.

Justice Black's main thesis was that the facts indicated public facilities were being used in some way directly to aid religion. He held that the facts

⁸ McCullum v. Board of Education, 333 U.S. 203, 209-210 (1948).

[. . .] show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education [. . .] This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.⁹

Even though the Court pointed to usage of tax-supported schools in the aid to religion, the Court did not respond to the allegation that taxpayer, Vashti McCollum, was deprived of part of her taxes unconstitutionally. Neither did the Court respond to the appellees' arguments that parents' rights were denied in not allowing them the aid of public facilities for religious instruction.

Since no specific statement was made by the Court on parental rights in education, any conclusion on such rights had to be drawn from the facts of the case. Pierce was not mentioned by the Court in its majority decision.

The Pierce case had held that parents have the right to educate their children free of undue force and independently of the state. In McCollum this right was not denied in that parents, if they so desired, could place their children freely in private schools where religious instructions might be offered.

⁹ McCollum v. Board of Education, 333 U.S. 203, 209-210.

However, the Pierce decision had not held that parents could demand the state to provide the facilities for religious instruction on public school properties. On the other hand, it had not denied that the state could do so. That issue was never at stake in Pierce.

Cochran and Everson had accepted the concept of legally permitting non-religious aid to private school pupils in the form of loaned textbooks and free transportation. McCullum drew the line with the issue of the state giving more direct aid to religious teaching even though it was small aid.

Pierce and its stated doctrine evidently held despite the McCullum decision, but the latter case did nothing to extend the aid to parents as far as helping children receive direct religious instruction at some government expense.

e) Reaction to the Case. - Studies on the McCullum decision varied from complete approval of the Court's decision to outright condemnation of it.

Schmidt attacked the decision on the grounds that it favored unbelievers. He said:

Indeed, the logic of the McCullum case comes to this: the only ones constitutionally entitled to any incidental advantage as byproducts of our organized society are atheists.¹⁰

¹⁰ Godfrey P. Schmidt, "Religious Liberty and the Supreme Court of the United States," 17 Fordham Law Review 173, 186 (1948).

Hantman¹¹ and Burlage¹² held that the Court had made a completely legal and justifiable decision in light of the First Amendment to the Constitution. Stout claimed otherwise.

The Supreme Court, through its decision in the McCullum case, has opened a virtual Pandora's box, the results of which are still in doubt. It has also brought home the fact that the First Amendment as stated is not sufficiently clear to meet the modern situation [. . .]¹³

The "Pandora's box" reference may have referred to possible future litigation about government aid to religion in the form of paid military chaplains, grants to religious colleges, and funding of a similar nature. None of these things was, of course, the issue in the McCullum decision.

A critical study by Owen concluded that the Court had erred in judgment in the light of the Pierce decision. He held that if children could be released fully from public school control to attend private school, they could be legally released part-time for religious instruction.

11 Alfred Hantman, "Voluntary Religious Instructions in Public Schools," 16 George Washington Law Review 556 (1948).

12 Thomas D. Burlage, "Church and State in American Education," 43 Illinois Law Review 374 (1948).

13 William David Stout, "The Establishment of Religion Under the Constitution," 37 Kentucky Law Journal 220, 239 (1949).

In the case of Pierce v. Society of Sisters, supra, the Court had held that a parent has the right to choose the kind of school which his child shall attend, whether public, private or parochial [. . .] If it is legal and constitutional to apply the compulsory attendance law to children enrolled in a parochial or private school, full-time each day, for 180 days, then it would seem equally legal and constitutional to apply it to children who, at the request of their parents, are enrolled in a weekday religious class for one hour each, for thirty-six days.¹⁴

Owen's opinion seemed to put the crux of the problem at the level of parent's rights. However, he also seemed to have missed the point of the Court's decision. The Court had held that the facts indicated that the public schools in Illinois were providing direct assistance to religious sectarian teaching contrary to the First Amendment. The question was not whether the pupils were allowed to attend religious instructions on certain days, but whether the state could directly assist in providing such instructions.

Crowley went so far as to claim that the Court had in reality reversed Pierce by the instant decision,¹⁵ while Loughery held that parental rights had been modified by it.

¹⁴ Ralph Dornfeld Owen, "The McCollum Case," Temple Law Quarterly 159, 169-170 (1948).

¹⁵ Joseph Crowley, "The Oregon School Case Reconsidered," St. Meinrad Essays, Vol. 9, No. 4, 1951, pp. 27-30.

While the doctrine of parental rights current in judicial thinking up to 1947 was referred to in several decisions, this doctrine has been felt, by some, to have been greatly modified by the United States Supreme Court in the McCollum decision.¹⁶

It is possible that the Court had placed some restriction on parental rights or choice in the McCollum case, but certainly did not restrict rights as stated in Pierce. Pierce had guaranteed parents the right of free choice of schools uncontrolled by the state. There was no way the McCollum case could be construed to read contrary to this principle.

The McCollum studies varied in their outlook on the Supreme Court decision. They ran the gamut of approval to disapproval, perhaps because the case carried considerable emotional overtones. However, the question of the case itself, direct state aid to teaching religion, was responded to by the Court. It ruled that and that alone unconstitutional.

2. Zorach v. Clauson

In the case of Zorach v. Clauson, 343 U.S. 306 (1952), the Supreme Court ruled on the constitutionality of released time from public schools to receive religious instructions and whether such a practice was an aid to religion in violation of the First Amendment. The case centered around the New York state practice of releasing children from public

¹⁶ M. Bernard Loughery, op.cit., p. 150.

schools for religious instructions.

a) Facts in the Case. - Suing parents, Tession Zorach and Esta Gluck, brought the Zorach case to the Supreme Court for reviewing an action by the New York City Board of Education which set up a released time religious education program. The courts of New York state had upheld the action of the board of education which authorized the releasing of children from public schools for religious instruction upon the request of their parents. Pupils did not remain on the public school premises but left the buildings and were taught at various religious centers. This arrangement was distinct from the previous McCollum case where religious instructions were held on public school property. The board of education rules permitted children to be excused for one hour or less per week. Whether the pupils remained in school or used the released time privilege was entirely at the volition of the signing parents.¹⁷

b) Argument for the Appelants. - The appelants presented three chief arguments against the New York released time plan. First of all, they contended that the basic issue in Zorach had already been decided in McCollum and Everson and that there was no significant difference in the cases.

¹⁷ Brief for Appelants at 6; Brief for Appellees at 2-3, Zorach v. Clauston, 343 U.S. 306 (1952).

Secondly, they argued against any allegation that deciding the instant case in the same way as McCullum would result in a denial of the principles held in Pierce. Thirdly, appellants held that they were denied the opportunity to prove some facts in the case, especially regarding the element of compulsion of children to attend the released time classes.¹⁸

Appellants held that the issue of giving time off for religious instructions had been ruled out by the McCullum decision and that the principle of aid to religion by government agency was stated in Everson. Thus, they held that there was no reason for the Court to make a different decision at the present time. Appellants stated:

We contend that the McCullum case is determinative of the issue raised in the present case. But even if the McCullum case had never been decided, we submit that the meaning of the First Amendment as stated by this Court in the Everson case would require a determination adverse to the New York released time program.¹⁹

McCullum had ruled out the religious instructions being held on school property in the Champaign, Illinois, program as being aid to religion by the schools. Everson, in approving bus transportation for private school pupils in New Jersey, had also stated that direct aid to religion

¹⁸ Brief for Appellants at 27-78, Zorach v. Clauson 343 U.S. 306.

¹⁹ Ibid., p. 40.

could not be allowed.

In response to the possible allegation that a ruling in the instant case similar to that of McCollum would invalidate the principles of Pierce, appellants said:

Invalidation of the released time system would not interfere with freedom of religion nor would it constitute an overruling of Pierce v. Society of Sisters.²⁰

Appellants' claim could easily be understood since the Pierce case had really dealt with parents exercising their rights independently of the state. The New York released time program was seeking something beyond that.

In order to strengthen their case that parental rights would not be defended by a decision favorable to the released time program, appellants attempted to build a case that there was really compulsion involved rather than freedom of choice.

Under the released time plan, the state rebates one hour weekly to those children whose parents contract that the rebated hour shall be used exclusively for religious instruction. [. . .] other children are compelled to remain in the public school during that hour. This is real compulsion and real abridgement of freedom [. . .]²¹

Whatever value this argument had, it at least claimed that some of the children were free at a given time by their parents' request, whereas others were not. The question of

²⁰ Brief for Appellants at 62, Zorach v. Clauson, 343 U.S. 306.

²¹ Ibid., p. 63.

whether the parents wanted the children to remain in school at that time was not discussed.

Thus, appellants centered their argumentation around the three points that the case had already been decided in principle by McCollum and Everson, that an adverse decision would invalidate no principle upheld in Pierce, and the claim that some compulsion of students did exist in the released time program.

c) Arguments for Appellee. - The board of education of New York City, favoring the released time program, centered their argumentation on two main points. The first allegation stated that the New York released time program did not violate any provision of the Constitution, and the second was that this case could easily be distinguished from the McCollum case. As a corollary the appellees called upon Pierce v. Society of Sisters to support their argumentation.

Regarding the relationship of the New York released time program and the First Amendment of the Constitution the appellees stated:

The question before this Court in the instant case is then: Do the statute and rules of the Commissioner establish such a relationship between the public education system and religious instruction as to violate the First Amendment to the Constitution? We submit that they do not; that appellants have not shown and cannot show that they do.²²

²² Brief for Appellee at 16, Zorach v. Clauson, 343 U.S. 306.

Obviously, appellants held to the view that the religious instruction program as set up by the commissioner in New York did not violate the Constitution.

That there was a real distinction between the McCollum case and their case was the second claim.

The issue argued in the McCollum case, the issue there decided was the constitutional propriety of having religious instructions in the public school buildings [. . .] In New York, the statute and rules permit the children to be absent from school for religious education ' to be had outside the school buildings and grounds.'²³

The major differences between the New York released time program and the McCollum case seemed to be that no direct aid of any kind was given to religion in the New York case. The program was conducted without aid from the school and outside the school. In the McCollum case the schools did provide facilities and other services of a minor nature.

The appellees in the instant case seemed to think that the weight of Pierce was on their side when they said:

This Court has been particularly assiduous in leaving to parents the freedom to rear and educate their children in their own faith (Pierce v. Society of Sisters, 268 U.S. 510) [. . .]²⁴

Whether this calling upon the precedent of Pierce was pertinent to the argument would be difficult to determine;

²³ Brief for Appellees at 27-28, Zorach v. Clauson, 343 U.S. 306.

²⁴ Ibid., p. 24.

however, the appellees used it here to strengthen the parents' rights dimension in the case.

The appellees rested their argumentation with the two major points of the distinction between the present case and the McCollum case along with the contention that here was no violation of the Constitution.

d) Decision of the Court. - The decision of the Court seemed to recognize a difference between this case and the McCollum case and a lack of constitutional violation. Obviously notice was taken of the parents' involvement in giving permission for children's release to attend the religious instructions. Despite this, there was no clear cut statement of parental rights as such. Any effect on parental rights had to be drawn from the outcome of the decision.

The Court did not consider the present instance of the New York released time program a violation of the First Amendment as Justice Douglas stated.

[. . .] our problem reduces itself to whether New York by this system has either prohibited the 'free exercise' of religion or has made a law 'respecting the establishment of religion' within the meaning of the First Amendment.²⁵

Justice Douglas responded to his own statement of the problem by adding:

²⁵ Zorach v. Clauson, 343 U.S. 306, 310.

It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take the religious instruction. He is left to his own desires [. . .]²⁶

Obviously Mr. Justice Douglas considered the New York released time program no violation of the Constitution. But he also took cognizance of a second factor in the case, the free choice of parents for their children. It was not the students who signed for the released time but their parents. Two places in the Court decision pointed up the fact that release from the schools took place only upon written request of the parents.²⁷

Even though there was no clear statement of parental rights involved in the decision, and even though the main determination was the question of violation of the First Amendment to the Constitution, it would be ignoring the facts to claim that parental rights were not involved. The results of the decision recognized the right of the parent to control the religious education of his child in much the same way as was allowed in Pierce. In Zorach the parent was permitted to sever the child for the moment from the state controlled school to obtain this religious instruction. The

26 Zorach v. Clauson, 343 U.S. 306, 311.

27 Ibid., p. 308, 311.

Zorach decision, however, seemed to go a step beyond Pierce. In Pierce the right to control the child's education independently of the state was recognized. In Zorach the same right was accepted in practice even though the child was making use of the public school for the secular part of his education.

The Court in Zorach made its decision on the basis of the First Amendment but on the other hand, did not ignore the parental rights aspect naturally involved in the case. One could only speculate why the Court did not use the occasion for a thorough going statement of parental rights principles. That it did not do so in no way affected the results of the decision.

e) Reaction to the Case. - Legal studies criticized the Zorach decision as being unclear on church-state relations, missing an opportunity to spell out parents' rights and as a partial overruling of McCollum.

Grossi challenged the lack of clarity in the Zorach decision. He said:

The Court has here announced that it follows the McCollum decision, but just where is not made clear. It would appear that the instant decision presents somewhat of a paradox. The mental gymnastics employed to keep from overruling the McCollum case have served only to muddle the issue further. The issue needs to be resolved, but a majority of the courts have chosen not to face the challenge squarely.²⁸

28 Charles Grossi, "Validity of Released Time Program,"
15 Georgia Bar Journal 363, 366 (1953).

The issue not faced by the Court as referred to by Grossi was the church-state relationship involved in religion being taught somehow in connection with the public schools. Even though Grossi considered the Court as avoiding the church-state issue, there was no lack of clarity on the Court's part in making a clear distinction about the lack of aid given to religion in Zorach versus that given in McCollum.

The Harvard Law Review seemed to detect what the Court was in practice using as a norm for its decision.

Even though the attitudes in Zorach and McCollum are irreconcilable, the results are consistent with a rule which the Court seems to have adopted that a released time program is constitutional if the role of the school authorities is kept to a minimum.²⁹

In McCollum the school authorities had been processing the whole religious education program from an administrative point, whereas in Zorach even that was minimized to as little as any dismissal of pupils would involve.

Reed held that the Court's decision did not rest importantly on parental rights.

²⁹ Paul A. Freund, "Supreme Court, 1951 Term," 66 Harvard Law Review 89, 119 (1952).

Even the majority opinion in Zorach had very little to say about the part which the parents play in the educational process. It is true that the Court did refer to the fact that the parents must first give their consent and approval before a child may participate in the program. Unfortunately, the Court did not elaborate on this fundamental position, and thereby missed an excellent opportunity to settle a vexatious problem.³⁰

It seemed true that the Court in Zorach made no explicit statement on parents' rights, but the case had been brought to them primarily as a violation of the First Amendment. Thus its decision seemed also to be responsive to the grounds on which it was brought. This was not to say that the Court could not have used its position to make a statement on parents' rights at this time, but it did not do so. In both McCollum and Zorach parents were asking for religious education for their children. It was denied in McCollum because the aid given by the public schools was considered a violation of the First Amendment. It was not denied in Zorach because the Court considered no direct aid being given.

In Pierce the Court had recognized the right of parents to educate their children independently of the state. Northington seemed to see this as the stance taken by the Court in Zorach.

³⁰ George E. Reed, "The Zorach Case," 27 Notre Dame Lawyer 529, 549 (1952).

[. . .] but it appears that the courts are trying to bring constant pressure on advocates of the respective programs to operate as independently from the public school as is possible.³¹

However, in practice the Zorach case results seemed to go a step further than did Pierce. The Pierce principle was that parents could provide for the education of their children independently of the state. Zorach allowed the choice of regular academic education at the hand of the state with the religious education being done independently.

The Zorach case was seen as one where suit was brought to enjoin the New York practice of permitting children at parents' request to be dismissed from the public school for religious education. The challenge was made that such a practice was in violation of the First Amendment of the Constitution. The U.S. Supreme Court held that there was no direct aid to religion given in the New York practice and thus upheld the statute permitting it.

Even though no direct statement was made by the Court dealing with parental rights, the outcome of the case did in fact seem to extend the rights of parents to educate their children independently of the state a step beyond the principle in Pierce.

³¹ D. Henry Northington, "Validity of Released Time Religious Education Programs," 9 Washington and Lee Law Review 213, 221 (1952).

3. Brown v. Board of Education

In the case of Brown v. Board of Education, 347 U.S. 483 (1954), a challenge was made against the then accepted practice of assigning children to public schools on the basis of race alone. The Court ruled that such practices, contrary to the accepted principle of Plessy v. Ferguson, were against the Constitution. The decision of the Court made no direct statement of parental rights nor did it use Pierce in its defense. The Court on the other hand did make a statement on the rights of minor children. Since the implication of parents' rights was inherent in this situation, Brown was included in this study.

a) Background of the Case. - The case of Brown v. Board of Education of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954), was a civil rights case involving segregation of children in the public schools by race alone as an allowable principle. Argued with Brown were three other cases of a very similar nature also involving segregation in public schools. Despite minor differences the following cases were presented with Brown: Briggs v. Elliott, from South Carolina; Davis v. County School Board of Prince County, from Virginia; and Gebhart v. Belton, from Delaware. In each case minor Negro plaintiffs, through legal representatives, sought to void laws which segregated schools

by race.³²

However, due to the complexity of the four cases presented together, they were ordered restored to the docket for additional argumentation and clarification prior to the final formulation of the Court decrees. The case was finally decided by the Court one year later as Brown v. Board of Education, 349 U.S. 294 (1955) with the addition of Bolling v. Sharpe from the District of Columbia. The first decision has come to be known as Brown I, the second decision as Brown II. Since the doctrine of each case is identical, both are treated here together.

b) Case for the Appellants. - The allegation of the appellant in Brown was that the state of Kansas in affording opportunities for education to its citizens had no power under the U.S. Constitution to impose racial restrictions. They stated their case thus:

When the distinctions imposed are based on race and color alone, the state's action is patently the epitome of that arbitrariness and capriciousness constitutionally impermissible under our system of government.³³

The "distinctions" spoken of were those of segregating children in schools because of color and predominantly

³² Brief for Appellants at 2-4, Brown v. Board of Education, 347 U.S. 483.

³³ Ibid., p. 6-7.

so because of persons belonging to the Negro race.

The appellants also held that Plessy v. Ferguson as interpreted for separate but equal facilities in schools no longer carried any weight in light of the Supreme Court's decision in Sipuel, Sweatt, and McLaurin. (These cases were not introduced into this study because their concern was adult students on the graduate level, not minor children where parents' rights would be involved.)

The appellants considered the weight of the above cases in their argumentation.

The rights of adult students in Sipuel, Sweatt, and McLaurin cases required, this Court held, vindication forthwith. A fortiori, this is true of the rights of children to a public education that they must obtain, if at all while they are children. It follows that appellants are entitled to be admitted forthwith to public schools without distinction as to race and color.³⁴

Two basic arguments were set forth by appellants: that the state of Kansas had no right constitutionally to impose racial segregation and that the principle of Plessy was defunct.

c) Case for the Appellees. - The basic position of the appellees, the Board of Education of Topeka, Kansas, was simply that Negro children were not denied any constitutional

³⁴ Brief for Appellants in Nos. 1,2, and 4 and for Respondents in No. 10 at 191, Brown v. Board of Education, 347 U.S. 483.

right by being segregated into separate but substantially equal schools. They stated:

The position taken by the Supreme Court of Kansas in the cases cited, supra, is sustained by the weight of this Court in Plessy v. Ferguson, supra, and Gong Lum v. Rice, 275 U.S. 78 [. . .]³⁵

Plessy dealt with a decision by the Supreme Court stating that separate but equal transportation facilities among races were not contrary to the Constitution. Gong Lum v. Rice has been treated in the previous chapter, and the case dealt with assigning a Chinese student to a Negro school. Such an assignment was at that time considered by the U.S. Supreme Court not in violation of any rights guaranteed by the Constitution. However, the legality of segregation of schools as such was not being challenged in Gong Lum.

In the instant case there seemed to be no question of radically unequal facilities from the physical standpoint, such as buildings, curricula, teachers, and other measurable criteria. The question centered around whether race as such could be the norm for school assignment.

d) Decision of the Court. - The U.S. Supreme Court faced the cases of Brown v. Board of Education head on. Mr. Chief Justice Warren addressed himself directly to the

³⁵ Brief for Appellees at 22, Brown v. Board of Education, 347 U.S. 483.

question about the segregation of children in schools according to race alone.

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 groups of equal educational opportunities? We believe that it does.³⁶

The Court held that race as a basis of school assignment was a denial of equal educational opportunity. The reason for so holding was that such segregation gave the children at least a sense of inferiority, as the chief justice stated.

To separate them from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.³⁷

The lack of equity was not necessarily to be found in buildings and books but in the position where segregation psychologically placed the Negro pupil.

The decision of the Court in Brown, though far reaching in its implications, was brief. There was minimal recall of precedent cases. The statement of the Court's philosophy and rationale in the present instance was simple and clear. The Court said: "We conclude that in the field

³⁶ Brown v. Board of Education, 347 U.S. 483, 493.

³⁷ Ibid., p. 494.

of public education the doctrine of ' separate but equal' has no place. Separate educational facilities are inherently unequal."³⁸

Any statement of parental rights was worded in terms of child's rights. Here the Court indicated that such rights must be available to all under equal terms.

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied 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.³⁹

The decision set down as a right of the child that his education be provided on equal terms with others. It might be noted that the Court did not speak specifically of parental rights. This difference of emphasis from parental rights to those of children, however, in no way denied the fact that minor children are basically under parental control until a stipulated age.

In comparing the decision of the Brown Court to the Pierce Court, it can be noted that neither the appellants, appellees, nor the Court made any reference to Pierce in the pleadings or decision. The appellants, Board of Education of Topeka, could have called upon Pierce as was done in Gong Lum v. Rice to plead that Negro children, like Chinese

38 Brown v. Board of Education, 347 U.S. 483, 495.

39 Ibid., p. 493.

children therein, could have used private schools to avoid racial segregation. Perhaps, they realized that such a massive use of private schools for a solution to the segregation problem was totally impracticable. Whatever the reason, they did not call upon Pierce. The Court itself did not call upon Pierce in its decision even though it was making a monumental move favoring parental rights in the choice of schools for their children. The decision of the Court was farther reaching and broader in its results than in Pierce. Pierce had upheld the rights of parents in guiding the education of their children while acting independently of the state. In Brown the Court upheld a further step, the rights of Negro parents to guide the education of their children while the state supported their choice. The Court could have decided that the parents of Negro children could exercise their choice of non-segregated schools by attending private schools such as parents in Pierce found free choice in sending their children to private schools, and as was stated in Gong Lum v. Rice. The decision in Brown went beyond Pierce and Gong Lum in recognizing parents' rights to control the education of their children in so far as it extended this right to include regular public education without arbitrary assignment to schools on a basis of race alone.

e) Reaction to the Case. - In the light of the earlier decisions of Sipuel, Sweatt, and McLaurin, the doctrine

of the Brown decision did not appear at all surprising. Nevertheless, it was both praised as a proper development of constitutional law⁴⁰ and damned as an illegal venture of the Court.⁴¹ The majority, however, upheld the Court's decision. Bertain took special note of the rights factor involved.

It would appear that the Supreme Court of the United States has met a most difficult national problem forthrightly. It has extended the privileges of the Court to children. [. . .] The decision was rendered in favor of the children.⁴²

Woefel and Forkins recognized the parental rights elements that were involved in the Court's decision along with seeing that the spirit of the Constitution had been adhered to. They pointed to the fact that there was no article of the Constitution or law of Congress that in itself could be called upon to forbid segregation in the schools. The Court took its stand on what it considered was the intent of the Constitution. They said:

40 William P. Rogers, "The Problem of School Segregation: A Serious Challenge to American Citizens," 45 ABA Journal 23 (1959); George L. DeLacy, "A Judicial Problem Judically Solved," 43 ABA Journal 519 (1957).

41 Charles J. Bloch, "A Legal Error That Should Be Corrected," 45 ABA Journal 27 (1959).

42 George J. Bertain, Jr., "Racial Segregation in the Public Schools," 5 Catholic University of America Law Review 141, 155-156 (1955).

From a purely legalistic point of view the question was relatively simple. If the parents of Negro children were claiming 'equal protection of the law' - as they apparently were - it is merely a matter of asking to which federal law they were appealing. From this viewpoint they had little hope of a case, for there is no law prohibiting segregation on an elementary and secondary educational level. Consequently, they were not appealing to any law of Congress but to what may be called the spirit and intent of the Constitution. As such it was their need to show that the ideals of the nation cannot be realized in the present environment of State segregation laws. This need the Court has decided they met. Hence, its decision.⁴³

As noted previously, parental rights per se were not mentioned in Brown I and II, but as the above opinion held, it was basically parents who were requesting through proper legal representation "equal protection of the law" for their children. This they received from the "spirit and intent" of the Constitution as the Court interpreted it.

In the light of the Court's holding that all children have the right to a public education on equal terms, Borinski held that public education was a right of citizenship and could not be abolished without violence to the federal Constitution.⁴⁴

⁴³ Paul A. Woefel, S.J., and James M. Forkins, "The Federal Government and Public School Desegregation: An Inquiry into Principles," 18 University of Detroit Law Journal 393, 399 (1955).

⁴⁴ Ernst Borinski, "A Legal and Sociological Analysis of the Integration Decrees of May 31, 1955," 16 University of Pittsburgh Law Review 329, 332-333 (1955).

It might be observed in the light of Borinski's statement that citizenship in its full extent resides only in adults not in children. Thus the parental rights element in the Court's decision seemed apparent.

In summary, the Brown cases⁴⁵ stemmed from suits attempting to desegregate schools in various areas of the country. The appellants held that the states had no right to restrict attendance at public schools on racial lines. The appellees held that Negro pupils were not being denied any constitutional guarantee by segregated school assignment and that the Court had already decided this issue in Plessy and Gong Lum. The Court decided that the principle of Plessy no longer held and that assigning pupils to public schools on the basis of race alone was contrary to the Constitution. The results of Brown were seen to advance the principle of Pierce a step farther than the original decision. For the most part, legal comments were in agreement with the Court.

45 Between the original decision and 1969 fourteen cases have been decided by the U.S. Supreme Court to prevent delay in Brown enforcement: Hawkins v. Board of Control, 350 U.S. 413 (1956); Cooper v. Aaron, 358 U.S. 101 (1958); Shuttlesworth v. Board of Education, 358 U.S. 101 (1958); Watson v. Memphis, 373 U.S. 526 (1963); McNeese v. Board of Education, 373 U.S. 668 (1963); Goss v. Board of Education, 373 U.S. 683 (1963); Griffin v. County School Board, 377 U.S. 218 (1963); Bradley v. School Board, 382 U.S. 103 (1965); Rogers v. Paul, 382 U.S. 198 (1965); Green v. County School Board, 391 U.S. 430 (1968); United States v. Montgomery County, 395 U.S. 225 (1969); McDaniel v. Barresi, 39 LW 4450; Keyes v. Denver School District, 396 U.S. 1215 (1969); Alexander v. Board of Education, 396 U.S. 1218 (1969).

4. Engel v. Vitale

The constitutionality of the New York Board of Regents' official prayer for the public schools was the basis of the suit Engel v. Vitale, 370 U.S. 421 (1961), before the U.S. Supreme Court. Shortly after the Regents' Prayer was adopted in the New Hyde Park School District, Steven I. Engel and nine other parents of minor children brought suit against the school board on the allegation that the use of this prayer was contrary to their personal beliefs and a violation of the First Amendment of the Constitution regarding the establishment of religion. Both the trial court and the New York Court of Appeals upheld the standing of the New York Board of Regents' Prayer as long as there was no compulsion involved in its use.⁴⁶ The U.S. Supreme Court agreed to rule on the decision of the New York courts.

a) Argument for the Petitioners. - The threefold argument of the petitioners, Engel, et al., was 1) that the Regents' Prayer was sectarian and denominational, 2) that this prayer was an aid to religion in as far as any prayer is a teaching of religion, and 3) that is case was basically the same as the McCollum case because it does promote

⁴⁶ 10 N.Y. 2d. 174, 218 N.Y.S. 2d. 659; 175 N.E. and 579.

religion in the public schools.⁴⁷

The claim that the Regents' Prayer was sectarian and denominational was founded on the allegation that it was a prayer of Christians and not acceptable to certain other denominations and non-believers.⁴⁸

Secondly, it was alleged that the prayer did teach religion in that it proposed belief in God and reliance upon him.⁴⁹

Thirdly, the instant case was held to be identical with McCollum where the Court overruled teaching of religion on public school property as being an aid to religion. The Regents' Prayer was said to be doing exactly the same thing.⁵⁰

For the above reasons the Regents' Prayer was alleged to be contrary to the establishment of religion clause of the United States Constitution.

b) Argument of the Respondents. - The argument for the respondents, board of education of New Hyde Park, N.Y., contained the following allegations: 1) the Regents' Prayer is no more than a brief recital of belief in God consuming

⁴⁷ Brief for Petitioners at 12-32, Engel v. Vitale, 369 U.S. 809.

⁴⁸ Ibid., p. 12-13.

⁴⁹ Ibid., p. 17-22

⁵⁰ Ibid., p. 22-32.

fifteen seconds, 2) no one is subjected to any sectarian influence, and 3) the Regents' Prayer is in harmony with prior rulings of the Court.⁵¹

The first argument of the respondents that the Regents' Prayer was no more than a brief recital showed that the prayer contained a mere twenty-two words as follows:

'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country.'⁵²

The brevity of the prayer was considered by respondent to be an insignificant contribution as religious aid to schools.

Secondly, the claim was presented of no sectarian influence. Respondents said:

There is no evidence in this case that any pupil in the schools operated by respondents' School Board has been subjected in the schools to any sectarian or other formal religious training.⁵³

The prayer was not considered a propagation of any particular religious sect nor the giving of any specific training in religion.

Thirdly, it was held that the prior rulings of the Court had defended the position that the United States are

⁵¹ Joint Brief of Respondents and Intervenor-Respondents Opposing Certiorari at 5-24, Engel v. Vitale, 369 U.S. 809.

⁵² Ibid., p. 5.

⁵³ Ibid., p. 7-8.

a religious people and that the government was founded on belief in God. Respondents substantiation for this was in Zorach v. Clauson, 343 U.S. 306; Board of Education v. Barnette, 319 U.S. 624; and Church of Holy Trinity v. United States, 143 U.S. 457.⁵⁴

Thus, the respondents held that the prayer's introduction into the schools was an insignificant matter as far as religion is concerned, that no one was subjected to sectarian influences, and that the matter had already been decided by the Court.

c) Decision of the Court. - The U.S. Supreme Court in its opinion written by Mr. Justice Black rejected the practice of the New York Board of Regents' composing a prayer for recitation by the pupils in the public schools. The Court took note of the petitioners' request to have the New York statute remanded on the grounds of constitutional violation and it considered the Regents' Prayer a participation in the establishment of religion even if only in a small way. Mr. Justice Black stated:

⁵⁴ Joint Brief of Respondents and Intervenors-Respondents Opposing Certiorari at 14-24, Engel v. Vitale, 369 U.S. 809.

[. . .] petitioners argue, the State's use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by government officials as a part of a governmental program to further religious beliefs.⁵⁵

And in regard to the amount of the establishment, the Court said:

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others - that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to governmental encroachments upon religion which were commonplace 200 years ago.⁵⁶

In agreeing that the Regents' prayer was only a small violation of the First Amendment, the Court also recalled James Madison's warning that first experiments with religious liberties could easily grow into other developments towards the establishment of religion.⁵⁷

Thus, the Court rejected the Regents' prayer by indicating that the government was out of its area of competence with respect to writing prayers. This was not part of its business, and it should stay out of such. The Court felt that writing prayers and approving them belonged in the realm of others. The Court stated:

⁵⁵ Engel v. Vitale, 370 U.S. 421, 425.

⁵⁶ Ibid., p. 436.

⁵⁷ Ibid.

[. . .] government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people chooseto look to for religious guidance.⁵⁸

The Court considered the writing and approving of prayers an interference by government in an area where they had no right according to the First Amendment and in which history had indicated it would eventually lead to the abuse of an individual's freedom.⁵⁹

Parental rights in the Engel case were discussed only in so far as it was pointed out that although no pupil was forced to join "in the prayer over his or his parents' objection,"⁶⁰ such rights were best protected when the no establishment clause of the Constitution was upheld.⁶¹

As a parents' right case, it was seen that both sides of the controversy were not favored by the Court. The suing parents' objection seemed more nearly fitting the prescriptions of the First Amendment, even though the Court made no response to the suing parents' claim that their rights were being violated by the Regents' Prayer plan. The school

58 Engel v. Vitale, 370 U.S. 421, 435.

59 Ibid., p. 425-433.

60 Ibid., p. 423.

61 Ibid., p. 425-430.

board, the other party in the suit, which possibly had the support of many parents, was not favored by the decision. However, no parents claiming to approve the school board were a party in the suit. In reality, the decision of the Court seemed very similar to McCollum in so far as it restricted the school's direct participation in promoting religion.

When compared to Pierce, the outcome of the decision did not seem contrary to Pierce. The principle in Pierce was that parents may educate their children free of undue force and independently of the state. But Pierce in no way guaranteed the rights of parents to promote prayers or religion in the public schools. And in Engel the Court in no way militated against anyone using a private school to exercise his choice for praying in school. However, the Engel court did not go beyond Pierce as far as favoring public school sponsorship of religious matters. Parents who might have desired prayer in the public school could possibly have complained that their rights were denied, but on the other hand, they were not a party to the instant case. Had they been, the Court might have suggested their use of private schools to exercise their option.

The chief emphasis seemed to be that the government should stay out of the business of religion and not compose prayers to be recited in the public schools. The problem

of whether pupils or anyone else could pray on their own in public school was not solved by the Engel decision. Up to the time of the present writing, such a case has not been presented. Thus, it was seen that the Court neither went beyond Pierce nor denied its principles.

d) Reaction to the Decision. - The common response of the legal commentators on Engel was that the Court had acted properly in declaring the Regents' Prayer program unconstitutional in line with the establishment clause of the First Amendment. Little comment was made with regard to the equal protection of the suing parents' rights because the case was not decided on that ground.

However, Sutherland wondered whether plaintiff parents had really suffered any wrong from the Regents' prayer arrangement. He felt that the wrong, if any, de minimis, was scarcely worth a decision by the Court.⁶² Perhaps, that was partially the reason the Court did not base its decision on alleged wrongs sustained by the suing parents, but rather on the First Amendment. Admittedly, the Court recognized that no serious hardship was wrought on anyone by the Regents' Prayer since by proviso one could easily not participate.⁶³

⁶² Arthur E. Sutherland, Jr., "Establishment According to Engel," 76 Harvard Law Review 25, 42 (1962).

⁶³ Engel v. Vitale, 370 U.S. 421, 423.

Castruccio challenged the decision of the Court on the grounds that it could be claimed that rights of believing parents were not protected. He stated:

[. . .] the very argument that asserts promotion of prayer to be violative of non-believers' rights, can logically be used to prove that a policy of 'no prayer' is a position against believers under a broad interpretation of the establishment clause.⁶⁴

Castruccio, however, realized the dilemma involved. No matter which way the Court decided, it could be accused of making the wrong logical decision.⁶⁵ As was earlier pointed out, on the other hand, the Court did not rule out prayers in public schools by this decision but that the government should stay out of the business of constructing them and promoting them.

Since the Court made no specific parental rights statements in handing down its decision, neither did comment on the case center around parental right. Much of it was speculation about what this strict interpretation of the First Amendment could possibly mean in the future and in other possible suits.

In summary, the Engel case was seen as one which challenged the constitutionality of the New York Regents'

64 Louis M. Castruccio, "Engel v. Vitale: The Internal Establishment Dilemma," 36 Southern California Law Review 240, 251 (1963)

65 Ibid.

Prayer in the public schools. Petitioners alleged that the use of this prayer was contrary to the First Amendment of the Constitution; respondents claimed that it was not. The Supreme Court held with the petitioners and indicated that it was not the business of government to be constructing and promoting prayers in the public schools. In its thus holding, the Court was seen to be much in line with McCollum and as neither going beyond Pierce nor denying it. Legal commentators generally were favorable to the Court's decision.

5. Abington v. Schemp

Closely following upon Engel v. Vitale was the case of Abington v. Schemp, 374 U.S. 203 (1963). Engel had dealt with prayer in the public schools; Schemp dealt with bible reading in public schools.

The circumstances eliciting the suit were these. The School District of Abington Township, Pennsylvania, regulated that each day twelve verses of the bible were to be read in the classrooms of the public school and to be followed with the recitation of the Lord's Prayer. There was to be no comment by the teacher following the reading and the prayer. Soon afterwards, Schemp et al., parents of students in the Abington Township schools, filed suit against the practice, and the local court enjoined its continuance. The school

district then eliminated any compulsory element in the practice. But since the appellants, the School District of Abington Township, were denied relief from the local court enjoiner, they appealed the case to the Supreme Court of the United States.⁶⁶

Filed together with Abington v. Schemp was the case of Murray v. Curlett, one from Maryland of a very similar nature. The Supreme Court accepted both cases together for judgment.

a) Argument for the Appellants. - The basis of the argument for the appellants, Abington School District, was that the bible reading was not a violation of the First Amendment to the Constitution. The allegation was that since no force was used and listening to the bible reading was optional, the free exercise of religion was not impinged upon.⁶⁷

It was further held that this case was different from McCullum in so far as there was no proselytizing nor was any religious instruction provided at expense to the state. In addition, the bible reading allegedly did not require any religious act on the part of the hearer nor did it even

⁶⁶ Brief for Appellants at 7-12, Abington v. Schemp, 374 U.S. 203.

⁶⁷ Ibid., p. 24-27.

envision such a performance on his part.⁶⁸

A third contention of the school district stated that the government must be neutral to voluntary religious practices and that the Supreme Court in the past had so acted and should do likewise in the present instance.⁶⁹

b) Case for the Appellees. - The facts in the case were not basically contended by the appellees, parents of the Schemp children. They did, however, allege that the method used in the execution of the bible reading and recitation of the Lord's Prayer constituted a religious practice contrary to their beliefs. This was the prime allegation of the appellees, namely, that the practice ensuing upon the Pennsylvania statute did in reality constitute a religious ceremony.⁷⁰

A second claim was that the practice of bible reading, etc., in the schools aided one particular religion, i.e., the Christian religion. Appellees said: "Christianity is the religion favored by this act to the exclusion of all other religions."⁷¹

⁶⁸ Brief for Appellants at 7-12, Abington v. Schemp, 374 U.S. 203.

⁶⁹ Ibid., p. 27-34.

⁷⁰ Ibid., p. 23.

⁷¹ Brief for Appellees at 23, Abington v. Schemp, 374 U.S. 203.

This statement was further extended to claim that the Pennsylvania act favored the Protestant religion in that the King James version of the scriptures was generally the one read.⁷² Using the bible was also alleged to be offensive to Jewish religionists, Mormons, Christian Scientists, and others.⁷³

An additional allegation was that the bible reading practice in the Pennsylvania schools aided all religions and that such modifications as different bible versions or using the Koran, etc., would not keep it from being an aid to religion.⁷⁴

Finally, appellees held the act providing for the bible reading interfered with the free exercise of religion.

Appellees submit that the statute violates the free exercise clause of the First Amendment because it requires they and their children take public action in order to exercise the freedom of religion or non-religion which the Constitution guarantees to them.⁷⁵

The "public action" referred to in the above statement was the proviso of the Pennsylvania statute which allowed parents to have their children absented from the

⁷² Brief for Appellees at 25, Abington v. Schemp, 374 U.S. 203.

⁷³ Ibid., p. 32-33.

⁷⁴ Ibid., p. 33-37.

⁷⁵ Ibid., p. 37.

bible reading upon written request. The rights of the dissenting parents were allegedly violated by their having to make a positive effort for their children to be excused from the readings and prayer. The consenting parents did not have to do this.

The appellees' arguments were thus seen to be that the Pennsylvania law provided a religious practice in the public schools that was contrary to their belief, that favored the Christian religion, specifically Protestant, that could not be easily modified by changing reading texts, and that it interefered with the free exercise of religion.

c) The Decision of the Court. - The Supreme Court decided that the Pennsylvania statute requiring bible reading in the public schools was indeed a violation of the First Amendment to the Constitution. In doing so, the Court conformed to its previous term decision against the New York Regents' stipulated prayer, Engel v. Vitale, 370 U.S. 421 (1962).

The instant case was decided conjointly with Murray v. Curlett because as the Court said: While raising the basic questions under slightly different factual situations, the cases permit of joint treatment."⁷⁶

⁷⁶ Abington v. Schemp, 374 U.S. 203, 205.

The Court considered the bible reading required in the Pennsylvania public schools a violation of the establishment of religion clause of the First Amendment, even though it was voluntary on the part of the individual.

The conclusion follows that in both cases the law requires religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for the fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.⁷⁷

The parents of the minor children in the Pennsylvania and Maryland schools were considered by the Court as legally aggrieved by the aforementioned school regulations. Even though the appellees were the minority in the case, it might be questioned whether the rights of the majority non-objecting parents were violated by forbidding the bible reading practice. Mr. Justice Clark addressed himself to this problem.

While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.⁷⁸

The Court seemed to indicate that the state could not be used by either position in the suit to force the

⁷⁷ Abington v. Schemp, 374 U.S. 203, 225.

⁷⁸ Ibid., p.226.

exercise of religion or to prohibit its free exercise.

Mr. Justice Brennan in his concurring statement clarified the parental rights value inherent in the Court's decision. He pointed out the importance of protecting the freedom of parents to choose the type of education and school they desired for their children.

Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent [. . .] The choice which is thus preserved is that between a public secular education with its uniquely democratic values, and some form of private or sectarian education which offers values of its own.⁷⁹

While defending the right of the parents to choose whatever school they prefer, the Court justice also defended the right of various schools to exist with neither kind being left in jeopardy.

In my judgment the First Amendment forbids the State to inhibit that freedom of choice [. . .] either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one [. . .] which our Constitution leaves to the individual parent.⁸⁰

⁷⁹ Abington v. Schemp, 374 U.S. 203, 242.

⁸⁰ Ibid.

In the case of either type of school or the values found in each, Mr. Justice Brennan held that the parent had the final right of choice.

Mr. Justice Brennan also recalled for the Court the fact that the Pierce case had upheld the rights of private schools and the rights of parents with children in them.

In Pierce v. Society of Sisters, 268 U.S. 510, a Catholic parochial school and a private [. . .] academy challenged a state law requiring all children between certain ages to attend public schools. This Court held the law invalid as an arbitrary and unreasonable interference both with the rights of the schools and with the liberty of the parents of the children who attended them.⁸¹

The implication in referring to Pierce was to show that parents had every right to exercise their freedom of religious choice in schools, but it had to be done independently of the state. In the instant case the bible reading practice was not independent of the state, but was, under the terms of the Pennsylvania proviso, required by the state in the public schools contrary to the Constitution.

The stance of the Court seemed to be that parents had the right to exercise free choice in schools and the values they teach as was held in Pierce. The Court did not remand bible reading as such in the public schools. It did indicate that it was a violation of the Constitution for the

⁸¹ Abington v. Schemp, 374 U.S. 203, 248.

public schools to require it even while allowing the refusal to participate for dissenters. The Court's position was not one that could be classified as extending further than the Pierce decision, but neither could it be considered as a denial of it. Individuals still had the free choice of education independently of the state, but the state could not be involved as requiring any form of religion in the public schools.

d) Reaction to the Decision. - The legal studies following Schemp generally accepted the Court's opinion with little reservation. With Schemp following closely upon the prayer decision in Engel, it was possible that few commentators expected the Court to go further than it had done in Engel.

Pollak, after noting that the more precise statement in the Schemp case came from concurring Justice Brennan, said that the Court did protect parents' rights in the decision.

The first amendment, in Justice Brennan's view guarantees the American parent a choice between this form of public education and private education oriented to any religious belief the parent may elect.⁸²

⁸² Louis H. Pollak, "Public Prayers in Public Schools," 77 Harvard Law Review 62, 69 (1963).

The obvious implication here was that Pierce guaranteed the right of the private schools and private school parents to promote whatever religious belief they preferred while Schemp denied the constitutionality of the state promoting religion through required bible reading in the public schools.

Regan vigorously attacked the Court's decision claiming that it was not adhering to the neutrality it was proclaiming. He also claimed that the Court could not rightly rule out voluntary religious participation in the public schools.

Here we must recall the central principle of the case of Pierce v. Society of Sisters, that the child is not 'the mere creature of the state' and that parents enjoy the primary right, duty, and responsibility to educate the child.
[.]
In the light of that decision and its philosophy of parental primacy, I do not see how the state's compulsory education laws could constitutionally insist on the exclusion of voluntary religious instruction as part of the child's formal schooling.⁸³

The above observation, although recognizing the parental rights primacy in Pierce, failed to note that in Abington v. Schemp the U.S. Supreme Court merely ruled out the principle of the state being the teacher of religion by requiring bible reading in the public schools. The Schemp decision did not rule out the voluntary reading of the bible,

⁸³ Richard J. Regan, S.J., "The Dilemma of Religious Instruction and the Public Schools," 10 Catholic Lawyer 44, 46 (1964).

the bible studied as literature, or the scientific study of it. The Court was saying that the state, according to the U.S. Constitution, is neither the teacher of religion through its public agency, nor the one to prevent it.

Thus, Schemp was seen as a parental rights case where parents of children in Pennsylvania schools objected to the required bible reading in the public schools. Even though the required element was eliminated for the individual person, it was not withdrawn from the school regulations pertaining to the individual schools.

The appellants in the case claimed that there was no violation of the Constitution in the bible reading practice; the appellees contended that there was a violation. The decision of the Supreme Court held with the appellees stating that the state was not the machinery for teaching religion through its public schools. The Court also restated the principle of free choice for parents with regard to schools. The concurring opinion from the Court pointed up the fact that parents were not required to send their children to public schools, and that by sending them to private schools of their choice, they could have whatever values they wished taught their children.

The Schemp case when compared to Pierce was seen as conforming to the principles of the latter but as not extending beyond it.

6. Board of Education v. Allen

In the case of Board of Education v. Allen, 392 U.S. 236 (1968), a New York statute requiring school districts to loan textbooks free to all pupils regardless of school attended, including religious schools, was brought to the Supreme Court for judication. The Court was requested to determine whether the above statute was a violation of the First Amendment establishment of religion clause.

a) Facts in the Case. - The legal action terminating in the case, Board of Education v. Allen, originated in the state of New York where a statute required school districts to purchase and loan textbooks to pupils of seventh to twelfth grades. This included pupils in public, private, and church-owned parochial schools. The textbooks as provided by the statute remained the property of the local school district and were loaned to the pupils, not to the schools.

This statute was declared unconstitutional by the New York Supreme Court. After a series of appeals and reversals, the case was carried to the U.S. Supreme Court. As parties to the suit, parents of minor children enrolled in parochial schools filed to protect the right of their children to have the benefits of the free textbook loan.⁸⁴

⁸⁴ Brief for Appellee, James E. Allen, Jr., at 1-4, Board of Education v. Allen, 392 U.S. 236 (1968).

b) Argument of Appellees. - The appellees in the case were James E. Allen, Jr., the commissioner of education in New York, and parents of certain children attending private schools.

The basic argument of the appellees was that the loaning of textbooks to children, regardless of the school attended, was not a violation of the establishment clause of the First Amendment. Appellees argued that the child and the parent received the benefits of the textbooks, not the parochial schools or churches sponsoring them, and thus no establishment of religion was present.

The textbooks are loaned to children, not schools. The sectarian schools did not previously provide textbooks, so that no relief from previously existing financial burdens has been provided to sectarian schools. The only beneficiaries of this law are students and their parents. On that basis the law cannot be said to be an establishment of religion.⁸⁵

The parents and children were the alleged beneficiaries of the New York textbook statute. The schools or their sponsoring churches were not considered as having benefitted in any way since no funds or books went to them.

A further argument pointed to the rights of parents to employ private schools for their children's education. Appellees argued:

⁸⁵ Brief for Appellee, James E. Allen, Jr., at 5-6, Board of Education v. Allen, 392 U.S. 236.

Indeed, this Court has held that a state may not enact legislation compelling attendance of children at a public school (Pierce v. Society of Sisters, 268 U.S. 510). This Court held the law invalid as an unreasonable interference with the right of parents to control the education of their children [. . .]⁸⁶

Along with the recognition of the parents' right to use private schools, the appellees added a stronger claim: "Not only do children have a right to attend sectarian schools, they also have a right not be be penalized for attending such schools."⁸⁷

Appellees also warned that denial of public welfare rights to children because of attendance at sectarian schools could be construed as a "violation of their right to the free exercise of their religion."⁸⁸

The allegations of the appellees, then, were that there was no violation of the Constitution in the textbook statute, that no benefits came to denomination-sponsored schools, that parents by law had the right to use such private schools, and that attendance at them should not be penalized by law.

⁸⁶ Brief for Appellee, James E. Allen, Jr., at 38, Board of Education v. Allen, 392 U.S. 236.

⁸⁷ Ibid., p. 39.

⁸⁸ Ibid.

c) Argument for Appelants. - The only argumentation presented by the Board of Education of the Central School District No. 1, Nassau Co., New York, appelants, were those of amici curiae. Justice White, in giving his decision, even hinted at the lack of argumentation and record on the appellant's part.⁸⁹

The basic claims in the briefs of amici curiae were simply the opposite of the appellees, i. e., that the New York statute did violate the First Amendment to the U.S. Constitution. A group of Jewish organizations filed a brief of amici curiae. Commenting on the "loan" of textbooks in the New York statute, they claimed that this was only a subterfuge of the law.

It is a fiction to designate the provision as one for 'loans' and, even if it were not, free loans of public property to churches is an unconstitutional as gifts of the property.⁹⁰

Even the loaning of property to churches, which they indicated to be the point at issue, was allegedly unconstitutional. However, the wording of the New York textbook statute made no provision for loaning textbooks to churches, only to pupils or the school administrators representing

⁸⁹ Board of Education v. Allen, 392 U.S. 236, 248.

⁹⁰ Brief of American Jewish Committee at 5, Board of Education v. Allen, ibid.

these pupils interests.⁹¹

A second amicus curiae, Protestant and Other Americans United For Separation of Church and State, for the appellants urged that the child benefit theory, often invoked in aid to private school children, should be strictured and modified.

Amicus argues that the so-called 'child benefit' theory should be limited to situations where the benefit to the child is genuinely paramount and is not being advanced as a 'subterfuge' to evade constitutional strictures against government aid to churches and church-related institutions [. . .]⁹²

Amicus for the appellant considered the child benefit theory found in Cochran and Everson, treated supra, as being undesirable and too broadly interpreted in the instant case. No other briefs for the appellants were recorded in the official transcript.

d) Decision of the Court. - In handing down the decision of the U.S. Supreme Court, Mr. Justice White indicated that the New York textbook statute did not violate the First Amendment to the U.S. Constitution. He considered the benefits of the statute as an aid to children and their

⁹¹Brief of American Jewish Committee at 43, Board of Education v. Allen, 392 U.S. 236.

⁹² Brief of Protestants and Other American United For Separation of Church and State as Amicus Curiae at 15, Board of Education v. Allen, 392 U.S. 236.

parents, not to any schools.

Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend books free of charge.⁹³

To show that the aid was not to the schools, the justice added:

Books are furnished at the request of the pupil and ownership remains, at least technically in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.⁹⁴

The emphasis of Mr. Justice White was to point out that no benefit accrued to a church-related institution or the church itself.

The Court's decision also noted that parents were within their rights to make use of private schools to fulfill a state's requirement for compulsory education.

In the leading case of Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court held that although it would not question Oregon's power to compel attendance [. . .] Oregon had not shown that its interest in secular education required that all children attend publicly operated schools.⁹⁵

Mr. Justice White considered those attending private schools as fulfilling New York's school laws and suitable

93 Board of Education v. Allen, 392 U.S. 236, 243-244.

94 Ibid.

95 Ibid., p. 245.

recipients of the textbook loan. And the pupils could be such recipients without denying the rights of any other individuals. He specifically pointed out that the appellants had not demonstrated any violation against themselves as guaranteed by the First Amendment.⁹⁶

Although Justice White made no broad doctrinal reference to parents' rights at this time, the implications were sufficiently evident in so far as he noted that the rights of private school parents were not to be denied. Their children could receive the textbook loan just the same as the children of any other parents. He upheld the child benefit principle in the present case by calling upon the authority and strength of Cochran v. Board of Education, from which the child benefit theory was elicited.⁹⁷

Basically, however, the case was decided not on whether there was some benefit to children or parents but whether there was some violation of the First Amendment in the New York statute. None was found.⁹⁸

As compared with Pierce, there was nothing in the decision that would be considered derogatory to its principle of parents being free to educate their children independently

96 Board of Education v. Allen, 392 U.S. 236, 249.

97 Ibid., p. 247.

98 Ibid., p. 243.

of the state and without undue force. The Allen case could be considered an advancement beyond Pierce much in the same sense as Cochran had been. The latter was also a case of furnishing textbooks for private school pupils.

The Court had seen the New York textbook statute not in violation of the Constitution. Its reasoning was that no aid was being given to religion or churches as appellants had contended. Further, the Court found that the benefits accrued went to the children and parents and not to the schools. The outcome of the case was seen to be much like that of the earlier Cochran case and was a step beyond the principle held in Pierce in so far as parents were not denied the use of private schools to receive a public benefit.

e) Reaction to the Decision. - Legal studies recognized the fact that the Court had based its decision on non-violation of the establishment of religion as required by the First Amendment. Other factors, however, were noted such as parent and child benefits.

Yale's study, while holding that the Court had decided wrongly and should have declared the New York statute unconstitutional, took note of the parents' rights involved.

The Court argued that since parents can constitutionally send their children to private schools to comply with the state's compulsory law, and since private schools serve a public function by educating these children in the secular subjects, the loaning of textbooks is an appropriate public concern.⁹⁹

Even though recognizing the justification of the Court's action, the above study held that the New York statute should have been declared unconstitutional. Yale's opinion was that as the textbook loan relieves parents of a monetary burden, this in turn becomes an indirect aid to the private schools.¹⁰⁰ What the author failed to explain, however, was any legal connection between unproved aid to private religious schools and the establishment clause of the First Amendment. The books did not go to schools.

Coffey speculated that one motivating factor of the Court's decision was that parents of private school children, unless aided in some way, will no longer be able to exercise their admitted right of sending their children to schools of their choice.¹⁰¹

Whether this was even the remotest consideration of the Court could not be adjudged from the wording of the

⁹⁹ Jerold S. Yale, "Constitutional Law," 18 Buffalo Law Review, 356, 360 (1968-69).

¹⁰⁰ Ibid., p. 363.

¹⁰¹ Thomas Coffey, "Constitutional Law-Aid to Parochial Schools-Establishment Clause-Everson to Allen: From Buses to Books and Beyond," 18 DePaul Law Review, 785, 798-799 (1969).

decision. It neither confirmed nor denied any alleged difficulty sustained by the parents in making a free choice of schools. The Court only maintained that the statute was constitutional and did not aid religion or private schools but the children and their parents.¹⁰²

Bjurstrom's study concurred with the Court's holding that the New York statute aided the children and that they alone were the beneficiaries. He said that the Court's wording focused on the children.

This language suggests that the child-benefit theory is being utilized to aid in the Court's determination. This theory emphasizes the benefit derived by the child from public aid to schools and in effect says that any benefit to the parochial schools is merely incidental.¹⁰³

The purpose of the Court's decision, of course, was not first of all whether children were being helped but whether the statute was in violation of the Constitution by giving direct aid to religion or religious schools teaching religion.

In summary, Board of Education v. Allen was seen as a case testing the constitutionality of a New York statute providing for the loan of textbooks to all school children whether in public or private schools. Appellees held that

¹⁰² Board of Education v. Allen, 392 U.S. 236, 243-244.

¹⁰³ Stanley T. Bjurstrom, "Constitutional Law," 15 Loyola Law Review, 338, 342 (1969).

there was no aid to religion in the case of children attending religious private schools. Appellants claimed that there was aid to religious schools. The Supreme Court held that there was no direct aid to religion. The case was seen as a step beyond Pierce in that parents did not have to abandon private schools for their children to receive the aid of free textbook loans.

7. Tinker v. Des Moines School Dist.

The Supreme Court held in Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) that the wearing of black armbands in protest of the Vietnam war by students in public schools could not be prohibited by the local school board without a violation of free speech.

a) Facts in the Case. - John Tinker, et al., minor students in public school at Des Moines, Iowa, chose to wear black armbands to school in memory of the Vietnam war dead and in protest against the war. This was in 1965. Doing so was a violation of a previously stated school board regulation. Students were suspended from school until compliance could be exhibited.

The basic difference in the facts of the case as presented by the petitioners, Tinker et al., and the respondents, the Des Moines School District, was that the petitioners

claimed no disturbance was caused whereas the respondents claimed that a variety of disturbances did ensue.

The petition brought to the U.S. District Court of the Southern District of Iowa refused relief from the school district regulation. On writ of certiorari the petitioners carried the case to the U.S. Supreme Court in the name of adult parents and next friend.¹⁰⁴

b) Argument of Petitioners. - The petitioners' allegation was that the school board prohibition order infringed upon their constitutional right of free speech and that their suspension from school was an unlawful restraint upon this right.

Petitioners claimed that in the doctrine of Meyer and Pierce the Court had contravened any interference "with the right of the students to develop their individual capacities."¹⁰⁵

They quoted from Pierce the statement that the child was not merely the state's creature but rather that the parents have the right to direct his educational destiny.¹⁰⁶

¹⁰⁴ Brief for Petitioners at 1-10, and Brief for Respondents at 2-15, 33, Tinker v. Des Moines School Dist., 393 U.S. 503.

¹⁰⁵ Brief for Petitioners at 10-11, ibid.

¹⁰⁶ Ibid., p. 11.

Allegedly the main reason given the petitioners by the school district for the prohibition of the armbands was that it might cause a disturbance. Petitioners also held that suspension from school for a legitimate expression of free speech in the form of a sign was contrary to the First Amendment clause regarding free speech. They said: "Free speech, for students as for others, may not be subordinated solely upon speculation by the State that it will result in a grave evil."¹⁰⁷

Speculation by the school district board that wearing the armbands might cause trouble was considered by the petitioners as insufficient reason for restricting the rights of the First Amendment.

Finally, it was claimed by the petitioners that the actual suspension from school did inhibit the students' exercise of free speech and there was not here just a threat to do so.¹⁰⁸

The argumentation of the petitioners was totally based on the alleged restriction of free speech both by the regulation against the armbands as well as by the actual suspension from school.

¹⁰⁷ Brief for Petitioners at 21-22, Tinker v. Des Moines School Dist., 393 U.S. 503.

¹⁰⁸ Ibid., p. 24-25.

c) Argument for Respondents. - The arguments for the respondents, the Des Moines School District, were these:

1) the regulation against wearing the armbands did not deprive students of the right of free speech, 2) disturbances in school must be viewed broadly, and 3) the rule was reasonably calculated to promote discipline in the schools.¹⁰⁹

To justify their first argument the respondents argued that the courts had upheld in the past numerous cases where free speech or demonstrations were prohibited in order to prevent disruptive actions in a given locale.¹¹⁰

Secondly, respondents argued that students should not be allowed to infiltrate the classroom for the purpose of propagating personal convictions in a way that might disrupt "the scholarly discipline that is necessary to the school room."¹¹¹

Finally, respondents stated that the rule made by the school board was calculated to promote discipline in the schools and for the purpose of avoiding violence. Allegedly, it was not for the purpose of dissuading demonstrators from their ideas or prohibiting them from displaying their beliefs.¹¹²

¹⁰⁹ Brief for Respondents at 16-36, Tinker v. Des Moines School Dist., 393 U.S. 503.

¹¹⁰ Ibid., p. 16-17.

¹¹¹ Ibid., p. 26.

¹¹² Ibid., p. 32-33.

On the above three arguments the respondents rested their case.

d) Decision of the Court. - The U.S. Supreme Court reversed the decision of the district court and its affirmation by the court of appeals. These lower courts had held that the school board regulation against wearing the armbands was within the rights of the local school board.

The Court in giving its decision upheld the rights of free speech as it applied in schools.

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years [. . .] Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student and parent. See Also Pierce v. Society of Sisters [. . .]¹¹³

It might be noted that the petitioners in the instant case were parents acting in the name of minor children. The Court was accepting the allegation of the petitioners that their free speech and free expression were being violated.

A strong statement on students' rights separately from their parents; was made by the Court. This was done even though in the instant case parents had been a party to the suit. Mr. Justice Fortas said:

113 Tinker v. Des Moines School Dist., 393 U.S. 503.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in schools as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reason to regulate their speech, students are entitled to freedom of expression of their views.¹¹⁴

Three specifics were involved in Justice Fortas' statement: 1) students possess a basic right of free speech, 2) the wearing of the armbands was considered a matter of free expression, and 3) there was no valid reason for restricting free speech here. Thus, in the Tinker case the state was considered devoid of the right to absolute control over students' training.

The Court answered the objection of the respondents that disruption and violence might occur if the armband regulation did not hold.

But conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech.¹¹⁵

114 Tinker v. Des Moines School Dist., 393 U.S. 503, 511

115 Ibid., p. 513

The Court by the Tinker decision clearly was not defending activities and speech that were disruptive of the schools or violative of others' rights. Obviously, the Court had not attempted by its decision to condone profligate or derelict activities under the cover of freedom.

When compared to the Pierce decision, it could be seen that the statement the Court made regarding children was reminiscent of the one it had made for parents in its earlier decision. They were not to be considered merely the fiefs of the state; and even though they were using a state agency in the public schools, this did not mean that all rights were thereby taken away. Since likewise, parents had brought suit in the place of minor children, the Court's statement on children's rights could also be considered a parental rights statement. The parents obviously accepted the children's stance, otherwise they would not have sued for them. Further, the parents were not required to send their children to private schools which would not have the local school board governing their actions and to which the armband regulation did not apply. In the light of the above considerations, Tinker could be considered an advancement beyond Pierce. In no way did the decision deny the principles of Pierce.

e) Reaction to the Decision. - Comments on the Tinker case pointed up the fact that the Court had not given carte blanc to justify any activities of pupils, that children did have some rights on their own, and that a number of problems would need to be brought up for future judication.

Stemwedel expressed the view that students must be cognizant of the rights of others in expressing their freedom.

Although the Tinker Court assured students of the full freedom of expression, the decision cannot be interpreted as giving them an absolute right to act or speak as they please. Those students wishing to express an opinion must do so in a manner which does not infringe upon the rights of other students.¹¹⁶

Aspelund also indicated that Tinker had not defended disruption of schools but the right of free speech.

[. . .] Tinker extended the right of freedom of speech to public school students during school hours. However, this right cannot be abused by use of violence or disruption of the classroom. [. . .] The Court has definitely settled that a school cannot restrict the rights of its students either by speech or symbols to express ideas, even though they may be unpopular with the administration, or may cause some controversy with other students.¹¹⁷

With regard to the rights of children as minors, Cutlip took notice of the background leading to Tinker and

¹¹⁶ John A. Stemwedel, "Constitutional Law-Free Speech Clause-Education," 57 Illinois Bar Journal, 848, 854 (1969).

¹¹⁷ Carl L. Aspelund, "Free Speech Rights of School Children," ¹⁶Loyola Law Review 176 (1969-70).

its obvious extension in Tinker.

Gradually, however, the Court established that children are not mere creatures of the State, and that boards of education, while performing delicate and highly discretionary functions, cannot standardize children and strangle the free mind.¹¹⁸

Footnoted for this observation was Pierce v. Society of Sisters. The obvious reference was to children and their relationship to the state. Cutlip summarized past decisions pointing out that there are certain things students cannot be forced to do.

In accordance with this view, it has been held that students cannot be compelled to salute the flag, that compulsory bible reading and prayers in the public schools violate first amendment rights, [. . .] that the state, even in its role as parent cannot deprive a child of fundamental rights[. . .]¹¹⁹

Legal response to the Tinker decision took note of the perspective with which the Court viewed the rights of the children involved. This perspective seemed to indicate that the Court was holding for the freedom of speech of those involved but was not holding for uncontrolled disturbance of the classroom. The Court seemed to think that it was possible to have a balance that respected free speech but did not destroy normal procedures of learning.

¹¹⁸ James Cutlip, "Symbolic Speech, High School Protest and the First Amendment," 9 Journal of Family Law 119, 120 (1969).

¹¹⁹ Ibid., p. 120.

In summary, the case of Tinker v. Des Moines School Dist. was seen to be one where parents of children in Des Moines, Iowa, school district brought suit to defend the rights of their children to wear armbands in the classrooms. These armbands were in protest to the Vietnam War and in memory of those who had died in it. The local school board had made a regulation against such an activity.

The school board claimed that the students by wearing the armbands were disturbing the classroom and hindering the learning process. The students claimed that they were only giving silent expression to their beliefs and were causing no disturbance. The parents suing for the children claimed that their children's right of free speech was violated by the school board regulation. The school board held that their regulation did not deny free speech and was promulgated solely for the purpose of protecting order in the classroom.

The Court upheld the suing parents by indicating that the Des Moines school district regulation was a violation of the free speech of the children involved. In doing so it recalled how the earlier case of Pierce had upheld the liberty of teachers, students, and parents. While holding for the right of free speech, the Court did not overlook the possibility of some interpreting its decision so broadly as to allow almost any sort of activity in the classroom without restraint. The Court denied that this was the meaning or

intent of its decision.

g) Review of McCollum to Tinker. - In this chapter seven cases decided by the United States Supreme Court were studied. They were McCollum v. Board of Education, 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952); two cases together Brown v. Board of Education, 349 U.S. 294 (1955); Engel v. Vitale, 370 U.S. 421 (1962); Abington v. Schemp, 374 U.S. 203 (1963); Board of Education v. Allen, 392 U.S. 236 (1968); and Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

Each of these cases dealt with the rights of parents in educational matters. The results of each decision was compared with the Pierce decision to determine if the Supreme Court had remained consistent with Pierce. This study indicated that the Court was consistent in holding Pierce in the above decisions.

In McCollum v. Board of Education the Court held that religious instructions conducted on public school property with the ensuing aid to religion was unconstitutional. The Zorach v. Clauson case resulted in the Supreme Court decision that the releasing of children from public school premises for religious instruction, as in the New York arrangement, was not a violation of the U.S. Constitution. The two Brown v. Board of Education cases saw the Court

holding that children could no longer be placed in public schools solely on the basis of race or national origin. In Engel v. Vitale the Court held that the New York State Regents' officially sanctioned and required prayer for the public schools was in violation of the Constitution. Abington v. Schemp was a determination by the Court that the Pennsylvania statute requiring bible reading in the public schools was also against the Constitution. The Court decided in Board of Education v. Allen that the New York statute requiring local school districts to provide the loan of textbooks to private school pupils was not a violation of the Constitution. In the final case studied in this chapter, Tinker v. Des Moines School Dist., the Court held that the local school district restriction against the wearing of armbands of protest in public schools was a violation of the individual pupil's constitutional rights.

In each of the cases studied parents of minor children had brought suit to judicate a situation which was considered by them to be violative of their rights under the Constitution. When the results of these cases were compared to the Pierce decision, they seemed to show that the Court had retained the Pierce doctrine. In Zorach, Brown, Allen, and Tinker the Court seemed to have gone beyond Pierce, while in McCollum, Engel, and Abington, it seemed to have held a doctrine at least as broad as Pierce.

SUMMARY AND CONCLUSIONS

1. Summary of the Study

In the year 1922 the state of Oregon passed a school referendum which would require attendance at public schools of all children between the ages of eight and sixteen. Since the implementation of this law would have the effect of closing all private schools teaching children of these ages, the Society of Sisters and others conducting private schools brought suit to enjoin enforcement of the law.

Because the United States District Court handed down a decision favorable to the private schools, the attorneys for the governor of the state of Oregon appealed the case to the United States Supreme Court. The case before the Supreme Court was Pierce v. Society of Sisters, 268 U.S. 510 (1925). It has popularly come to be known as the Oregon School Case.

In its decision, Pierce v. Society of Sisters, the Court stated a principle of parental rights in education that basically was the following. Parents have the right to educate their children independently of the state and free of undue force. The purpose of this study was to determine if the Supreme Court in its subsequent decisions on parental rights in education cases remained consistent with this doctrine. Fourteen cases on parental rights in education were seen to be handled by the Court following Pierce up to and

including the year 1969. The present study reviewed these for the purpose of determining the Court's consistency in the light of Pierce.

The method used in this study was to analyze the Oregon School Case in its background, its presentation to the federal district court, and its conclusion with the United States Supreme Court. Then each of the fourteen cases subsequently decided by the Court was treated for comparison. Each of these cases was analyzed for its background, the pro and con argumentation, the decision of the Supreme Court, its comparison to Pierce, and the reaction of professional legalists to the Court's decision.

The fourteen cases dealing with parental rights in education were seen to be the following: 1) Farrington v. Tokushige, 273 U.S. 284 (1927), which overruled a Hawaiian law forbidding private Japanese language schools; 2) Gong Lum v. Rice, 275 U.S. 78 (1927), upholding the Mississippi law which permitted the assigning of a Chinese pupil to a negro school; 3) Cochran v. Board of Education, 281 U.S. 370 (1930), which stated that a Louisiana statute permitting free textbooks to private school pupils at government expense was constitutional; 4) Hamilton v. Regents, 293 U.S. 245 (1934), a decision upholding the right of the regents of the University of California to require military training, 5) Minersville School District v. Gobitis, 310 U.S. 586 (1940),

upholding the right of a local Pennsylvania school board to require flag saluting in public schools contrary to the demands of Jehovah Witness parents; 6) West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), wherein the Court reversed the above flag salute case; 7) Everson v. Board of Education, 330 U.S. 1 (1945), a New Jersey statute permitting transportation of private school pupils at public expense being deemed constitutional; 8) McCullum v. Board of Education, 333 U.S. 203 (1948), the Court denying the constitutionality of an Illinois law which permitted the teaching of religion at some public expense on public school property; 9) Zorach v. Clauson, 343 U.S. 306 (1952), upholding a New York law permitting children to leave public school premises for religious instructions; 10) two cases together, Brown v. Board of Education, 347 U.S. 483 (1954), and 349 U.S. 294 (1955), in which the Court declared that assignment of pupils to schools on the basis of race was unconstitutional; 11) Engel v. Vitale, 370 U.S. 421 (1962), a ruling of unconstitutionality against the New York Regents' prayer in public schools; 12) Abington v. Schemp, 374 U.S. 203 (1963), a decision against a Pennsylvania school statute requiring bible reading in public schools; 13) Board of Education v. Allen, 392 U.S. 236 (1968), a ruling of constitutionality for the New York statute requiring public school authorities to lend textbooks to private school

pupils; and 14) Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), in which the Court upheld the right of pupils to wear forbidden armbands in public school.

All the cases studied were ones where parents of minor children were involved in a situation where seemingly their rights or those of their children had been violated. Each case was studied in the light of the Pierce doctrine to see if the Court had been consistent with itself in upholding that doctrine. Some of the decisions handed down by the Supreme Court used the weight of Pierce, some did not. The Court in making decisions in these key cases sometimes set out clear cut statements of parental rights or strongly hinted at them. At other times it only implied them or was completely silent. The outcome of the decision itself, however, was always the critical point for analysis.

2. Conclusions

In each of the above cases studied, the doctrine of the Court over a forty-four year period was weighed against that stated in Pierce v. Society of Sisters. The cases were diverse in nature, and the causes of the suits were more often than not totally dissimilar from Pierce. Despite the fact that some commentators on the law held that the Court had wavered from the doctrine of Pierce, the present study

has contended that there was no evidence to substantiate that the Court had either reversed itself on Pierce or had abandoned its basic principle.

There are, however, certain implications that may be drawn from the present study even though they were not the primary object of research. The writer presents these implications with the risk involved in suggesting a number of untested hypotheses.

Six main categories in education were touched upon in Pierce and the fourteen decisions of the Court studied above. They included the legal status of private schools, the assignment of pupils according to race or national origin, auxiliary aid to private school pupils from public sources, curriculum, specific school regulations, and religion in public schools.

In Pierce the right of private schools to exist as legitimate substitutes for public schools was clearly upheld. In Farrington the functioning of private Japanese language schools was defended. Current literature in the educational field does not seem to discuss supplementary private schools as a problem. Attendance at them is voluntary, and they are not intended as a substitute for a full school program. A number of such schools do exist today, i.e., modern language schools, schools for special tutoring, trade, or skill

schools. Such schools are often licensed by some government agency to perform the task they claim to perform, but the object of such licensing is possibly more for consumer protection than an attempt to limit their existence.

The quality of education given by the private schools in the Pierce case was not seriously called into question. Whether the Court would uphold private schools as legitimate substitutes for public schools if they failed to provide satisfactory education is doubtful. The major issue in such a suit could readily center around the facts presented in the case regarding the meaning of satisfactory education. In actual practice a number of private schools, both elementary and secondary, do function without state accreditation. Seemingly this lack is not sufficient cause to bring suit against these schools as legitimate substitutes for their counterpart public schools.

Even though the Court defended the right of private schools to exist and the right of parents to use them legitimately for their children, this independence from the state seemed to have its price. The private schools' independent existence seemed also to mean that private schools must finance themselves independently of governmental support. The only type of private school support from public funds approved by the Court was peripheral in nature and considered

as not being given to the schools themselves. The crux of the problem seemed to be the private schools' sponsorship and control by religious agencies. This added the dilemma of the state seemingly supporting religion contrary to the First Amendment of the Constitution.

With regard to pupil assignment on the basis of race or national origin Gong Lum made little contribution except to uphold the older but now reversed Plessy case. Brown, however, has had a tremendous effect upon almost every school district in the United States where Negro students were present. The numerous decisions of the Court (footnoted in this study) to implement Brown are surely not the end of the legal battles. A realistic question that every school administrator must take into consideration as a result of Brown is whether pupils are being assigned to schools because of race, or whether de facto segregation does exist. If such can be proven at the local level, it is not unlikely that a lawsuit to reverse the situation will ensue.

Three cases, Cochran, Everson, and Allen, dealt with auxiliary services from public sources to private school pupils. The Court seems to have decided that the services given to the private school pupils, specifically those in religious schools, were neither a direct aid to religion nor given in reality to the schools themselves. Thus far

aid has been legally restricted to non religious textbooks and transportation. Since religious schools were involved in the above three cases, the question was raised as to the constitutional problem regarding the establishment of religion as forbidden by the First Amendment. It seems unlikely that the Court is going to approve any direct aid to religious private schools where it complicates the state's relationship in control over or support for the religious element in these schools. How the religious element vis-a-vis the purely educational element in the private schools can be separated to the satisfaction of the Court has not yet been solved.

Without entering into the merits or demerits of a system that would ultimately be of benefit to private schools from public funds, it seems, at least, that a constitutionally legal case might be built for it. In the light of decisions already studied, direct aid to religious institutions for education seems out of the question. A system, however, that would emburse all parents of children in public or private schools might find constitutional acceptance with the Court. The parents would make the choice of school for their children. Such a method would not directly involve the state in any payment of funds to religious organizations. The parents of the children would make the choice of school and

expend the funds committed to them for the education of their children. If the Court did approve such a system, it would appear logical to expect that schools participating in such a program would be required to meet certain educational standards. Such schools would undoubtedly be expected also to follow the prescriptions of any other law that bound public schools. There are, however, problems that could arise. For example, could religious schools refuse to accept pupils not of their particular persuasion? Could they place a quota on the number of such pupils? It is doubtful that the Court would find either situation acceptable. Could pupils in religious schools be forced to participate in religious instructions? Again, this would be very doubtful if such schools were considered acceptable as participants in a state financed educational program. In any event, the crux of the problem, at least with religious private schools, would most likely center around whether such a program was giving direct aid to religion. Such a system has not been tested in the Court. It is not unlikely that some state in the union will make such a proposal. The states that have large percentages of private schools are faced with the problem of an ever increasing number of such schools closing, thus placing a larger burden upon the public schools. If such a proposal does come before the Supreme Court, the Court's

task will be to render judgment on the constitutionality of the issue not its educational merits.

Although lower courts have often made decisions on school curriculum matters, little has been decided by the U.S. Supreme Court in this regard. The Hamilton case in this study and the Meyer case upon which much of Pierce was based held that a required curriculum of military training at a state university and the teaching of German contrary to a state law were neither one contrary to the Constitution. It seems that curriculum requirements are being left to the decision of the school boards except where the constitutional rights of individuals may be denied. From the cases studied it might be deduced that an optional course in comparative religion or the bible would not be declared unconstitutional. Courses in these areas on a required basis in public schools would surely be declared such. This conclusion is drawn more from Schemp and Engel than Hamilton. At the present time a number of courses are required by schools for graduation. Conceivably a case could be constructed wherein a parent objected on conscientious grounds to required courses and win a favorable decision from the Court. Most likely the Court would rule out the required element only if it violated some constitutional guarantee. In Hamilton the required military training was not considered a violation of

any constitutional guarantee. Many schools presently have in their curriculum courses in sex education. It is not impossible to conceive of a parent objecting to such courses on grounds that they violated some dictate of conscience. Whether such courses are required courses in any public schools would almost entail a poll of the school districts of the United States. If a serious case came to the Court in this regard on grounds of conscientious grounds, it is doubtful that the doctrine of Hamilton would be sufficient to eliminate the required element. However, the doctrine of Barnette which voided the required flag salute on grounds of conscience might be enough to sway the Court against required sex education.

Specific school regulations have been ruled on by the Court in Gobitis, Barnette, and Tinker. Tinker dealt with the wearing of armbands of protest to the Vietnam War. Barnette reversing the Gobitis decision held that the salute to the flag was no longer to be mandatory in public schools. The position of the Court in Tinker was that the wearing of armbands of protest constituted a legitimate expression of free speech and could not be denied. Although ruling out violations of reasonable discipline, the principle of free speech enunciated in Tinker could open the door to many suits upholding the right to free speech. For example, could a

student demand equal class time to answer an opinion given by a teacher or another student? It might be that if a teacher demanded a certain opinionated response in exam material, the student would find a friend in the Court. The case would probably be stronger if a school system rather than an individual demanded certain opinionated responses in board or regent exams. The case for one student answering another student opinion would seem very weak since no element of the state requiring an opinion would be involved. Could a student be legitimately expelled from school because of dress or hair style? It would not be difficult to conceive the Court as upholding the student in the light of Tinker.

The cases of Mc Collum, Zorach, Engel, and Schemp, were concerned with religion and the public schools. Mc Collum eliminated the teaching of religion on public school premises with the concomitant expenses from public funds involved. Zorach approved the releasing of pupils from public schools for religious instructions elsewhere during regular school hours. Engel and Schemp forbade required prayer and bible reading in public schools. These decisions, however, did not solve all the related problems. Even though Mc Collum forbade religious instructions supported by public schools, the decision could possibly have been entirely

different. Had the religious agencies sponsoring the instructions paid a covering charge for rent of the school space and had they done their own record keeping, all expense to the public school system would have been eliminated. In this manner the public schools would have been involved with no expense and involved to no greater extent than had they rented the same space to any civic organization. The sponsoring religious organizations would still have had the advantage of a favorable location for the religious instructions. At this point it is pure speculation to say how the Court would have responded. But it seems that the chances for a favorable decision would have been much greater for the religious agencies had the facts in the case been as proposed above.

Did Engel and Schemp rule out prayer and bible reading in the public schools? It appears not. The crucial issue in both cases seemed to be that a governmental agency was constructing the prayer to be said and was stipulating that the bible be read in the schools. On the surface, voluntary prayer by teacher or student or purely voluntary reading of the bible in public schools was not dealt with by the Court. There was no rationale from the Court's statement that would preclude teaching a course in the bible as literature, quoting from it as an example of an ancient source, using it to describe the culture of a people, or explaining

it as an example of an ethical system. Conceivably, also, a teacher or student could pray at a given moment that was suitable and yet not violate any prescriptions of Engel. The required element became the center issue in the Court's decisions of both Engel and Schemp. True enough the requirement for individual students to participate had been eliminated by the time of the suit, but the requirement for the individual schools to have prayer and bible reading programs was not eliminated. This latter dimension is what the Court seemed to attack. It is conceivable that should a suit appealing a contrary regulation which prevented persons from praying or reading the bible in public school would find the Court declaring such a regulation unconstitutional on grounds of restricting religious freedom.

Cases before the Supreme Court such as the ones in this study are certainly not finished. Future studies will have to deal with them. Other related problems that possibly may be presented for Supreme Court judgment might include litigation over school tuition to private school parents, teaching of religion in some manner in connection with public schools, or provisions for bible reading or prayer in public schools.

The conclusion of the principal body of research in this study was that the United States Supreme Court from

the time of Pierce up to and including 1969 has remained consistent with the principles of Pierce in cases dealing with parental rights in education.

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Deals with the sociological and legal principles leading to the Brown v. Board of Education decision.

Bover, Thomas A., "Constitutional Law," 32 Georgetown Law Journal 93 (1943).

A review of Minersville v. Gobitis and West Virginia v. Barnette. Critical of the Court's alleged lack of consistency in these decisions.

Bruce, Andrew A., "The Furnishing of Free Textbooks to Private Schools," 25 Illinois Law Review 547 (1931).

A questioning of the Court's wisdom in Cochran v. Louisiana in that it might be the beginning of many subsidies to private schools.

Burlage, Thomas D., "Church and State in American Education," 43 Illinois Law Review 347 (1948).

An historical and legal defense of Cochran v. Louisiana and McCollum v. Board of Education.

Carpenter, Charles E., "Current Constitutional Law Decisions of the United States Supreme Court," 14 Southern California Law Review 56 (1940).

This study holds that the Court was swayed by popular opinion in Minersville v. Gobitis.

Castruccio, Louis M., "Engel v. Vitale: The Internal Establishment Dilemma," 36 Southern California Law Review 240 (1963).

An historical and legal background study of the establishment of religion problem in relation to Engel.

Coffey, Thomas, "Constitutional Law-Aid to Parochial Schools-Establishment Clause-Everson to Allen: From Buses To Books and Beyond," 18 DePaul Law Review 785 (1969).

A comparative study of Board of Education v. Allen with Pierce, Cochran, Everson, McCullum, Zorach and Schemp.

Cutlip, James, "Symbolic Speech, High School Protest and the First Amendment," 9 Journal of Family Law 119 (1969).

A brief study of the principles used by the Court in the Tinker v. Des Moines School Dist. decision.

DeLacy, George L., "A Judicial Problem Judically Solved," 43 ABA Journal 519 (1957).

A study of the cases leading up to the Brown v. Board of Education decision and a defense of the Court's stance in the latter case.

Dowst, Henry, Jr., and John F. Sullivan, "Aid to Parochial School Students," 27 Boston University Law Review 281 (1947).

This study questions the wisdom and value of the Court's decision in Everson v. Board of Education. The authors hold that the Court should not be involved in cases that mix politics and religion.

Fahy, Charles, "Religion, Education and the Supreme Court," 14 Law and Contemporary Problems 73 (1949).

This analysis holds that the Court responded to parents' rights and needs in Everson v. Board of Education.

Flynn, Thomas F., "Constitutional Law-Religious Liberty-Saluting Flag," 29 Georgetown Law Journal 112 (1940).

Here is an analysis and critique of Minersville v. Gobitis holding that the Court allowed a restriction on freedom of religion.

Freund, Paul A., "Supreme Court, 1951 Term," 66 Harvard Law Review 89 (1952).

An extensive study of the 1951 Court with a brief look at Zorach v. Clauston.

Gardner, George K., "Liberty, State, and the School," 20 Law and Contemporary Problems 184 (1955).

Basically a study of Everson v. Board of Education and Brown v. Board of Education. It is a defense of both decisions of the Court.

Grossi, Charles, "Validity of Released Time Program," 15 Georgia Bar Journal 363 (1953).

A brief legal study indicating that the Court used semantics to avoid overruling McCullum in the Zorach v. Clauson decision.

Hantman, Alfred, "Voluntary Religious Instructions in Public Schools," 16 George Washington Law Review 556 (1948).

A legal and historical study attacking the Court's stance in McCullum v. Board of Education on grounds that it favors non-religionists.

Haynes, Evan, editor, "Constitutional Law: Schools and School Districts: Power to Classify Chinese as Colored Persons," 16 California Law Review 346 (1928).

A brief analysis of Gong Lum v. Rice that is critical of the Court's position in that it did not review the whole problem of school segregation.

Holmes, Warren W., "Constitutional Law-Religious Freedom-Compulsory Flag Salute by School Children," 14 Temple University Law Quarterly 545 (1940).

A defense of the Court in Minersville v. Gobitis.

Howard, Fred J., "Constitutional Law-Freedom of Religion-Compulsory Flag Salute," 6 Missouri Law Review 106 (1941).

This study holds that the Court was not justified in its Minersville v. Gobitis decision in that there was not sufficient need for the decision.

Howson, Walter Y., "Constitutional Law," 17 Temple University Law Quarterly 465 (1943).

A defense of the Court's decision in West Virginia v. Barnette.

Ihrig, H. William, "Constitutional Law," 11 Marquette Law Review 158 (1927).

A review of the facts and significant principles in the Farrington v. Tokushige decision.

Joseph, Leonard, and Herbert R. Silvers, "Public Funds for Sectarian Schools," 60 Harvard Law Review 793 (1947).

A legal study with historical background to show that the Court based its decision in Everson v. Board of Education on the First and Fourteenth Amendments.

Kramer, Robert, editor, A Symposium, "School Pupils and the Law," 20 Law and Contemporary Problems 1 (1955).

Covers a variety of topics including compulsory school attendance, control of pupil conduct, religious issues in public schools, segregation, and the state and the school.

Levene, Louis, "Constitutional Law: Compulsory Flag Salute: Interference with Religious Freedom," 26 Cornell Law Quarterly 127 (1940).

Holds that the Court did not defend freedom of choice in the Minersville v. Gobitis decision.

Levin, Allen J., editor, "Constitutional Law," 83 University of Pennsylvania Law Review 529 (1935).

A brief defense of the Court's position in Hamilton v. Regents.

Levin, Harvey, "Public Aid to the Establishment of Religion," 96 University of Pennsylvania Law Review 230 (1947).

A review of separation of church and state as related to Everson v. Board of Education.

Levine, Joseph, editor, "Aid to Religion," 22 New York University Law Quarterly 331 (1947).

A brief study of establishment of religion as related to Everson v. Board of Education.

Lovelace, James B., "Oregon School Law Case," 12 Virginia Law Review 146 (1925).

Discusses the background cases for Pierce v. Society of Sisters relative to property rights.

M., J., [sic] "Racial Segregation in Public Education; Gong Lum v. Rice," 2 St. John's Law Review 215 (1928).

A brief study criticizing the Court for its stand in Gong Lum v. Rice in that it did not really deal with segregation in schools.

Northington, D. Henry, "Validity of Released Time Religious Education Programs," 9 Washington and Lee Law Review 213 (1952).

A brief legal study comparing Zorach v. Clauson with Everson and McCollum. It holds that doubt is left as to how much help public schools can give to religion teaching programs.

Ohlbaum, Daniel R., "Establishment of Religion Clause Applied to the States," 33 Cornell Law Quarterly 122 (1947).

A study of establishment of religion as related to several Court decisions and specifically Everson v. Board of Education.

Owen, Ralph Dornfeld, "The McCollum Case," 22 Temple Law Quarterly 159 (1948).

A legal study attacking the Court's position in McCollum v. Board of Education. It holds that constitutional amendment and not the Court should decide issues like the one presented.

Pollak, Louis H., "Public Prayers in Public Schools," 77 Harvard Law Review 62 (1963).

A comparison of Abington v. Schemp with Everson, McCollum, Zorach, and Engel.

Reed, George E., "The Zorach Case," 27 Notre Dame Lawyer 529 (1952).

A study of Zorach v. Clauson compared with Everson and McCollum holding that Zorach was a clarification of McCollum.

Regan, Richard J., "The Dilemma of Religious Instruction and the Public Schools," 10 Catholic Lawyer 46 (1964).

Contains a critique of the case, Abington v. Schemp. Holds that the Court favored unbelievers over believers in ruling out government sponsored bible reading and prayer in public schools.

Remmlein, Madaline Kinter, "Constitutional Implications of Compulsory Flag Salute," 12 George Washington Law Review 70 (1943).

A study critical of the Court because of its lack of clarification of religious freedom in Board of Education v. Barnette.

Rogers, William P., "The Problem of School Segregation: A Serious Challenge to American Citizens," 45 ABA Journal 23 (1959).

A study defending the stance of the Court in Brown v. Board of Education by the former attorney general of the United States.

Schmidt, Godfrey P., "Religious Liberty and the Supreme Court of the United States," 17 Fordham Law Review 173 (1948).

An historical and legal study attacking the Court for its stand in McCollum v. Board of Education on the grounds that it favors non-religionists.

Seitz, Reynold C., "Supervision of Public Elementary and Secondary School Pupils through State Control Over Curriculum and Textbook Selection," 20 Law and Contemporary Problems 104 (1955).

The author holds that state laws and court decisions seem arbitrary in recognition of parents' rights over curriculum control.

Stemwedel, John A., "Constitutional Law-Free Speech Clause-Education," 57 Illinois Bar Journal 848 (1969).

A study of Tinker v. Des Moines School Dist. holding that the Court was legally justified in its decision but had little necessity to decide the case.

Stephens, Harold M., "School, Church, and State," 12 Marquette Law Review 206 (1928).

A study of Christian education and various state laws and decisions. It defends Pierce v. Society of Sisters as a noteworthy stance by the Court.

Stout, William David, "The Establishment of Religion Under the Constitution," 37 Kentucky Law Journal 220 (1949).

A study of ecclesiastical and legal history as related to McCollum v. Board of Education. It indicates that the wording of the First Amendment is faulty in spelling out the relationship between church and state.

Strickler, Frank H., "Laws Affecting the Establishment of Religion," 15 George Washington Law Review 361 (1947).

This study opposed the Court's decision in Everson v. Board of Education because the author considered bus transportation to religious schools a violation of the First Amendment.

Sutherland, Arthur E., Jr., "Establishment According to Engel," 76 Harvard Law Review 25 (1962).

A thorough study of Engel holding that the Court should have left the question of prayer in schools to the local citizenry and to the states.

Tinnelly, Joseph T., "Constitutional Law in Flag Salutes in Public Schools," 15 St. John's Law Review 95 (1940).

Holds that the Court did not have sufficient reason for the decision that it made in Minersville v. Gobitis.

Waite, James Barker, "Foreign Language Schools-Due Process Under Fifth Amendment," 25 Michigan Law Review 906 (1927).

A brief analysis of Farrington v. Tokushige which sees it as very similar to Pierce.

Wailes, M.B., "Cases of Interest," 34 Law Notes 233 (1931).

A brief analysis of Cochran v. Louisiana justifying the Court's decision but speculating on its future extension.

Warren, Charles, "The New Liberty Under the 14th Amendment," 39 Harvard Law Review 431 (1926).

This study indicated that "liberty" in the Pierce decision was a broad and new interpretation of its meaning for corporations.

Wingerd, Sheldon, "The Compulsory Flag Salute in Schools," 9 Journal of the Bar Association of Kansas 276 (1941).

An analysis of viewpoints of flag salute cases which really takes no strong stand on these viewpoints.

Woefel, Paul A., and James M. Forkins, "The Federal Government and Public School Segregation: An Inquiry Into Principles," 18 University of Detroit Law Journal 393 (1955).

A study of the rationale and background for the Brown decision.

Yale, Jerold S., "Constitutional Law," 18 Buffalo Law Review 356 (1968-69).

This study relates Allen to Everson, McColum and Schemp. It holds that the Court erred in Allen because the author claims that the textbooks given by the state were controlled by the religious schools.

Zucker, Sidney, "Compulsory Military Training," 15 Boston University Law Review 332 (1935).

This study defends the position of the Court in Hamilton v. Regents.

Other Periodicals

Crowley, Joseph, "The Oregon School Case Reconsidered," St. Meinrad Essays, St. Meinrad, Indiana, 1951, 17-31p.

This brief study charts some of the history of Pierce and Farrington with an attempted claim that Pierce was reversed by McColum.

Books

Drury, Robert L. and Kenneth C. Ray, Principles of School Law, New York, Appleton, 1965, v-356p.

Contains a good summary of some of the cases in this study with limited quotations from Supreme Court decisions. This work studies mostly state court cases and has little slant on parental rights in education.

Fellman, David, The Supreme Court and Education, New York, Bureau of Publications, Teachers College, Columbia University, 1960, xiii-120p.

The writer gives brief comments on Pierce, Cochran, Everson, Barnette, McCollum, Zorach, Brown, and several other cases not in this study. The greatest part of the book is a transcript of Supreme Court decisions.

Loughery, M. Bernard Francis, Parental Rights in American Educational Law, Washington, Catholic University of America Press, 1957, xii-248p.

This published thesis contains an analysis of parental rights as seen in Christian and ecclesiastical concepts. It also contains a study of several factors that have influenced the making of educational law in America. Part of this study is devoted to judicial interpretations of educational law in America and other democracies. Index.

Nolte, Chester, and John Phillip Linn, School Law For Teachers, Danville, Ill., Interstate, 1963, xiv-343p.

Deals with the sources of school law, rights of teachers, teacher responsibility and a few comments on parental rights in education.

Remmlein, Madaline Kinter, School Law, Danville, Ill., Interstate, 1962, vii-376p.

Contains commentaries on state and Supreme Court decisions in areas of teacher personnel, pupil personnel, and private school pupils. The method of presentation is verbatims from the courts with brief commentaries.

APPENDIX 1

AN ACT TO PROPOSE BY INITIATIVE PETITION
TO AMEND SECTION 5259, OREGON LAWS

COMPULSORY EDUCATION

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OREGON:

Section 1. That Section 5259 Oregon Laws be and the same is hereby amended so as to read as follows:

Section 5259: Children Between the Ages of Eight and Sixteen Years--Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the ages of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such a child to a public school shall constitute a separate offense. Provided, that in the following cases, children shall not be required to attend public schools:

(a) Children Physically Unable--Any child who is abnormal, subnormal or physically unable to attend school.

(b) Children Who Have Completed the Eighth Grade--Any child who has completed the Eighth Grade, in accordance with the provisions of the State course of study.

(c) Distance from School--Children between the ages of eight and ten years inclusive, whose place of residence is more than one and one-half miles, and children over ten years of age whose place of residence is more than three miles, by the nearest traveled road, from a public school; provided, however, that if transportation to and from school is furnished by the school district, this exemption shall not apply.

(d) Private Instruction--Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school, but before such child can be taught by a parent or a private teacher, such parent or private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian or other person, to send such child to the public school the remainder of the school year.

If any parent, guardian or other person having control or charge or custody of any child between the age of eight and sixteen years, shall fail to comply with any provision of this Section, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than \$5.00, or more than \$100.00, or to imprisonment in the county jail not less than two nor more than thirty days, or both such fine and imprisonment in the discretion of the Court.

This Act shall take effect and remain in force
from and after the first day of September, 1926.¹

¹Oregon School Cases, Complete Record, Baltimore,
Belvedere Press, 1925. p. 9-10.

APPENDIX 2

ABSTRACT OF

A Comparative Study of Parental Rights in Education
As Recongized in Pierce v. Society of Sisters
And Subsequent U.S. Supreme Court Decisions
Up to 1969¹

In 1925 the United States Supreme Court ruled in Pierce v. Society of Sisters, 268 U.S. 510, that the Oregon School Law prohibiting the attendance of certain age children at private schools was unconstitutional. When making this decision, the Court stated in essence that parents had the right to educate their children independently of the state and free of undue force.

In this study the decisions of the Supreme Court from 1925 to 1969 dealing with parents' rights in education were compared with the Pierce decision to determine if the Court had remained consistent with the parental rights principle found in the 1925 decision.

All the parental rights in education decisions of the Supreme Court handed down during the above period were included in this study with certain exceptions. Omitted were cases of tort and liability in so far as they were not directly concerned with education as such. Also omitted were

¹ James P. Dooley, doctoral thesis presented to the School of Education, University of Ottawa, Ontario, March, 1973,

per curiam decisions made to implement former decisions.

The Supreme Court cases chosen for this study and their topics were the following: Farrington v. Tokushige, 273 U.S. 284 (1927), language schools; Gong Lum v. Rice, 275 U.S. 78 (1927), pupil assignment; Cochran v. Board of Education, 281 U.S. 370 (1930), free textbooks for private school pupils; Hamilton v. Regents, 293 U.S. 245 (1934), required military training in land grant colleges; Minersville v. Gobitis, 310 U.S. 586 (1940), required flag salute in public schools; Board of Education v. Barnette, 319 U.S. 624 (1943), required flag salute in public schools; Everson v. Board of Education, 330 U.S. 1 (1945), free transportation for private school pupils; McCullum v. Board of Education, 333 U.S. 203 (1948), religious instructions in public schools; Zorach v. Clauson, 343 U.S. 306 (1952), released time religious instructions; Brown v. Board of Education, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), segregation of pupils by race; Engel v. Vitale, 370 U.S. 421 (1962), prayer in public schools; Abington v. Schemp, 374 U.S. 203 (1963), bible reading in public schools; Board of Education v. Allen, 392 U.S. 236 (1968), free textbooks for private school pupils; and Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), wearing forbidden armbands in public schools.

The conclusion of this study was that the U.S. Supreme Court remained consistent with the Pierce decision in its

subsequent decisions on parental rights in education up to 1969.