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THE ROLE OF JUDICIAL REVIEW IN THE
DETERMINATION OF EDUCATIONAL POLICY AND ACTIONS
A CASE FOR CAUTION

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Francis D. Silvernail

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ABSTRACT

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There is an ever increasing number of issues from the field of education which can only seem to be resolved by litigation. To verify such a trend it is only necessary to count the number of recent cases being reported in the various Court Reporters, both at the federal level and at the state level. Such demands on the courts have caused considerable concern by some educators that, more and more, the courts rather than the school boards or educators are becoming determiners of educational policy. These demands on the court and the resulting concern of who is to really determine educational policy, provides the framework for focusing attention on the concept of judicial review. Even though this concept has been written about throughout our judicial history, the volume of recent legal literature and judicial commentary about the subject, especially in relation to education, indicates that there is a need for continued reflection about, and development of processes which may improve the comfortableness of the relationship between the judiciary and education.

In the research for this dissertation one decision was evaluated in depth, in an attempt to determine the problems faced when the judiciary is called upon to judge litigation involving educational conflict. That decision was the Hobson v. Hanson decision of 1967. Secondly, an extensive study was made of the legal literature, especially journal articles and court decisions, pertaining to the concept of judicial review. In the research, the reasoning for both more and less judicial review was evaluated.

The study led to the conclusion that the relationship of the judiciary to education will continue to be an uneasy one but one which requires continued attention in an attempt to assure equal educational opportunity and the protection of constitutional rights. It was concluded that in order to improve on the assurance of those rights, it is necessary to direct attention to a concept of separation of powers which utilizes the competency of educators for educational functions and judges for judicial functions. It was also concluded that, the separation of powers, as a conceptual framework, can provide the basis for cooperation between the judiciary and education. This cooperation allows for an improved utilization of the competency of the educator in the evaluation of educational material, even for constitutional ends. Alternatives for carrying out this process are also presented in Chapter Five.

THE ROLE OF JUDICIAL REVIEW IN THE
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TO:

Pat for her patience, understanding, and belief in the value of the study; Marjorie Lynn who helped me maintain a perspective when at three years old she asked, "Daddy, how is the dissertation going?" To which I replied, "Oh not too bad", and she said, "H-m-m-m, not too bad, that means good doesn't it?" and to Mr. Robert Gray my home town banker who before the days of government insured educational loans was able to say yes for request for money to complete my undergraduate education, which of course was the preliminary to further study.

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CHAPTER I

THE RATIONALE, PURPOSE, BACKGROUND, AND OVERVIEW

The primary purpose in writing this dissertation is to state the results of an investigation of the potential educational consequences of court encroachment upon educational policy. While the emergence of this problem is not recent and the problem has historical precedent and commentary, the reemergence of conflict between the judiciary and education as observed in such cases as Hobson v. Hansen¹ suggests that the problem needs further investigation and clarification. Hobson provides an excellent justification for reaffirming the necessity of directing careful attention to the development of alternatives which can possibly reduce the tension in this conflict.

Rationale

The pursuit of equal educational opportunity for an increasing number of students is a major concern of contemporary educators. This pursuit is not unique to our

¹Julius W. HOBSON, individually and on behalf of Jean Marie Hobson and Julius W. Hobson, Jr., et al., Plaintiffs, v. Carl F. HANSEN, Superintendent of Schools of the District of Columbia, the Board of Education of the District of Columbia, et al., Defendants. Civ. A. No. 82-66. United States District Court, District of Columbia. June 19, 1967. 269 F. Supp. 401 (1967).

times as can be attested to by the historical development of the concept of formal education for the few to formal education for most, **if not all, in the United States.** To assure that the greatest number shall receive the best possible education, discrimination in education procedures must be based on other than racial or social distinctions. The Hobson decision attempts to affirm that principle as a legal principle and to direct the District of Columbia Public Schools to develop particular remedies to overcome the results of inappropriate discrimination in times past.

The decision declared de facto segregation unconstitutional and attacked the track system. The legal point that de jure segregation is unconstitutional had been previously established in such cases as Brown v. Board of Education of Topeka² and Bolling v. Sharpe³ and the extension of this concept to de facto segregation was significant. However, the Hobson decision can cause questions to be raised as a result of suggested remedies for changing the educational framework in the District Schools. The remedies and the interpretation of educational material weakens the case and does little to assure educationally the constitutional protection of the children in the District of Columbia. However, the decision also illustrates the need for educators

²347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

³347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

to create affirmative approaches which will enhance the fulfillment of the constitutional rights of children during the time they are students in educational institutions. The potential educational change to be brought about by the court directives is questionable and in some instances appears to be no more sound than the very practices that the court hoped to overcome.

It is necessary, in light of Hobson, to again consider the separation of governmental powers and functions. The historical triad of powers is executive, legislative, and judicial and the case provides the basis for the discussion of the appropriate separation of and exercise of judicial power. The argument put forth is that the limits of judicial power have been well defined and that it should remain for the judiciary to decide only those issues that come clearly within its domain.

The actions of educators are, in essence, administrative even though the authority for such actions is derived from the legislative branch. However, it is not for the legislature to pass judgment upon those acts, though the legislature can change the law or statute to affect the legal basis upon which the educator operates in the similar way that the judicial branch, by declaration of unconstitutionality, forces the legislature to consider alternative modes of legislation. Hence, this writer believes that the judgment of educational process or policy should properly be placed in the hands of and carried out by professional educators.

The refusal of the appeals court⁴ to reverse the Hobson case leaves the decision as law and implies the acceptance of an ever expanding involvement of the court in educational policy; hence, encroachment by the courts into administrative and legislative matters. Furthermore the principle that interpretation of educational material for the purpose of determining legal questions and constitutionality can adequately be done by the judiciary continues unchecked.

The debate as to the decision's potential as a landmark case continues. It is certain, though, that it has influenced education and specifically educational patterns in the public schools of the District of Columbia. Evaluation of this decision leads to the conclusion that it is a decision which should not stand as a landmark case. It unjustifiably **encroaches** upon the legislative branch of government and it verifies Judge Wright's own judgment that "it is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise."⁵

The literature following the decision contains numerous articles about the decision in a broad spectrum of periodicals, ranging from popular magazines such as Saturday

⁴Infra, p.10. Smuck v. Hobson, 408 F.2d. 175 (1969), appeal dismissed 393 U.S. 801, 89 S.Ct. 40 (1968).

⁵Hobson, 517.

Review⁶ and US News and World Report⁷ to the more professional Harvard Law Review.⁸ The debates in this literature focus on whether this was a landmark decision or one of dubious value, as well as the implications of the decision.

There is little evidence in the case that the court understood what the consequence of its directives and remedies might be as they affect the lives of the people involved in the system. If the purpose of the decision is to change the schools so as to improve in reality the quality of education it is questionable that the decision will succeed. One of the objectives of school systems must be the reduction of failure in achieving the primary purpose of educating youth; therefore, alternatives other than those suggested by the judiciary must be developed and evaluated and which will provide greater potential for success than those presented in Hobson.

Concern by both educators and legal experts about encroachment by the legal profession upon educational matters indicates a need to evaluate what the role of the courts ought to be in the determination of educational policy. Increased judicial review of education is a concern

⁶"Judge Wright Faces North," Saturday Review, L (July 15, 1967), 51.

⁷"As Nation's Capital Goes All Out for Integration," US News and World Report, LXIII (July 17, 1967), 54.

⁸"Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board," 81 Harvard Law Review, 1511 (1968).

expressed throughout educational circles and society generally. This concern is often expressed in such a way as to imply a negative rather than positive attitude about the involvement of the legal profession in education. Hobson contributes to that concern.

To give the courts further reason to pause before claiming the right to evaluate educational policy, it should be remembered that the court has been willing to admit that some conceptualizations in their field, such as that of judicial power,⁹ are not capable of precise definition but they have been willing to define what education is.¹⁰ Education is no more eligible for precise, absolute definition than is judicial review. It must also be remembered that education is a political or governmental right and not a constitutional or private right.¹¹

A crucial concern here is the quality of education which is available to the student, not that which might hopefully be brought about someday. The need to develop policies which enhance the constitutional rights of the individual citizen to equal opportunity of education is without question. The issue to be resolved is whether the desired quality of

⁹ 7 Ruling Case Law 1029. State v. Creamer, 97 N.E. 607.

¹⁰ 19 Corpus Juris 1014. 28 Corpus Juris Secundum 832 and citations in both instances.

¹¹ 79 Corpus Juris Secundum 349, para. 448.

education is best achieved when educators are required to carry out their obligations or when the courts make the decisions about educational policies. For the courts to decide is to discourage leadership and encourage mediocrity on the part of the profession. It can delay policy decisions for unnecessary lengths of time. Such procedures take away the right of the profession to exert its leadership except through court testimony and such things as amicus curiae briefs.

A clarification of and delineation of a more satisfactory functioning of the courts and of the education profession can provide us with more assurance of the protection of constitutional rights educationally and of a higher quality of education for all. Judicial review is for the purpose of reviewing constitutional questions. Of that review there is no question. The review of educational policy for educational purpose by the court is questioned. An analysis of the Hobson decision and an investigation of the more general principles of law will help achieve a clarification of a more satisfactory functioning of the courts and of the profession.

It may appear that the judiciary must accept all of the blame for encroachment upon the field of education. However, the judiciary has been forced to this encroachment by the unwillingness of educators to provide leadership in affirming the law as developed by the courts. In no way is the educational field excused for this failure. This lack

of leadership requires that educators share the blame equally with the judiciary for the latter's involvement in educational policy. With relative consistency the courts' review and involvement has been to correct unconstitutional behavior on the part of the profession and to correct the profession's continued and blatant refusal even to carry out the letter, not to mention the spirit of the law.

Purpose

An analysis of the Hobson decision is one of the purposes for writing this dissertation. The analysis requires consideration of the consequences of the court's remedies to the educational profession and consideration of the potential impact of the decision upon the education received by students in the District of Columbia. Germane to this purpose, as stated earlier, is an evaluation of the impact of the court's exceeding its constitutional limitations and of the court's determining educational policy.

Also, a purpose of this study is an investigation of established court precedent and the theoretical literature in reference to court encroachment upon educational policy.

Still another major concern in this dissertation is the development of alternatives which will help to resolve the problem of conflict between the judiciary and professional educators and to enhance more adequate interpretation of educational matters which are involved in the pursuit which guarantees students equal protection under the law.

General principles of law emerge from the analysis of Hobson, and in this dissertation there is an attempt to clarify these principles and to search out their significance as they affect educators and educational policy.

Finally, Hobson has numerous merits in its implications for educators which might have been clarified and affirmed in the appeal. However, the appellate court's review was limited and did not significantly contribute to a clarification of these issues. Therefore, it is the purpose here to clarify some of those issues.

Background

The writer became interested in the Hobson case during his tenure in Washington, D.C., as Director of the Antioch Graduate School's Urban Teaching Intern Program. This position required his involvement in the problems of the District of Columbia's education system and his awareness of the frustrations in attempts to improve the system. For teaching interns in this program seminars were arranged with both Mr. Julius Hobson and Dr. Carl Hansen. In these seminars and in private conversations, it was possible to learn about both men's hopes and frustrations as they attempted to improve the system. This direct involvement in the District of Columbia Public School System was the catalyst for interest in this case and for following the prelude to the case and its arrival in court. The reading of the

decision in July of 1967 as it appeared in the Congressional Record on June 21, 1967, caused great concern about the implications of this decision for educators. It seemed certain that the case would be appealed and that many of the issues in the case would be appropriately clarified, deleted, or extended. The decision was upheld on January 21, 1969, by a four-to-three decision with the United States Court of Appeals for the District of Columbia sitting en banc.¹²

Overview

The basic point from which this dissertation develops is that the judgment in Hobson is an encroachment upon administrative actions and to some degree upon the legislative branch of government, which in this instance were the actions of the Superintendent of Schools and the Board of Education. This point is established in Chapter Two as a result of analyzing the case page by page. Also in Chapter Two, general principles of law which are germane to the problem of judicial acts, ultra vires in nature, in cases involving education are developed. The detailed analysis is used for the purpose of illustrating why the courts ought to be cautious when dealing with educational matters and even when interpreting educational issues for constitutional judgments. The mis-interpretation and resulting poor theory becomes

¹²Supra n. 4, p. 4. It is of interest to note that one of the dissenting opinions in this decision was written by Warren Burger who was later sworn in as Chief Justice of the U.S. Supreme Court on June 23, 1969.

apparent in the analysis. The justification for cautioning against increased expansion of court action is developed upon potentially negative educational consequences.

The role of the courts in policy determination as developed by court precedent and by the theoreticians is the concern of Chapters Three and Four. To consider this role adequately, investigation of administrative law and judicial review in cases where the substance of the case was other than education was necessary. Chapter Three deals specifically with the justification for non-involvement by the courts, and Chapter Four deals with the specific conditions under which it is justifiable for the courts to be involved in what appear to be educational policies. Throughout both of these chapters it is necessary to consider a related issue in cases which are substantively educational. In the general sense the topic is one of jurisdictional rights. Specifically it deals with the use of judges for non-judicial matters, a concern most germane in the analysis of Hobson. One complete section of the first Hobson¹³ case deals with this very matter. The arguments are presented in this dissertation because they support the need for judiciary caution when the judiciary is tempted to involve itself in matters foreign to its expertise.

¹³Hobson v. Hansen, 265 F.Supp. 902 (1967). Note that this citation is to the less well-known decision and was decided prior to the case handled in depth throughout this dissertation.

Evidence presented, both in the cases reviewed and in theoretical discussions by those whose competency is in law, conflict. The arguments on both sides must be recognized as well-reasoned and appear to be a matter of disagreement between honest men of intellectual and legal integrity. However, people must make choices about the conflict and in Chapter Five the nature of the conflict is investigated. By use of the now famous principle that we are a nation of laws not of men,¹⁴ suggestions are made as to potential alternatives for resolving the dilemma as the legal profession continues to be called upon to judge educational issues and interpret educational policy.

Based then upon the acceptance of the propositions that the present judicial processes for making educational decisions are inadequate and that educators are often remiss in carrying out their professional obligations, need for change becomes clear. Also in Chapter Five possible alternatives for both the judiciary and educators, but especially for educators, are presented and evaluated. These alternatives require that consideration be given to further investigation into related areas. The areas are delineated and explanations are given for their particular significance.

There are, of course, many other issues which could be appropriate concerns of this dissertation. However, these

¹⁴Marbury v. Madison, 5 U.S. (Crunch) 137 (1803);
2 L.Ed. 60 (1803).

concerns are separate studies in and of themselves. They are stated throughout the dissertation and when appropriate included in footnote references. Alternatives suggested as a result of this study are limited to the obligation of education to carry out the law and to the potential for the use of court-appointed referees or special commissions to interpret and pass judgment on educational matters.

CHAPTER II

HOBSON V. HANSEN: AN ANALYSIS

Overview

In 1966 Julius W. Hobson, et al., brought suit in Civil Action No. 82-66 against Carl Hansen, Superintendent of Schools of the District of Columbia, the Board of Education which included each Board member, the judges of the District Court for the District of Columbia, and members of the Board of Elections of the District of Columbia.

With the exception of Carolyn Hill Stewart, the Plaintiffs were acting individually and on behalf of their children enrolled in schools in the District of Columbia. The Plaintiffs also presented the action as a class action.

The members of the Board changed during the time that the action was in process and as new members were appointed they also became Defendants. During the time the action was in process the necessary changes were being made in the matter of election processes and statutes in the Code of the District of Columbia to make the Board an elected body. This was completed and the Plaintiff Julius W. Hobson was elected to the Board following the decision in this case and he also became the Board president. He served for one term and was defeated for reelection in 1970.

Carl Hansen, the Superintendent of Schools resigned in conflict with the Board over an appeal of this decision soon after the decision was handed down. The District of Columbia Public Schools were then under the direction of Mr. Benjamin Henley, Acting Superintendent, followed by Dr. Manning and then Dr. Hugh J. Scott, who served into 1973.

In charges filed January 13, 1966, Plaintiffs contended that, in essence, the Board of Education was functioning unconstitutionally because of the process of appointing its members by judges of the District Court. Because the Board was alleged to be functioning unconstitutionally the Plaintiffs also contended that Dr. Hansen, having been hired by the Board, was functioning unconstitutionally as Superintendent of Schools.

This cause of action was separated and heard in another case before a three-judge court.¹ That decision upheld the constitutionality of the process for selecting the Board though it was a split two-one decision. The dissenting judge was J. Skelly Wright who later became the judge sitting alone to hear the remainder of the causes for action.

The second cause for action, according to the Plaintiffs, was that:

¹Hobson v. Hansen, 265 F.Supp. 902 (1967).

The defendants, and each of them, have at all times operated and, unless restrained as a result of this action, will continue to operate the public school system of the District of Columbia in such a manner as to discriminate against the infant plaintiffs solely because of their race and/or color, all in violation of the Fifth Amendment to the Constitution of the United States.²

The Plaintiffs, to verify this charge, offered as evidence the use of the track system, practices which encourage juvenile delinquency, distribution of supplies and public revenues, acceptance of private monies to further enhance the superior education of whites, use of policemen, teacher promotions, lack of utilization and improper distribution of Elementary and Secondary Education Act of 1965 funds, assignment of teachers, the drawing of geographical boundaries, and the refusal to carry out the mandate of the U.S. Supreme Court in Bolling v. Sharpe.³

The third cause of action stated by the Plaintiffs was one that implied lack of educational leadership on the part of the Defendants.

Defendants have failed, refused and neglected and continue to fail, refuse and neglect to demand adequate funds from the agencies of the District of Columbia and the Congress of the United States with which to [properly] operate the public school system under their control.⁴

²The Plaintiffs' Complaint as filed on January 13, 1966, in District Court of the District of Columbia, p. 9.

³Ibid., 10-13.

⁴Ibid., 13.

The remaining causes extended the charges to the area of economic deprivation as well as racial and/or color discrimination.

The Plaintiffs were represented by William M. Kunstler, Jerry D. Anker and Herbert O. Reid, Sr. Defendants were represented by John T. Duncan, Corporation Counsel for the District of Columbia, Matthew Mulaney, Jr. and John A. Earnest, Asst. Corporation Counsel, and James M. Cashman and Robert R. Redman, Asst. Corporation Counsel.

The judge for the case was J. Skelly Wright. Besides being the dissenting judge in the earlier Hobson v. Hansen decision,⁵ he had gained attention for his article, "Public School Desegregation: Legal Remedies for the De Facto Segregation"⁶ and was the judge in Bush v. Orleans Parish School Board.⁷

Judge Wright found, in essence, that the defendants did, in fact, operate the schools in such a way as to "unconstitutionally deprive the District's Negro and poor public school children of their right to equal educational opportunity."⁸

⁵Supra, n. 1, p. 15.

⁶J. Skelly Wright, "Public School Desegregation: Legal Remedies for De Facto Segregation," 40 New York Law Review 285 (1965).

⁷138 F.Supp. 337 (1956).

⁸Hobson v. Hansen, 269 F.Supp. 401 (1967). Herein-after referred to as Hobson. Appeal dismissed 393 U.S. 801 89 S.Ct. 40 (1968).

To support the conclusion that he had reached, Judge Wright offered eleven principal Findings of Facts, most of which supported the charges brought by the Plaintiffs in the original complaint. Judge Wright commented upon a broad spectrum of issues in these Findings of Facts. Briefly stated the areas covered and commented upon in support of the conclusions were as follows: Racial and social homogeneous grouping, Relationship of scholastic achievement to racial and socio-economic factors, Racial composition of the School Board, Neighborhood school policy, Teacher assignment, Per pupil expenditures, Overcrowding, Reading scores of the Plaintiffs as a class, and the lack of improvement in those scores, the Track system, and finally, the Testing program.

As indicated in Chapter One, there is little debate about the purely legal aspects of Hobson in its extension of equal protection to those affected by de facto as well as de jure segregation. That part of the decision is not analyzed in this chapter. What is analyzed is how Judge Wright interpreted the educational material, drew conclusions from that material, and justified judicial review in this case in order to determine that:

The Superintendent of Schools and the members of the Board of Education, in the operation of the public school system here, unconstitutionally deprive the District's Negro and poor public school children of their right to equal educational opportunity with the District's white⁹ and more affluent public school children.

⁹Ibid., 406.

Prior to the development of the analysis it is appropriate to indicate that in addition to the use of the decision as it appears in the Federal Supplement, considerable time was given to reading the materials as they appeared in the four volumes of the official court record on file at the Courthouse in Washington, D.C. The transcripts which were a part of the official record were also read and some of the exhibits explicitly filed with the case were examined.

One other point which needs attention is the emphasis that Judge Wright placed on the designation of poor as well as Negro. In many of the instances referred to in the District, either category of classification is inclusive of the other. However, to suggest the poor as a classification raises a whole new area of consideration in the protection of the educational rights of citizens. The historical trend has been to assure that education will be more available to more people, but to evaluate this in terms of equality of facilities, personnel, and curriculum in the courts is to extend judicial action beyond the present precedence in the assurance of civil rights. This concept has received significant attention from Arthur Wise, author of Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity.¹⁰

¹⁰ Arthur Wise, Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity, (Chicago, University Press, 1969).

In turn, however, the thesis of Mr. Wise has been challenged by David L. Kirp writing in the Phi Delta Kappan.¹¹

Judge Wright made mention of the poor from time to time throughout the decision but did not really develop the case around the poor. Mainly he addressed his evaluation to the problem of the black children, some of whom were also economically poor. Commentary on this problem is provided in the Harvard Law Review. While noting the difficulties in dealing with the concept of the poor, yet attempting to save the principle as one which needed attention, in the review it was stated:

The court seemingly uses the words 'poor' and 'Negro' interchangeably in its analysis of educational problems, . . . This approach is too facile; the constitutional status of the poor at least deserves separate analysis On balance, however, the court is probably correct in not trying to distinguish between the poor and the Negro in the application of its standard. . . . Although extending the Hobson standard to all 'disadvantaged minorities' gives the decision such broad scope that it may cause serious institutional problems, institutional problems do not justify drawing an untenable distinction between¹² Negroes and equally under-privileged whites.

¹¹David L. Kirp, "A Critique of Wise's Thesis", Phi Delta Kappan, LI:3 (November, 1969) 148-150. It must be noted that judicial precedence is expanding to include the inequities caused through unequal financing even though the Supreme Court has now acted. See San Antonio Independent School District v. P. Rodriguez, 93 S.Ct. 1278 (1973) an reversal of 337 F.Supp. 280, Serrano v. Priest, 487 P 2d. 1241 (1971) and Robinson v. Cahill, 287 A 2d 187 (1972).

¹²"Hobson v. Hansen: Judicial supervision of the color-blind school board," 81 Harvard Law Review 1511 (1968), 1523.

The relevant point here is that had Judge Wright, in the decision, dealt more significantly with the problem of the poor, it might have contributed significantly to the decision's potential as a landmark case. However, the uniqueness of dealing with the category of poor as well as Negro would have required a far greater amount of court activity in terms of testimony and legal delineation. A great deal more time would have been needed in order to evaluate fully what it would mean to assure equal protection of the law for the poor.

The court record of the Hobson decision as it appeared in the Federal Supplement was organized around three sections: Findings of Fact, Opinion of Law, and Remedy. This Chapter is organized around the major subdivisions found in the section Findings of Fact. Some of these subdivisions have in turn been subtitled to enhance clarity and to reduce the need to discuss a topic a second and third time. The four major categories for analysis and discussion are: Student segregation, Personnel segregation, Equality of distribution of resources, and the Track system. At the end of Chapter Two is a short discussion of the principles of law which will be further examined in Chapters Three and Four.

Student Segregation

In this subdivision the analysis indicates that the issue of student segregation contains little with which one can argue. It is quite clear that a school system with better than 90% Negro population will probably be segregated; unless 1) The white and black populations are appropriately evenly dispersed throughout the district, or 2) The district abandons its neighborhood school pattern since the city's housing pattern is segregated, and/or consequently 3) The district develops procedures for transporting both black and white students into other neighborhoods in order to assure the desired racial integration.

As the following discussion will illustrate, there are some interpretations of material which cannot help but raise questions about the credibility of the decision and of the remedies put forth.

Judge Wright found that the operation of the schools, mainly by the administration, encouraged segregation of students as charged by the Plaintiffs. He suggested that the school system's policies resulted in more segregation than was necessary, a valid criticism even if the increased segregation was not the intent of the administration.

It is apparent that Judge Wright felt that the integration of the schools could be improved if optional zones were no longer allowed, if the neighborhood school policy were rejected as a primary basis for geographical

school zones, and if some students were bussed voluntarily from east of Rock Creek Park to schools west of the Park. He made integration of schools a primary objective by which to measure educational success or potential.

Judge Wright overlooked some significant and difficult evidence that the integration of schools in itself might not have improved the performance of black students.¹³ He seemed to ignore some of the difficult problems which the system had to face in its attempts to bring theory and practice together. This was indicated when he insisted on attacking the school administration under the leadership of the Superintendent as being "affirmatively satisfied with the segregation which the neighborhood policy breeds."¹⁴ He also suggested that

¹³In the attempt to translate theory into practice, this writer also has difficulty accepting this overlooked evidence. There are at least two or three reasons for this difficulty. One is a personal commitment to integration, another is the feeling that if people only somehow live together they will accept each other as individuals and cease to discriminate on a racial basis as suggested by Dr. Robert Cole (Cited on p.419 of Hobson, n. 25.). Remembering his experiences in integrated situations, the writer finds this concept of harmony emotionally as well as philosophically acceptable.

However, in the Coleman Report Equality of Educational Opportunity, James S. Coleman (Washington, D.C.: U.S. Department of Health, Education, and Welfare, 1966), it is suggested that schools which were mixed racially were not, in fact, the reasons for the higher performance of students. The higher performance was dependent upon other supportive education attitudes. (pp. 307-310) However, as indicated in the Harvard Law Review (supra) these findings are in turn criticized in U.S. Commission of Civil Rights (Washington, D.C., 1967) vol. II, pp. 35-47 and 73-114.

¹⁴Hobson, 419.

the school administration was ready to sacrifice the neighborhood policy if that would keep from splitting a small white population in half so that the white population might attend the same school.¹⁵ The difficult problem for the school administration at this time was to maintain, as much as possible, any white population in order to assure at least a degree of integration. Judge Wright rejected the use of this point as a defense implying that it was a type of blackmail.¹⁶ Yet the conditions in the public schools of the District as well as the population of the District bore this process out as a reality quite beyond the control of the school administration.

The creation of flexible school boundaries by the school administration could have been an attempt to develop conditions which would have kept a population of white students in the District schools. Another but absurd possibility for maintaining a white student body without developing flexible school boundaries would have been for the courts to dictate that parents could not place students in private schools or that they could not move from the District; both of which would have been an infringement

¹⁵Ibid., 418.

¹⁶The blackmail referred to is the implied threat that if a few white students were forced, by geographical zones, to attend a predominantly Negro school then parents would send their students to private schools. By legal definition, blackmail is, of course, unacceptable.

upon their civil rights. Yet short of these extreme measures, the maintenance of a white school population becomes almost impossible. It appears then that the administration was in fact attempting to maintain some semblance of integration by the very policies which Judge Wright found so deplorable.

The insistence upon the development of hard and fast rules about boundaries would seem to encourage further de facto segregation, unless of course the parents could be forced to remain in the District as well as be prevented from enrolling their children in private schools. This is an absurdity and a position which would require a change in established legal precedence and a reversal of Pierce v. Society of Sisters.¹⁷

That these Findings of Facts are open to considerable debate can be little questioned. It is on these Findings about segregation that Judge Wright extended his remarks to Opinion of Law in relation to disestablishing de jure and de facto segregation.

A perplexing question is whether or not the inadequacies in the Findings of Facts weakened the Opinion of Law. It appears that abstractly the Opinion did not depend upon the Findings of Facts other than to give justification for developing the Opinion. The attempt to direct the

¹⁷ 268 U.S. 510 (1925), 45 S.Ct. 571, 69 L.Ed. 1070.

Remedies to the system as a result of the Findings of Fact becomes questionable. Yet the issues in the Opinion of Law seem to stand somewhat by themselves which requires that attention be directed to student segregation as it appeared in the Opinion of Law.

In the Opinion of Law the degree to which Judge Wright believed that the issue of the unconstitutionality of de facto segregation did not have specific precedent appeared early. His belief that he needed to consider educational policy to assure students equal protection under the law also appeared at the onset. For instance, after admitting that many previous decisions were dissimilar for the District of Columbia schools, where segregation resulted because of neighborhood schools, Judge Wright stated, "The argument can be made, however, that even in these situations [attendance patterns] the court has the power, though not necessarily the duty, to insist on a degree of actual integration."¹⁸ To establish justification for this position, Judge Wright appealed to related concerns in Dowell v. School Board, W.C. Oklahoma,¹⁹ Gibson v.

¹⁸Ibid., 494.

¹⁹244 F.Supp. 971 (1965), affirmed sub nom. Board of Education of Oklahoma City, et al., v. Dowell 10 Cir., 375 F. 2d 158 (1967). Cert. denied 387 U.S. 931; 87 S.Ct. 2054; 18 L.Ed. 2d 993 (May 29, 1967); cited in Hobson, 494.

Board of Public Instruction,²⁰ and N.L.R.B.'s decision dealing with company unions.²¹

Even though there are merits to "the argument in the large"²² for involvement of the court to overcome past de jure segregation, Judge Wright did not extend court action to reject the neighborhood school. He rejected the Plaintiffs' request for relief in the assignment of pupils to achieve actual integration because of their failure to prove that **the neighborhood** plan did not provide significant integration in 1954 and that there was little standing on this issue by contemporary students.²³

Judge Wright's views in relation to present de jure segregation are extremely difficult to analyze educationally because they bear on an issue which is constitutional and about which there is a need to take into account projected consequences.²⁴ The court avoided decisions on housing

²⁰ 272 F.2d. 763 (1959), 766 5 Cir. Cited in Hobson, 495.

²¹ 76 N.L.R.B. 670 (1948) and Freund, "Civil Rights and the Limits of Law," 14 Buffalo Law Review 199 (1964) 205, cited in Hobson, 495.

²² Hobson, 495.

²³ Ibid.

²⁴ A related issue here and one taken upon in alternatives in Chapter Five is that in developing educational theory considerable attention can be given to potential and projected consequences of specific alternatives. The court, on the other hand, is limited to evaluation on the basis of real damage to individuals.

patterns, which indirectly affect the outcome of the educational process. This made the issue in at least one respect educational rather than legal.

The educational issue is that of the use or rejection of optional zones. The issue is constitutional in that de facto segregation in the schools exists by virtue of segregated neighborhoods. Because the judiciary does not, or is not willing to enforce the rapid integration of neighborhoods, it then burdens schools with a judicial fiat to right the wrongs of its refusal to act in another field. Should or can the courts fault policies which are attempts to reduce the extension of the evil being attacked? Also, should the courts fail to consider an issue as being outside of administrative discretion when in fact administration predictions are validated by prior experience? For example, white students did leave the District public schools in large numbers. What must be resolved is whether or not the impact of changing educational policy to affect legal ends does in practice work.

This writer believes that Judge Wright overlooked acceptable alternative explanations for the existence of zones. Wright also argued against the use of projected consequences on the one hand; for example, what whites might do if the zones were removed; while at the same time he used projected consequences to verify his own position;

for example, that education will benefit from volunteer bussing from east to west of the Park. He concluded on behalf of students something which he well ought to have concluded about teachers in the latters' seeking of transfers. He argued that:

The court need not and does not assume these students [those transferring] all seek escape from Dunbar because of racial prejudice; rather, the court agrees that Negro ghetto schools like Dunbar are inherently unequal educationally, and assumes that many white students want out for that reason.²⁵

What, it can be asked, did he hope to communicate by "inherently unequal educationally"? If it is by virtue of the predominance of one race in a school and this separation is inherently unequal, then the meaning is acceptable. But if it is a matter of claiming that black schools, by virtue of being black, are not sound educationally, there is much to fault. If he argued that black ghetto schools become educationally unsound by virtue of poor teachers and the results of lower budgets, then the schools are unequal by virtue of specific reasons and certainly not inherently so. If it were because of these reasons, then the reasons are educational and remedies should be developed by educators who have the support of, and not the antagonism of, the court.

²⁵Hobson, p. 501.

De facto segregation and neighborhood schools

Judge Wright drew a series of faulty conclusions from faulty basic assumptions or an overextension of the separate-is-inherently-unequal affirmation of the courts in 1954. He stated, "Negro schools provide their Negro students with an education inferior to that which others, white and Negro alike, receive in integrated or predominately white education settings."²⁶

It is necessary to remember that facilities which are designed to be separate but equal are unconstitutional. Facilities which are, in fact, separate even if equal, become unequal constitutionally but not necessarily educationally. Educationally, schools which receive lower financial support, lower quality teachers, poorer supplies, and poorer buildings are inferior by virtue of non-support and not by virtue of race. With general support among educators, this can be argued as an educational negative. Furthermore, when it happens that the schools which consistently receive this abuse educationally are racial in nature, a constitutional issue is involved. The remedy should first attack the primary cause of the constitutional issue not one of the results of the issue.

In an implied defense against insisting upon integration of neighborhoods while insisting upon integration of

²⁶Ibid., 504.

the schools, Judge Wright argued, "In addition, the segregation of the schools precludes that kind of social encounter between Negroes and whites which is an indispensable attribute of education for mature citizenship in an interracial and democratic society."²⁷ The difficulty here is that Wright asserted the existence of an interracial and democratic society, both of which are, at present, questionable as realities. He also assumed that the integration of the schools will bring about an interracial society; a desirable goal in this writer's estimation and beliefs but one not without questions for many citizens in society. It is surely questionable that the integration of schools alone will in fact result in an interracial society. It is appropriate here to add that this writer believes that the integrating of schools must still be one of our highest priorities. Nonetheless, the evidence for this position is not so conclusive as to insist upon this integration of schools apart from insisting upon the same for the whole society.

Further, Judge Wright argued that:

Education, which everyone agrees should include the opportunity for biracial experiences, carries on, of course, in the home and neighborhood as well as school. In this respect residential segregation, by ruling out meaningful experiences of this type outside of school, intensifies, not eliminates, the need for integration within school.²⁸

²⁷Ibid.

²⁸Ibid., 505.

This statement is questionable in that it appears to be based on assertions which are not inherently valid. It is not a certainty that everyone agrees that education should include biracial experiences. Secondly, if bi-racial experiences are appropriate, the kind of educational experiences are quite different from what the schools are presently about. Simply bringing people together in isolation does not lead to social interaction. And, thirdly, it does not categorically follow that because neighborhoods are segregated, that the burden for integration should be placed upon the schools. At best it is an assertion of belief.

This problem of segregated neighborhoods reiterates the need to deal with constitutional issues apart from educational issues. Constitutionally it is required that the society should be integrated. Will the integration of schools lead to the bringing about of integrated communities? If so, then plans for integration of schools to overcome the present harmful situation is a constitutional but not necessarily an educational concern though it will affect education.

Judge Wright rejected Counsel's appeal to the writings of Horace Mann for a defense of the neighborhood school plan. Judge Wright's explanation of the rejection appears to be plausible. But again, he assumed that the Defendants used the plan to isolate blacks from whites, an assumption which is unfounded and gains credibility only from Judge Wright's assertion of it.

The argument given by Judge Wright in favor of the democratizing of public education²⁹ is most plausible, but opens up a Pandora's Box not dealt with and seemingly rejected by precedent. Because of the extension of constitutional guarantees by civil rights legislation to race, creed, and national origin, the existence of private schools and particularly of religious schools, by their very operation, is a denial of this democratic principle of a totally integrated educational system.

Judge Wright wrote, based upon McLaurin v. Oklahoma State Regents,³⁰ Sweatt v. Painter,³¹ and Brown, "that to share experiences with the other race remains an integral aspect of educational opportunity."³² However, it would seem that this should read "race, creed or national origin" which then implies the need for a rejection of the right to have separate schools which are religious in nature. This position goes against the trend ever since Pierce v. Society of Sisters.³³ Judge Wright's assertion is acceptable as to the desired effect.

²⁹Ibid., 505. Wright implied Mann's claim that the association of students of every social economic and cultural background in the public school is essential to democracy.

³⁰339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950).

³¹339 U.S. 629, 70 S.Ct. 848, (1950).

³²Hobson, 505.

³³45 S.Ct. 571, 268 U.S. 510, 69 L.Ed. 1070 (1925).

But his assumption that this can be cured by forcing the few white students to attend black schools is incorrect and does not bring about the desired end. Furthermore, Judge Wright implied that it was only white students who were able to escape to the less crowded schools, a finding which needs considerable qualification to stand valid as a criticism. Optional zones did, in fact, allow non-white, though not the poor, to attend less crowded schools.

Court's suggestions to overcome educational segregation resulting from neighborhood segregation

A suggested alternative put forth by Judge Wright, with apparent satisfaction at how significant the program would be, was a plan which would reduce crowding and provide for a more integrated situation.

One such alternative which cannot fail to arrest the school official eager to explore ways of reducing segregation in the schools would be to transfer and transport volunteering Negro students stuck in overcrowded elementary schools in their neighborhood into the partly empty white schools west of the Park.³⁴

This would certainly be an improvement but hardly one to cause much excitement. It would nominally reduce some crowding in the black schools. It also could increase the black population to over 50% in some cases in schools which ranged from 3% to 18% black with most ranging from 8% to 16% black at the time of the decision. These latter percentages

³⁴Hobson, 509.

were calculated according to the school capacity and not school enrollment. When calculated on what was then actual enrollment, the percentage of black to white students increased significantly.

The schools then were already integrated, so little weight can be given to the claim of improving integration. In addition, moving only blacks to white schools is also discrimination, a point made by some educators at least as early as 1966. The disadvantages of the time involved for these children may far outweigh the advantages of the shift and the possible further reduction of the whites in these schools could decrease the excitement that this alternative provides.

As indicated earlier, the reduction of overcrowding will result in a few rare cases but other alternatives would provide far greater impact on overcrowding than this plan offers. Unless Judge Wright was willing to reject the right of parents to move to suburbia or to send their children to private schools then the pattern he suggested has little appeal to an educational system with a large percentage of black students.

Judge Wright suggested:

For at least this one alternative, therefore, the resulting social gains far exceed the cost of any kind. This confirms that the Board's generally strict adherence to the neighborhood policy is beyond justification in this one instance, which supports the assumption that other proposals can

also be framed the net advantages of which in integration terms will also be clear.³⁵

This position is unwarranted. The costs are feasible but there is little impact percentage-wise in the shift of students and the net results may actually further reduce the possibility that the schools will achieve greater integration which is, of course, the goal.

Judge Wright's faith in the concept of educational parks as an alternative was overly optimistic. He apparently refused to realize that one educational park in the entire public school system would not bring about any real degree of integration since the entire school population is 90% black.

There are many reasons to favor parks other than integration. Integration is a desirable incidental advantage of the educational park organization pattern. However, it needs to be realized that the park may cause further exodus of populations. It also assumes that bringing people together in a different but isolated environment develops desirable racial attitudes, a position held by this writer but with far less optimism and apparent justification than in times past. In the case of the District the parks would have to be cooperative ventures with other political entities which at present seem close to impossible to achieve if judges are unwilling to attack segregated housing patterns.

³⁵Ibid., 510.

Court review of legislation and administrative acts.

On the basis of precedence, Judge Wright built a very strong case for justification of review of legislation and administrative policy. Of the right to do so there is little question. Yet, as he pointed out, "Indeed, ordinary statutory classification resulting in inequalities economic in nature are traditionally upheld whenever the reviewing court can imagine a reasonable or rational basis supporting the classification."³⁶ And ". . . those objectives must be of sufficient magnitude to override, in the court's judgment, the evil of the inequality which the legislation engenders."³⁷

This is the real issue of debate; that is, that of interpreting the magnitude of the alleged inequities and the evaluation of administrative intent. The contents of the case and the interpretation or insufficient interpretation of educational material does not warrant the involvement of the court in the determination of educational policy in this particular instance.

Appealing to precedence, Judge Wright built a valid position that "integration is an educational goal to be given a high, high priority among the various considerations involved in the proper administration of a system beset

³⁶Ibid., 506.

³⁷Ibid., 507.

with de facto segregated schools. United States v. Jefferson County.^{38,39}

It can again be argued, however, that the court moved beyond its domain and into educational policy. It does not follow that a de facto segregated school will make integration a part of the curriculum anymore than any other school and the assumption that the neighborhood school, rather than the segregated neighborhood, should be under attack and for which remedies are issued is questionable. The legal point again should well be that integration is required for constitutionality. Let the neighborhoods integrate and let the administration integrate the schools in some manner. Let the educators debate the role of integration as a part of the educational curriculum. This would seem to be far more desirable than avoiding the negatives of integrated neighborhoods at the expense of involvement of the courts in educational matters.

An evaluation of the Remedies suggested by Judge Wright covers essentially much of the same ground that has been covered in the interpretation of Findings of Facts and of the Opinion of Law. However, there are some remedies and statements which warrant further comment and reiteration.

³⁸ 372 F.2d. 836 (1966), 5 Cir. reaffirmed en banc, March 29, 1967, 380 F.2d. 385.

³⁹ Hobson, 508.

Judge Wright suggested that the remedy to overcome discrimination "must center primarily on pupil assignment, teacher assignment, and the track system."⁴⁰ The provision to transport children from the overcrowded black schools to the schools west of the Park provided little relief. Other measures to reduce overcrowding were already in the planning stages and other alternatives which might have been suggested were overlooked.

The court avoided a direct attack upon the neighborhood school but continued to snipe away as if there were relevancy in the criticism of the neighborhood schools. "The use by the defendants of the neighborhood school policy, intentionally manipulated in some instances to increase segregation, is the primary cause of pupil assignment discrimination."⁴¹ Did the Board necessarily act maliciously if it knew that the consequences of its acts would be to create even more segregation? Was not the willingness to allow some free choice an attempt to achieve what Judge Wright felt the system ought to have achieved?

Personnel Segregation

Indicated earlier and briefly stated here, the Plaintiffs charged that the selection of the Board was unconstitutional. Other charges about personnel were directed to the composition

⁴⁰Ibid., 514.

⁴¹Ibid., 515.

of the general administration, teacher selection and assignment, teacher promotion and transfer, and the administrative composition of particular schools.

School Board and general administration

The question of racial composition of the School Board became a moot question both during the process of the decision and even more so soon after the decision. The earlier decision in Hobson v. Hansen⁴² upheld the legality of the process for appointing the Board although it did not change the overwhelming white majority of Board members. However, during the trial the selection method was in a state of transition to an elected Board. The election has continued as the process of selecting Board members.⁴³ Two Board members are elected at large and nine elected from specific districts within the District of Columbia.

Judge Wright found no reason to fault the system because of the number of blacks in administrative positions at the time of the case.⁴⁴ However, when he turned his attention to school personnel specifically he indicated that there

⁴²Hobson v. Hansen, 265 F.Supp. 902. This question was the primary substance of the first Hobson decision.

⁴³The composition of the immediate Board prior to the 1971 election was eight blacks and three whites. Six Board members were up for election in November, 1971.

⁴⁴Note: The present Superintendent is black and there are both black and white assistant superintendents. At the time of the decision the Superintendent was white and there were four black assistants and seven white assistants.

were numerous reasons to argue that a definite pattern of intentional segregation existed. He argued that this contributed to the inferior education received by black students.

This immediately creates a problem. Given today's attitude on the part of many black militants, society is confronted with a paradox. There are those who argue that separate but equal is to be preferred as long as the control of these schools is by blacks. At the time of the decision, however, the prevalent preference was for a truly integrated approach to education as a method of enhancing the potential for achievement of quality education for all.⁴⁵

School faculty segregation

There can be little argument with the facts of the segregation of school faculties. As of the 1966-67 school year there was a very high correlation between the number of black or white students and the number of black or white teachers in a particular school. However, there can be disagreement in the interpretation of the statistics to substantiate his charges against the administration's placement policies rather than giving thought to the character of the administrative problems. He also seemed to gloss over the

⁴⁵This debate, of course, still continues. Evidences of, are in the arguments for community control and the concern by the National Association for the Advancement of Colored People and its Atlanta chapter.

societal significance of the problem and failed to grasp the extent to which this is an educational problem.

The problem for the system in personnel placement is similar to that of student placement when the racial imbalance is as great as it is in the case of the District. For instance, what happens when you take the 22% white teachers and evenly distribute them percentage-wise throughout the District? Is it not possible that this further reduces the white population of teachers? One must consider that the transfers of whites from predominantly black schools to white schools was almost nil. But the transfer of teachers out of the system was significant. While on the one hand it is a relief to be rid of teachers who were possibly racists, it leaves the school system in even greater difficulty if the faculty is to become integrated.

It is sufficient to say here that this raises the question of professional educational leadership or lack of leadership, a question which will surface often throughout this discussion. In the examination of alternatives in Chapter Five the question will be handled in depth.

Statistics⁴⁶

Judge Wright used numbers instead of percentages of schools in his evaluation of the educational program. This

⁴⁶See generally the charts used for the calculations.
Hobson, 422-23.

helped to create an inadequate interpretation of what had in fact been taking place in the District. If one observes only numbers of schools, the changes, both positive and negative, do not seem significant given the magnitude of the present problem. But if one looks at percentages of change in the four-year period from 1962-63 to 1966-67, then one sees trends and it is more difficult to imply intent to segregate to the educators. It requires the directing of one's attention to that significant educational change which was in process.

If one observes two factors; namely, the change in the percentage of schools with all black and the percentage of schools with all white faculties, one finds that at the elementary level there was a decrease of 18.7% (from 64 schools to 52 schools) in the number with faculties that were all Negro. At that time there was almost a 100% increase (from 20 to 39 schools) in the number of schools with 85% to 99% black faculty. This is, of course, in this writer's view, an unquestionable negative.

During the same four-year period, from 1962-63 to 1966-67, there was an increase of 142.9% (from 7 to 17) in the number of schools at the level of 67% to 85% black faculty. There was also a decrease of 33.3% (from 15 to 10) in the numbers of school faculties with what Judge Wright considered the most desirable level (i.e. 33% to 67% Negro

faculty)⁴⁷ of integration and a 33.3% (3 to 4) increase in the number of schools with 15% to 33% black faculty members.⁴⁸

At the same time one finds that the number of all white faculties decreased by 70.6% (from 17 schools to 5). The increase in the number of schools with only nominal percentage (1% to 15%) of black teachers was 167%, or three schools to eight schools.

Another fact of significance is that during that time the number of schools within the acceptable range, which reflected the system-wide percentage of black teachers, more than doubled or increased approximately 142% (7 to 17). It is apparent that Judge Wright preferred that the total number of white teachers should increase so as to represent a figure of 33% to 67% black.

When one considers only the numbers of elementary schools involved or observes the number of schools in the negative categories at any given point, it is easy to conclude that the situation is most bleak. However, using percentages and giving thought to rapidity of trends, then it is possible to actually commend rather than condemn the administration.

⁴⁷Judge Wright selected this category for the appropriate integration level for reasons that this writer cannot ascertain. This does not represent the proportionate composition of faculties' or students' population. The upper limit does approximately represent the black-white ratio of the total District population.

⁴⁸Hobson, 422-23.

Turning to the junior high level, it is indicated that there was an increase in the number of schools with predominantly black faculties; that is, schools with 85% to 100% of their faculties of Black race. (It is assumed that because the category of 100% was not indicated separately as it was in the elementary school statistics there were no instances of a totally segregated faculty on the junior high level.) In this category of 85% to 100% there was an increase of 33.3% (12 to 16).

Significantly, the percentages of schools in the desirable category (desirable as defined by Judge Wright) increased by 133.3% (from 3 to 7 schools). There was a 50% decrease (6 to 3) in the number of junior high schools with percentages of black teachers in the 33% to 67% range and a 100% decrease (1 school to 0) in the 15% to 33% range. One junior high school remained at the 0% to 15% range.

Apparently there were not any junior high schools with an all white faculty because a category with 0% black faculty was not indicated. The chart did not indicate which schools moved from one range to another nor the increase in the range as a result of new schools.

At the senior high level there was a desirable change in faculty composition during the four-year span. There were no changes in percentages of schools with predominantly black faculties, but there was a decrease in all white faculties of 66.6% (from 3 to 1), and there was a 100% increase (2 to 4) in schools with faculty distribution reflecting the District-wide faculty racial composition.

These statistics are put forth for consideration because Judge Wright's interpretation of these "facts" provided him with what he considered a concrete basis for some far reaching suggestions and were employed by him to verify what he judged to be racist policies of the school administration. It must be noted that groupings were made which tend to encourage one to overlook noticeable, if not favorable, trends on behalf of the school administration.

Germane in the creation of attitudes but not of terribly great significance statistically was the switching of numbers in the statistics. These switches appear to be honest mistakes, but in this case they put the school administration in worse light than that in which it already appeared. For instance, the total number of elementary schools for the 1966-67 school year was 135.⁴⁹ Fifty-two of these had all black faculties. This number is verified in Section (b) of Chart (a) entitled "Students and Faculty".⁵⁰ Yet Judge Wright states, "Of 135 elementary schools, 57--over 40%-- are minus even a single emissary from the other race."⁵¹

Further attention must be given to some of the affirmations made by Judge Wright and on which he based his continued attack upon the administration. It is obvious that Judge Wright disregarded the changes between 1962-63 and 1966-67

⁴⁹Ibid., 422.

⁵⁰Ibid., 423.

⁵¹Ibid.

and considered them to have little if any significance on the presumed intent of the administration to keep the schools segregated. He was content to see the present situation as negative, as perhaps most people would, and to argue that the lack of change between 1954 and 1962⁵² was indicative of an administrative intent to prolong segregation even though there had been substantial changes between 1962 and 1966.

The interpretation of these statistics by Judge Wright led him to a series of observations or affirmations of what would seem to be true about the District schools. He stated, ". . . to a significant if not startling degree teachers and principals have been assigned to schools where their own race mirrors the racial composition of the schools' student body."⁵³ As indicated earlier in the chapter, given the present statistics, this point cannot be argued. However, given the trends and attempts of the school administration to change this, the Findings of Facts now have less significance as an indicator of needed changes. The charge of intentional segregation by administrative intent can be questioned.

Judge Wright stated that "since 22% of all teachers, but merely 9.2% of the students are white, at all grade levels we should expect some tendency . . . for faculties

⁵²Ibid., 429.

⁵³Ibid., 425.

to have slightly higher white percentages than the student body."⁵⁴ The hard reality was that it was not surprising that this 22% of the teaching faculty was not scattered throughout the District Schools. The high concentration of white faculty essentially west of the Park was due to the fact that for various reasons these teachers had not transferred to schools east of the Park while white teachers in those schools transferred out of the system. In essence there had been fewer openings west of the Park and fewer opportunities, short of reassignment, of faculty to achieve racial balance in the faculties west of the Park. Short of racial consciousness in the hiring of new teachers so that more whites would be placed in the ghetto schools these positions would naturally be filled by blacks and young and often transient white faculty members.

This writer's argument is not with the then existing situation as such but with Judge Wright's assumption about the prevailing condition which helped create this situation. Reasons extended far beyond racist intent, though many reasons may be in a loose sense racial as Mr. John Koontz, the then Assistant Superintendent, used the term in his testimony.⁵⁵

⁵⁴Ibid.

⁵⁵Ibid., 430.

Teacher transfer and turnover rate

Judge Wright suggested that because there was a high personnel turnover rate the personnel segregation must have been intentional. Apparently his argument would have been that a high turnover rate would have allowed the school system many opportunities to improve the racial composition in such a way as to make certain that each school would have had approximately twenty-two per-cent whites on the faculty.

However, there is no particular reason to accept this assertion at face value. If the white population of teachers, as indicated above, remained stable and white teachers new in the District tended to be transient for reasons other than racial, then inroads in changing the balance of white teachers in the predominantly black schools would have required the hiring of a considerably higher percentage of white teachers. This position is not inherently defensible given the racial composition of the population of the District and of the District's schools. The mere fact of reassigning the white faculty either in 1966 or in 1954 would not have brought about what Judge Wright as well as many educators would hope to achieve. That hope, of course, was the integration of schools of both faculty and student body.

Judge Wright downgraded defense of the integration policies by indicating that it was not clear whether or not the policies covered initial assignments in the District,

that the concern was mainly for token integration, and that the attempts were "barren of fruit."⁵⁶ It must be argued that the evidence cited earlier indicated considerable progress on the issue and that the defense pointed out many things that the administration was doing to overcome a difficult problem. The downgrading did not appear to be appropriate.

An attack upon the testimony of Dr. Hansen on teacher transfer policies was of little significance unless further clarified. As Judge Wright suggested, the testimony indicated inconsistency but little more. In itself it did not indicate racism.

Judge Wright pointed out that Dr. Hansen testified that "transfer requests have met stiff resistance, winning approval only when clearly justified by considerations of health or 'education.'"⁵⁷ Dr. Hansen soon after also testified that "his administration has approved transfers for teachers wanting to serve at schools nearer their homes--a factor of convenience unrelated to education or health."⁵⁸ For this inconsistency to be significant it needed to be proven that this had applied only to white and not to black teachers.

Other things being equal, convenience is of significance educationally and it can be of even more significance

⁵⁶Ibid., 427.

⁵⁷Ibid., 428.

⁵⁸Ibid.

in the case of the District schools with its need to retain more experienced teachers. To live in northwest Washington and to be assigned to a school in the far southeast is not inherently positive educationally even if using private rather than public transportation. Without stretching the concept of educational benefit to any great extent, a teacher's living near his school can be argued to be one of those benefits. For example, the fatigue factor in driving time and traffic congestion as well as identity in the neighborhood with the students are factors which can possibly influence teacher performance.

The court rejected by implication and without explanation the Superintendent's affirmation "that many white teachers have transferred from Negro to white schools during the last ten years, 'not always necessarily because of the difference in race.'"⁵⁹ The court found " . . . that some white teachers originally assigned to Negro schools have purposefully escaped therefrom via transfer process."⁶⁰

The policies of administration, while they were not sufficient, were certainly indications of attempts to live with the difficult realities of maintaining a racially balanced faculty. To charge racial intent here was the equivalent of suggesting racial intent on the part of Judge Wright for living

⁵⁹Ibid.

⁶⁰Ibid.

in far northwest Washington or suburban Maryland. Numerous other factors must be evaluated to ascertain racism. Guilt by association was not sufficient for this judgement of the school administration.

Teacher placement

Comments of Judge Wright on original teacher placements were of no more help than were the statements by the school administration which he judged to be of so little significance. Certainly the charge of racism could be made but with no more validity than the affirmation that other policies predominated in the placement of teachers. At the time of the decision, when schools opened with positions unfilled, it was appropriate for the administration to argue that hiring was on the basis of need. Once numbers of teachers were hired then assignments certainly could take in factors other than race. The desire to retain good teachers was a sufficient reason for assignments to schools which had a greater appeal to individual teachers.

This writer has difficulty here because he accepts the proposition of unconscious racism and the fact that some teachers are racist. However, this belief must be separated from educational issues and proof provided for judicial decision. This was not done by Judge Wright who accepted a type of guilt by association as a basis for determining racism. He also overlooked valid educational bases for the acts he found undesirable.

Judge Wright used 1962 statistics to indicate that "the court cannot forget one remarkable fact: In 1962-63, eight years after 'integration,' in a school system short on white students and white teachers, the faculties in 15 of 17 predominately white schools were 100% white."⁶¹ The point that was more appropriate was that in 1966-67 of 13 predominately white faculties only five were 100% white and the trend showed continued reduction in percentages of white teachers. The complaint here was that the condition was deplorable and the 1966-67 figures justified the complaint, but Judge Wright's use of 1962 figures was not warranted in the year 1967.

Judge Wright concluded, after using the 1962 statistics, "The pattern of teacher segregation persisting, although in a less extreme form, and no evidence having been offered of any change in policy or practice since 1962, the court concludes that elements of deliberate segregation by such officials continue."⁶² The actual admission of the change, it seems, should have indicated that whatever was being done was improving the situation and would bring about a more desirable pattern than existed.

⁶¹Ibid., 429.

⁶²Ibid.

Administrative and teacher segregation in the individual schools

The court suggested little clarification on the issue of segregation in dealing with the placement of principals. It did conclude that to the extent that blacks had not been assigned to white schools the racial segregation of teacher assignments became the pattern for the principal assignments if the promotions were from within the school.⁶³ Judge Wright implied that considerations in one particular assignment were racist. "These decisions were, as Assistant Superintendent Koontz said, 'in a sense, racial . . .' with respect to the 'background of a person.'"⁶⁴ This reference was to the assignment of particular assistant principals, one white to a predominately white school and one black to a predominately black school. At the point of this decision much emphasis was being placed on the need to have blacks in positions of authority visible to black youths. To make the assignment of these assistant principals appear racist was without full consideration of its actual administrative justification.

In commenting upon teacher and principal segregation as they relate to de jure segregation, Judge Wright did not extend his comments beyond what has been evaluated earlier in this chapter. He referred to a 1954 policy, allowing teachers to remain at the schools they were already at, and

⁶³Ibid., 430.

⁶⁴Ibid.

judged the system as acting wrongly on this issue. However, this policy would seem to have little relevancy because few teachers, teaching at that time, have remained in or are still teaching in the District. Also at that point it would not have appeared to be unreasonable to allow teachers to remain in their schools because both Division I and II schools did encounter changes in their racial composition which would have resulted in teachers teaching in more integrated situations.

An argument, plausible and justified, is that educational conditions explain the requests for many transfers. There were too many integrationists among teachers to argue that they had universally asked for assignments for racial reasons.

Judge Wright justified the need to attack teacher assignments by suggesting that "the fact that in many schools the equivalent of token integration has been carried out is of no legal moment; the Constitution is not appeased by tokenism."⁶³ This position, though, overlooked the increase in integration both in society and in the schools which had been established as a goal by Judge Wright. The potentially negative consequences to the cause of integration in the school system should have been considered if the system's assignment of white teachers to the black ghetto schools

⁶³Ibid., 502.

would have been categorical. The use of "many schools" lacked precision and suggested little in terms of evaluating the problem of overcoming faculty segregation.

Judge Wright utilized the Southern situation and de facto segregation of faculty to further strengthen his position, which appeared to be: Freedom of choice plans for students are unconstitutional if the faculties as well as student bodies are predominately of one race or another. Two problems emerge from this proposition. First, and again, to say that a school with an all black faculty is educationally inferior implies racism and secondly, if one is to say it is unequal because it is separate, then it is a legal question and cannot be resolved by judicial fiat in education but requires resolution by legal fiat for societal change. To deny the freedom of choice plan encourages that freedom of choice which causes an increase in the pupil population of private schols.

Criteria for assignment of teachers should be primarily on educational merit and consideration. The issue which needs resolution is what constitutes educational merit. Some may present the argument that these considerations discriminate against any given particular group. If this causes discrimination then attention needs to be given to what the proper definition of competency might be. Attention must be given to what constitutes a proper definition of education as well.

To force white inexperienced teachers upon a black community may well be both educationally unsound as well as

unconstitutional as regards the constitutional rights of students to equal protection. The unsoundness of the educational position of this remedy is affirmed by this writer. The constitutional question is left for the courts but with the reminder that lack of quality in teaching faculty suggests a denial of equal protection for students.

Wright's earlier reasoning on integration of faculty returns to haunt the writer on this issue. Once again, what is indicated is that it is imperative to separate legal and educational issues if changes which insure equal protection educationally for all children are to be effected with increasing rapidity.

Judge Wright argued ". . . that the Negro students' equal protection rights to an integrated faculty cannot be undermined or thwarted by racially induced preferences of the teachers."⁶⁶ The arguments were with his assertion of "racially induced preferences of the teachers" as a basis for judging the school system's policies as negative, and his assertion that equal protection rights were denied simply because an integrated faculty was lacking. Again, it must be asked whether the problem of lack of integration is substantially educational or rather one of neighborhood housing patterns. Further, it is suggested by this writer that to

⁶⁶Ibid.

impose integrated faculties at the cost of educational performance becomes an absurdity.⁶⁷

It is appropriate here that additional comments be directed to the initial sentence of that section. The sentence reads: "One of the court's findings of fact is that elements in the schools' administration, though not necessarily on the Board, are affirmatively satisfied with the segregation which the local neighborhood school policy spawns."⁶⁸ One of the reasons given for rejecting Hansen's request for intervention by the appeals court was that he was not sufficiently damaged or harmed by this decision⁶⁹ and that it was in fact the whole Board of Education which was on trial. However, statements such as the above as well as Judge Wright's initial use of the word "criminal"⁷⁰ could not help but give weight to Dr. Hansen's request regardless of how much one disagreed educationally with him.

The conclusion that the school administration is "affirmatively satisfied" was simply without foundation or

⁶⁷Note: With the present apparent surplus of teachers the process of assigning experienced, qualified teachers to educationally poorer schools may well have a chance of success, especially if one does not evaluate teacher attitude.

⁶⁸Hobson, 503.

⁶⁹Appeal, Smuck v. Hansen, p. 4 of original court record, also 408 F.2d 175 (actually same case as Hobson v. Hansen).

⁷⁰Infra, n. 84, p. 70.

conclusive proof. Even to have stated that the administration was passively satisfied was without justification. What could have been stated was that it was ineffective in its leadership to overcome the problem. As pointed out earlier, different interpretation of this material could well have led to positive even if disappointing conclusions about these elements in the administration.

Judge Wright's remedy⁷¹ for teacher integration was sound in theory but at the point of the decision the results he expected would not necessarily follow. Judge Wright indicated that teachers requested transfers for racial and not educational reasons. But he neglected to take note that if these teachers were locked into an undesirable school they could easily leave the system. This then would increase the probability of more inexperience and racial imbalance among teachers in the total system.⁷² Reassignment of the staff, however, would not bring about the desired goals in and of itself. Major changes in the educational conditions would achieve the desired ends and would not make it necessary to mandate the assignment of white teachers to the black ghetto schools. When educational conditions are acceptable, teachers

⁷¹That racial consciousness be a basis for appointment and reassignment. Hobson, 516.

⁷²It was this writer's observation while working in the District that much of the white teaching staff there is transient; a fact due, in part at least, to the attraction of living and working in the Nation's Capital for a part of one's life while one is youthful and **relatively unattached**.

will not seek to avoid assignment to these schools.⁷³

Significant increases in the number of black teachers in white schools would seem to be imperative. This color consciousness would be necessary to overcome the lag in the assignment of black teachers to white schools prior to this point.

Equality of Distribution
Of Educational Resources

Lack of monies in some areas, unequal distribution in others and the contributions of private groups and individuals contributed to the Plaintiffs' charges of unconstitutional operation of the school system. The administration, in essence, argued that the differences were insignificant and that there were educationally reasonable explanations for differences when they did exist.

This lack of equality in the distribution of educational resources was a factor in Judge Wright's judgment of inadequate leadership by the administration and justified the court's involvement in educational processes.

The data he used provided information about the elementary schools in the District and provided considerable potential for a judgment of bias on the part of the school administration. Consideration of the statistics on secondary schools does not necessarily verify that the same conditions existed at the secondary level as at the elementary level. Judge Wright indicated that it can be assumed when the secondary school situation was not commented upon

⁷³For educational conditions to be acceptable to professionals in many instances would require significantly radical measures not alluded to in this decision nor in this dissertation.

that "no noteworthy secondary school inequalities were found."⁷⁴ The neighborhood elementary school, with its unusually smaller geographical area, is more susceptible to the segregational evils resulting from the problems of distribution of funds.

Building construction

Generally, Judge Wright judged the efforts to maintain and construct buildings to be at least in good faith. There was little negative commentary on this subject. However, it is interesting to note that in this rather positive statement it was the Board and not the school administration which received commendation. The reason this is interesting is that the Board and the Superintendent were charged but generally the Board was excused when there were negative points made and received credit for the accomplishments. The Superintendent carried either an undue burden or did not receive sufficient credit.

There appeared to be an element of concern and **surprise that** the elementary schools attended by blacks were both the newest and the oldest and that a disproportionate share of the oldest buildings were in the slums.⁷⁵ Given the traditional housing patterns and the trend from the inner city to suburbia, this was not unusual. The problem which should

⁷⁴Hobson, 431.

⁷⁵Ibid.

have been dealt with was the rapidity or lack thereof in replacing the old structures within the core of the inner city and not what then existed.

Library facilities

Commenting on library facilities, Judge Wright had verified that the white schools were at an advantage in that they all had libraries while all the black schools did not. It can be inferred that Judge Wright was not happy with the lack of leadership shown by the school administration in establishing libraries. The reasons for his dissatisfaction were not established other than an indication that libraries in elementary schools until that time were begun as a result of public involvement and contributions. There was on this issue apparent satisfaction with the efforts of the administration to "equip every elementary school with a library by 1973"⁷⁶ and in its goal to provide "five books per student in each school."⁷⁷

It is not clear why Judge Wright's reference to Title II of the Elementary and Secondary Education Act of 1965 was appropriate. He indicated that when the projected libraries were complete the facilities would be a result of monies from Title II funds. As shall be seen later Judge Wright rejected

⁷⁶Ibid., 433.

⁷⁷Ibid.

the Defendants' use of per-pupil expenditures by the defense when federal funds were included. In the future might not Judge Wright also reject the administration's implementation of this financial aid program as evidence of its attempts to improve the schools as he had rejected Federal Aid contributions in the original case?

School congestion

There is little to debate about the problem of congestion in the schools. The difference in overcrowding between the black schools and the white schools was deplorable. However, given the geographical areas, the patterns in the density of population, and the fact that some schools with significant black populations also fell into the category of less crowded schools, there was little reason to charge administrators with irresponsibility.⁷⁸ Schools with over capacity enrollment are inherently bad, yet so are overcrowded communities which significantly contribute to the problem. Again, Judge Wright needed to be reminded of the problem of which he was a part by the fact that he lived in an area of low population density in which those less crowded white schools existed. Given the housing patterns in Washington and even the bussing suggested by Judge Wright, short of some district pairings of schools or educational parks, the white schools could not help but be the least

⁷⁸Ibid., 434.

crowded unless Congress had appropriated far more monies for rapid building programs. This would require extensive legal aid to expedite the condemnation process to obtain the land for the buildings in these areas.

Numerous other alternatives which might have been used were not acceptable to the mood of the communities at that time. These alternatives including bussing, create more problems than those which might be resolved. This will be taken up more fully in Chapter Five on alternatives.

Faculty differences

The quality of faculty and the distribution of quality of faculty was abhorrent as was implied in the Findings of Facts. However, Judge Wright's inability to understand the magnitude of problems resulting from attempts to change the situation and his willingness to reject the school administrators' attempts to overcome the problem weakened his argument of intent to discriminate. He admitted to the problem of measuring quality of faculty in terms of numbers of years experience or in terms of the significance of temporary certification. But he still argued that the requirements used by the school administration must have some significance or they "would abolish them instantly,"⁷⁹ a significantly

⁷⁹ These were the words used in the original writing as it appeared in the Congressional Record, Vol. 113, Part 13, p.16732, June 21, 1967. The quote was changed in the Federal Supplement simply to read: ". . . abolish them all." p. 436.

optimistic judgment of the capability of the profession and legislative branch.

The position that experienced teachers are superior to less experienced teachers in particular teaching situations for which they have not been prepared requires proof. Proof is also required to test the claim that the more experienced teachers who remained in white schools possessed a superior competency that would transfer to a new situation should such white teachers be required to teach in predominantly black schools.

Many of the system's teachers held temporary certificates. The question of temporary certificates became an issue because implied in "temporary" was the idea of "less qualified" and greater numbers of teachers with temporary certificates were assigned to poor and ghetto schools. Even though these teachers held Bachelors and in some cases Master's degrees in various disciplines, they lacked college course work in education per se which is a requirement for regular certification. There is some argument within the profession that in teacher preparation more emphasis on the disciplines is to be preferred to education courses. To hold the fact of temporary certification against the system rejected this professional debate and affirmed a position favoring emphasis on a teacher's college degree.

Attention must also be directed to the requirement that a Master's degree was necessary for permanent secondary school certification and that many teachers with temporary certificates were in the process of fulfilling that requirement.

Professional judgment would indicate that the system was doing everything possible to develop more qualified teachers. As in other places, Judge Wright's concern should have been with procedures for educational changes which would assure the retention of the good teachers rather than attempting to prove racism.

Actual per-pupil expenditure

Per-pupil expenditure represented a most puzzling picture and did not seem to be clarified by either Judge Wright or the School System. Judge Wright rightfully rejected total expenditures for schools as a criteria of equality because they included earmarked federal monies designed to provide additional compensation specifically for compensatory services. However, the refusal of the court to include Impacted Aid funds was not appropriate since they were assigned to be a part of a school's overall monies and were earmarked only in the sense that monies were provided on the basis of the number of federal employees in an area.

The Defendants put forth arguments which explained inequalities in expenditures such as low utilization of schools west of the Park resulting in lower pupil-teacher ratios, higher salaries for more experienced teachers, and general inefficiency in operating under-capacity schools. Judge Wright simply rejected these reasons as being responsible for the disparity and gave little justification

for his rejection of the Defendants' explanation. There was not an analysis of an individual school to determine whether these claims were true or false. Judge Wright appeared to have discredited the Defendants without reference to sufficient statistics which would have required an itemized analysis of the budget of two contrasting schools under consideration.

For example, Judge Wright rejected the defense explanations for the existing disparity⁸⁰ in per-pupil expenditures. However, and one must work here with some incomplete data, Judge Wright, using 1962-63 per-pupil figures, disclosed that the average teacher's salary at the 26 most expensive elementary schools (median per-pupil expenditure: \$387.) was \$7,742 compared with \$5,864 in the bottom 26 (median: \$246.). He stated that "even once all these extenuations and explanations have been introduced, the court is still without confidence that the very disturbing \$100 (or \$132)⁸¹ margin has been wholly accounted for. Neither

⁸⁰This disparity factor has changed in that the District spending for the 1971-72 school year for any individual schools had to be within 5% of the system's norm for schools in that particular category. Again, if enforced rigidly this can create educational management problems.

⁸¹This \$132 was accounted for by separating only the 13 elementary schools west of the Park where the total per-pupil expenditure was \$424 compared to the median of \$292 in predominantly Negro schools (p.437). This was a factor to keep in mind because if the per-pupil teacher expenditure for these 13 schools had been calculated, the cost would have reflected an even higher expenditure than by using the 26 most expensive schools. The \$100 margin was between the median for predominantly Negro schools \$292 and predominantly white schools \$392.

the graduate degree or the temporary-teacher factors can have very dramatic impact on per-pupil expenditures."⁸²

By using the charts for the 1963 fiscal year prepared by the Board and the average teacher's salary used by Judge Wright for the 26 most expensive schools and the 26 least expensive schools and the average number of students per school as well as the average of 30 pupils per teacher, it was possible to clarify rather quickly whether or not these explanations were of significance. The per-pupil cost of the teachers in the 26 most expensive schools was \$255. The per-pupil cost for teachers in the least expensive 26 schools was \$194. This was a difference of \$61 for one item and indicated that these factors did have a dramatic impact upon per-pupil costs.

Judge Wright used data from the year 1962-63 which indicated that the class size in white schools was smaller than in black schools. While this point tended to discredit the Defendants, because they held that this was not the case, it was another factor contributing to the significant range of pre-pupil expenditures.

Judge Wright rejected expenditures for maintenance as explanations for differences in per-pupil cost, arguing that the older buildings of the ghetto would naturally require

⁸²Hobson, 438.

higher upkeep expenses. However, in the ghetto areas the schools were both the oldest and the newest with the oldest often coming up for replacement whereas the white schools were in that middle age bracket where maintenance costs could be sky-rocketing. Outright rejection of the administration's defense was questionable on this issue. These defenses could be turned against the administration but for other reasons. On this point the defenses did explain what accounts for differences in expenditures.

Curriculum and special programs

Judge Wright's investigation into the area of curriculum and special programs appeared to be only a sample listing of the projects in existence at the time of the trial. He gave a complete and in-depth criticism of the lack of kindergartens.

Most professional educators would agree that the lack of kindergartens was deplorable but Judge Wright criticized the attempt to improve the situation. For example, "other schools have rather unsatisfactorily evaporated their waiting lists only by shortening kindergarten class time to as little as two hours a day, then running three sessions consecutively."⁸³ Kindergarten days are normally two and on-half to three hours long and while other alternatives might be suggested, this was a point where the administration should have been commended for efforts to improve an undesirable situation.

⁸³Ibid., 439.

The system, through its Model Schools Program, WISE Program, school pairings, the Trinity and Antioch-Putney Teacher Intern Programs and the Teacher Corps, indicated serious attempts to improve itself. On balance it must be noted that apparently some of these new programs were not put forth in testimony as indicators of change.

Ambiguities of judicial conclusions

In the conclusion to this section on Equality in the Distribution of Educational Resources, Judge Wright rejected the Plaintiff's charges as well as the defense presented by Corporation Council. Yet, apparently on the basis of the materials presented in this section Judge Wright projected seriously negative intent by the administration.

School officials can and should be faulted, but for another reason: That in the face of these inequalities they have sometimes shown criminally little concern. It is one thing, for example, when crowded residential conditions shut Negro children, and they alone, out of kindergarten in the nearby schools; it is another matter entirely when, confronted with this awful situation, school officials stand idly by circulating promises of more adequate school buildings years hence, but acquiescing in the⁸⁴ present injustice by their passivity.

⁸⁴This quotation is from the decision as it appeared printed in the Congressional Record (supra, n.79, p.64), p. 16734. The official version in the Federal Supplement is quoted here:

"It is one thing, to be precise, when crowded residential conditions shut Negro children, and them alone, out of kindergarten in the nearby schools; it is something else when school officials acquiesce in the situation once it arises by standing passively by, circulating promises of more adequate school buildings years hence."(p.442)

In short, the analysis illustrated that rather than lack of positive change, there were some actual improvements in the system. The school officials could perhaps be faulted for not having done far more and perhaps for the inadequacy of their leadership. But the validity of the arguments which caused "the collapse, . . . of defendants' argument"⁸⁵ was certainly open to question.

Apparently the numerous references to the inadequate defense of school administration and the discrediting of school administration indicated that if the school officials could be discredited there would be significant improvements in the educational system in Washington, D.C. However, to bring about significant and lasting change, considerations must go far beyond placing blame on the school administration. Numerous other factors, such as budget and how that was developed, professionalism of staff, parental and community desires and oppositions, legal process and time factors for obtaining land for new building should have been taken into account in assessing what school officials were actually capable of achieving at any given point. This did not appear to have been adequately accomplished by Judge Wright in this section.

The removal of such words as "criminal" and "awful" are of significance, at least enough so that a separate dissertation or joint study would have been appropriate on this point. That is, what are the psychological implications of judicial decisions and to what extent do these psychological attitudes, in reality, "justify" decisions?

⁸⁵Hobson, 441.

Unequal facilities, de jure and de facto concepts

By appeal to the conceptualization of separate but unequal, Judge Wright developed what appears to be a very sound legal case that unequal facilities were absolutely unacceptable since Plessy v. Ferguson.⁸⁶ He further suggested that de facto segregation which produces unequal facilities was similarly unconstitutional; hence, unacceptable to the court. The courts, prior to Brown, insisted upon remedy once it was proven that inequality existed under the separate but equal doctrine. This fact contributed to the credibility of the insistence that affirmative and immediate action should be taken when the unequal facilities exist as a result of de facto and not de jure segregation. However, this issue is non-educational in nature and it must be asked why the courts were unwilling to affirmatively attack the housing patterns which bring about the de facto segregation of other facilities throughout society.

The point is that segregation-integration is not an educational matter per se. However, it is a matter which requires educators to expend a great deal of time and energy in dealing with the sins of the total community and in that sense becomes educational. Education might be more improved if more of the energies of educators could be directed to educational processes rather than planning to superficially overcome segregation.

⁸⁶ 163 U.S. 537, 16 S.Ct. 1138 (1896).

This is not to criticize the court for asking schools to integrate but it is to ask why the constitutional principle cannot also be applied or enforced in the area of housing. The consequences of this lack of leadership are frightening in light of recent school unrest. It is possible that emphasis on school integration is qualified by the hope that this isolated step will contribute eventually to the development of a totally integrated society. In such issues as bussing, citizens may become so tired of the problems and time necessary for the bussing of their children to assure integration that they will work creatively and affirmatively to develop housing patterns which assure integrated communities. The faith of this writer that this will happen has waned significantly. However, this appears to be the continuing hope of the courts as reflected in their decisions.

Remedies

The question in this section focused on the court's interpretations of educational actions and on the court's suggestions for action based on these interpretations. For instance, it needs to be remembered that Judge Wright attempted to build the case that the inner-city schools compared badly with other schools, in terms of per-pupil expenditures, but he would not allow the use of Federal funds for special programs in the computation of per-school and per pupil expenditures. He argued that they do not cure inequalities. If added money means that the poorer schools' expenditures

were actually higher, educators ought not be faulted when they attempt to stretch limited budgets as far as possible to cover expenses which are logical deviations.

Judge Wright attacked the plans for new buildings as so "much pie in the sky." He attacked teacher assignment policies as well. Both these subjects were considered earlier. These attacks formed the bases for the judgment that the school system was operating unconstitutionally. Similarly, Judge Wright supported bussing by utilizing the familiar but questionable tactic of advocating bussing of blacks to white neighborhoods, but not whites to black neighborhoods. While offering this as a criticism it is less of a criticism of the judge than it is of Corporation Council (in essence the lawyers in defense) and the Plaintiffs' lawyers for not calling for sufficient testimony on this subject. Sufficient testimony even at that time would have indicated the implied racism of bussing only blacks.

The court continued to encroach upon the area of legislative responsibility by suggesting the type of specific plans which must be considered by the Board. The court insisted "... that the plan include compensatory education sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity for all children."⁸⁷ However, unless Judge Wright could

⁸⁷Hobson, 515.

compel Congressional funding it was wishful thinking to assert equal educational opportunity through compensatory education.

The Track System

Judge Wright's analysis and criticism of the track system provided the basis for his most significant attack upon the school system, and for his judgment that the school system was operating illegally. It is appropriate to indicate that, contrary to some early public and professional responses, Judge Wright did not declare homogeneous grouping unconstitutional but only those elements which tended to track students and which placed them into classifications which had a tendency of permanence. Also, those elements which were negative in implication and which placed students into the tracks on the basis of inappropriate criteria were considered to be illegal.

Judicial evaluation of reasons for the track system

The interpretation Judge Wright made of some of the evidence in the evaluation of the track system should cause considerable caution in the acceptance of the court's findings.

His judgment about tracking is contrary to the philosophy and practice of many teachers. As an educational principle many educators, including this writer, criticize homogeneous grouping. However, these educators do not overlook the fact that some grouping and actual tracking will

result by virtue of the educational and occupational goals of students. Once **tracking** begins it will to some extent become racial and cause hardship in the event that the student wants to alter his educational objective. For these educators, the question to be answered here is whether or not real change can be brought about by judicial fiat.

Judge Wright immediately indicated suspicion of the defense.

There is evidence which on its face supports defendants' claim that racial considerations were irrelevant to the decision to adopt the track system. Yet, as in certain other administrative decisions where defendants have purported to act without regard to race, the taint of segregation hangs heavy over their actions. . . . There is no escaping the fact that the track system was specifically a response to problems created by the sudden commingling of numerous educationally retarded Negro students with better educated white students.⁸⁸

It was further suggested that the track system was instituted as a result of realizing that the low achievers in the system were from Division II or the Negro schools.⁸⁹ However, an awareness of educational innovations and developments suggests that homogeneous grouping was in one of its heydays at the time it was adopted in the District of Columbia. Yet Judge Wright argued that:

⁸⁸Ibid., 442.

⁸⁹Ibid.

Given these unhappy consequences of 'separate but equal' education, Superintendent Hansen cannot be faulted for moving in 1955 to treat the casualties of de jure segregation. The court is persuaded that Dr. Hansen personally was then and is now motivated by a desire to respond--according to his own philosophy--to an educational crisis in the District school system.⁹⁰

Judge Wright argued that even though ". . . the track system cannot be dismissed as nothing more than a subterfuge by which the Defendants are attempting to avoid the mandate of Bolling v. Sharpe, neither can it be said that the evidence shows racial considerations to be absolutely irrelevant to its adoption. . . . To this extent the track system is tainted."⁹¹ Even though he reduced the intensity of his negative criticism of Dr. Hansen, he continued to suggest that many others felt that the track system's intent was only racist.⁹² It is important to keep this attitude in mind because when Dr. Hansen attempted to appeal the decision, the argument was presented that Dr. Hansen was not really on trial, that his reputation was not at stake and that he had lost his standing for appeal. This is an assertion which seemed to run counter to the attitude reflected in the decision in the case.⁹³

Dr. Hansen was personally saddled with the track system by Judge Wright.

⁹⁰Ibid., 443.

⁹¹Ibid.

⁹²Ibid.

⁹³Supra, p. 58, n. 69.

It [the court] cannot ignore the fact that of all forms of ability grouping, the one that won acceptance in the District was the one that . . . involves the greatest amount of physical separation by grouping students in wholly distinct, homogeneous curriculum levels. . . . this separation would be to insulate the more academically developed white student from his less fortunate black schoolmate.⁹⁴

Judge Wright concluded:

The court does not, however, rest its decision on a finding of intended racial discrimination. . . . As the evidence in this case makes painfully clear, ability grouping as practiced in the District of Columbia school system is a denial of equal educational opportunity. . . . What follows, then, is a discussion of that evidence. . . .⁹⁵

Justifying further the saddling of Dr. Hansen with the track system, Judge Wright stated, "Dr. Hansen disclaims full responsibility for creating the track system, . . . [but] Dr. Hansen presumably can be looked to as the authoritative spokesman on the subject."⁹⁶ And further, "in order to tailor the educational process to the level appropriate to each student, Dr. Hansen [not the school administration nor the school Board] adopted the track system."⁹⁷

Judge Wright concluded the discussion of track theory with what the track system was reputed to accomplish and described what the various tracks were. The reasons for

⁹⁴Hobson, 443.

⁹⁵Ibid.

⁹⁶Ibid.

⁹⁷Ibid., 445.

this extensive discussion were not clear but he did point out that the track system needs to fulfill a child's maximum potential, correct learning deficiencies, and be flexible.⁹⁸ These points were the basis for Judge Wright's evaluation of the track system because they represented the claims of the track system.

Judge Wright presented a series of tables and discussions as to the distribution of the students in the tracks. There was little argument with the facts. However, there were again issues which result from the interpretation and assertions made by the Judge. It was essential that these questions be resolved.

For instance, Judge Wright stated, "Clearly, then, race cannot be considered irrelevant in the operation of the track system. Even if the effects of tracking are not racially motivated, the Negro student nonetheless is affected."⁹⁹

This statement is certainly in itself valid but it still remains that the lower class child is affected. It is clear that in the District the track system also is racially connected as a result of those whites who have moved to suburbia. The continuing and perplexing question is whether the schools can resolve this or whether it must be resolved through a basic change in the class structure of the District and of the society.

⁹⁸ Ibid., 446.

⁹⁹ Ibid., 457.

As stated earlier, the educational system is asked to change its policies to compensate for the failure of society to overcome its tendency to become a class society and for not rejecting the class system as inappropriate to the democratic society.¹⁰⁰

Race, class, and tracks

The track system in the District, while racial in consequence, was not categorically racist because correlation to social class was a primary factor in pupil distribution in the tracks. As implied by the Coleman Report¹⁰¹ if the Negro population were from the upper class, the racial correlation in the tracks would not hold. A track system cannot be faulted as long as one defines education in class terms and as long as the rewards for obtaining particular kinds of formal education are correlated to class mobility. Placement in the tracks can be expected to have a high correlation to class. The social class structure has high correlation to particular minority groups of significant numbers. These groups have an inappropriately large

¹⁰⁰This is a point at which it is appropriate to suggest that still another related study would be significant in attempts to resolve this problem. That is, that the definition and process of education in operation today and as apparently used by Judge Wright is a product of middle or upper class value system. To some extent education can be thought to be middle class. However, this is not the domain of this dissertation and what is suggested here is that because the track system is middle class oriented it cannot be faulted without faulting the definition of education for its middle class bias.

¹⁰¹Supra, n. 13, p. 23 .

representation in the lower classes. This is a societal problem which must also be attacked, but by society as a whole. Education's responsibility and educational alternatives on this issue will be covered in Chapter Five.

Cross-tracking

Judge Wright found that the lack of a high degree of inter-track movement was positive proof that the track system served to deny the guarantees of the Fifth and Fourteenth Amendments. The difficulty educationally and legally is to determine the desired degree of movement from track to track. One of the purposes of tracking is to work with the under-achiever to help him move to a track which is conducive to the achievement of his full potential. Tracking also will serve, when the placement is soundly made, to provide a program within the track which allows for the fullest development of the students' potential.

Viewed as a whole, the evidence of overall movement between tracks conclusively demonstrates the defendants' failure to translate into practice one of the most critical tenets of the track system: 'Pupil placement in a curriculum must never be static or unchangeable. Otherwise, the four-track system will degenerate into a four-rut system'¹⁰²
The tragedy has occurred.¹⁰³

Judge Wright did take note of the difficulties in any attempt to implement cross-tracking, such as the problem of

¹⁰²Hansen, Carl, Four-Track Curriculum for Today's Schools (Englewood Cliff New Jersey, Prentice-Hall, 1964), 70.

¹⁰³Hobson, 463.

teacher schedules in the elementary schools, the system of block scheduling in the junior high schools, the problem of pre-requisites at the senior high level; but he seemed to disregard them as significant educational problems. He insisted that the lack of more cross-tracking was evidence of denial of equal educational opportunity when assignments to the track system appeared to be by race even when racism was not intended.

It could be asked what percentage of cross-tracking might be considered appropriate by Judge Wright to consider the tracking system flexible enough. There was no question that the number of students cross-tracked was a significant issue, but what needs to be noted here was the lack of educational discussion about a desirable level of cross-tracking as a basis for judgment. Judge Wright implied by the inclusion of the testimony of Dr. Haynes, the then president of the Board of Education, ". . . that it is commonly understood among students and teachers that the unwritten policy is not to permit cross-tracking. It appears that that belief is not without some basis in fact."¹⁰⁴

This writer had some ambivalent feelings, professionally, on this judgment because as he operated in the District's school system he remembered asking why and wondering why there

¹⁰⁴Ibid., 466.

was not more cross-tracking. Yet, on three different occasions he heard Dr. Hansen and Mr. Leo Allman, an Assistant Superintendant at that time, state emphatically the need for teachers to work out more cross-tracking for students. It appeared that the system was attempting to emphasize and practice the need for flexibility. It was a case where it appeared that the profession, i.e., the teachers and principals, seemed not to place into practice the theory of the school Board and of the administration. This is a problem which will haunt any large system and will also prevent or reduce the level of achievement for Judge Wright's remedies. In fact, it poses another interesting question as to whether or not the administration should have been charged with mis-management for failure to fire those people who did not carry out the policy or whether the Superintendent should not have taken teachers into court individually for failure to carry out these policies.

Judge Wright argued,

But what the disadvantaged child needs most -- by the defendants' own admission -- is not just instruction watered down to his present level of ability; he needs stimulation, enrichment and challenge to assure that his present temporary handicaps do not by educational conditioning become permanent. That this stimulation has not been forthcoming from the Basic curriculum is clear from the lack of upward movement from that track.¹⁰⁵

One of the educational issues which was overlooked was that those students who had been properly placed in the

¹⁰⁵Ibid., 470.

particular track and who were not oriented toward the content of the honors track or college "prep" track did not need the kind of stimulation being suggested here. Instead they needed the type of stimulation and education which would have led to vocational success or achievement and which would have allowed for the development of a satisfactory self-concept.

Judge Wright implied that the purpose of the track system is to bring all students into the honors program. To the extent that "honors" can be a part of vocational aspiration, this concept has some validity. Again, it was possible to accept Judge Wright's assertions on tracking. However, an extended discussion of the implications of what comprehensive education ought to be should provide the basis for judgment. The judgment should not be based on the assumption that the same education is equally beneficial to all students, a position Judge Wright rejected in theory but would emerge in practice if Judge Wright's assertions become realities. If one begins with a curriculum which is irrelevant and without significance to the individual little success can be achieved in attempting only to return the student to that curriculum. The validity of Judge Wright's assumptions held for those students who had been denied the opportunity to develop that orientation towards classical education. However, this is where the difference between theory and practice, administrative or judicial fiat, and classroom actuality becomes exceedingly clear. The difficulties in implementing change also become very clear at this juncture.

Educational theory and the track system

The following question requires thought before further evaluation of the track system is undertaken: What ought to be the aim of education for different individuals with different innate abilities and environmental conditioning? Judge Wright interpreted the educational process in teaching to mean "upgrading" to another track.

It [the system] incurs the obligation of living up to its promise to the student that placement in a lower track will not simply be a shunting off from the mainstream of education but rather will be an effective mechanism for bringing the student up to his true potential. Yet in the District the limited scope of remedial and compensatory programs, the miniscule number of students upgraded, and the relatively few students cross-tracking make inescapable the conclusion that existing programs do not fulfill that promise.¹⁰⁶

By judging the system as he did, Judge Wright eliminated the potential for alternative suggestions which could have required of the system, programs which enhance the fulfillment of the students' aspirations and which are relevant to most of the students' individual needs. To interpret education as totally remedial is perhaps only to impose additional pressures which contribute to continued learning problems for the student and which causes the student to reject education as an impractical process.

¹⁰⁶Ibid., 473.

Testing, placements, and liberal education

There was sufficient evidence for valid criticisms of the track conceptualization and procedures in the actual teaching of students. Such evidence is found in the assessment of methods of testing and placement, and also in the assumption that liberal arts or classical education was essential to all people. One could not fault the testing system too harshly given the class assumption about education. That is, to perform well in the upper track required particular competencies and orientation to those competencies. These competencies and the orientation are products of social class expectations. What might have been realistically attacked here was the lack of educational leadership in realizing that students were moving into a world where even sacred cows such as reading (a competency generally accepted as essential to an educated person) may not be needed for performance at adequate levels even in the humanities and social sciences. The system should have been faulted for not using educational technology to reach competent students and to bring them into the mainstream of educational pursuits. To criticize, as Judge Wright has done, without more adequate educational debate was to continue to encourage programs which for the students had questionable value in terms of improving the quality of their lives.

Judge Wright argued that the system affirmed the premise,

That school personnel can with reasonable accuracy ascertain the maximum potential of each student and fix the content and pace of his education accordingly. If this premise proves false, the theory of the track system collapses, and with it any justification for consigning the disadvantaged student to a second-best education.¹⁰⁷

The Plaintiffs contended that the placement of students was inappropriate because the tests did not really measure the innate ability of the students by virtue of the tests' cultural bias. The Defendants rejected this and put forth the argument that the tests were appropriate for the purpose used and that they were only one factor in the placement of students.¹⁰⁸

Judge Wright questioned the Defendants' position that the tests were appropriate and argued that the court ". . . finds that testing looms as a most important consideration in making track assignments."¹⁰⁹ He further argued that "it escapes the court, therefore, how defendants can possibly suggest that tests do not have a decisive influence on pupil programming decisions."¹¹⁰ The Defendants had attempted to argue that tests were not decisive but only that they were one consideration in determining students' track placement.

Intelligence testing is an area where educators would be in honest disagreement as to the value of such tests for track placement of students. Some educators

¹⁰⁷Ibid., 474.

¹⁰⁸Ibid., 474.

¹⁰⁹Ibid., 475.

¹¹⁰Ibid., 476.

would argue that performance on the test used would be the most significant consideration for placement into groups or tracks.

Judge Wright further criticized the school administration for the uses made of test results by suggesting that "the evidence that the defendants are in no position to make such judgements about the learning capacity of a majority of District school children is persuasive."¹¹¹ Judge Wright would seem to agree with the charges of the Plaintiffs, ". . . that for technical reasons the test being used . . . cannot provide meaningful or accurate information about the learning capacity of a majority of District school children."¹¹² and that ". . . because of misleading test scores these children are being misjudged and, as a result, under-educated."¹¹³

Again, the difficulty with the assertion was that given the content and process for present academic educational pursuits these types of tests did in fact measure the students' ability to perform in that particular academic situation. Now, if Judge Wright assumed that all students could perform at the upper academic level if they had been given remedial work, then this type of testing had validity. If, on the other hand, there were recognition of differences

¹¹¹Ibid., 477.

¹¹²Ibid.

¹¹³Ibid.

and the fact that there should have been a different curriculum for different abilities and interests, then the test contributed to the development of these distinctions. Hence, these distinctions were appropriate. It can be argued that the tests did not test innate ability but one can hold that the tests can appropriately make distinctions of performance ability. The important issue then becomes the development of curriculum which will provide and enhance the educational fulfillment of students with differing capabilities and aspirations.

The evidence was overwhelming that the tests that had been used did not measure innate ability, however, they did appear to indicate potential for achievement within the confines of the District school's curriculum. On this point the concern should have been on reducing the negative potential of educational programs which mainly emphasize achievement of the middle class goals of the District's curriculum. The emphasis should have been on the development of a curriculum which might have assured that the needs of a greater number of students would be met and assured that students who choose, at a late date in their education, the academic program, might be able to do so without undue penalties.

Judge Wright's assertion implied that all children were equal in ability to deal with academic abstractions; hence, he did not adequately deal with the consequences of valid testing programs which would illustrate a wide range

of academic ability in the achievement of the educational aims as established by the white middle class and upper class.

Judge Wright presented an extensive discussion of the cultural and racial biases and inadequacies of the intelligence and aptitude tests to indicate that the system's testing program had failed. He tended to reject the testimony of the experts in testing or at least downgraded their arguments that the tests were culturally biased more than racially biased. Hence, he gave undue weight to honest questions about test potential for placement purposes. For instance, Judge Wright stated that:

Dr. Dailey testified to having conducted a multiple regression study of District test results finding that the race of the child had no observable impact on those particular test scores. (Tr. 6316-6317, 6323-6324; Ex. 119; Ex. 120.) Nevertheless, Dr. Dailey later admitted that he has not firmly ruled out race as a wholly irrelevant factor. (Tr. 6395) Thus what both he and Dr. Lennon left open was the possibility of an overlap between socio-economic and racial factors, the former in many instances masking the effects of the latter.¹¹⁴

It is on the point of testing that Judge Wright raised a very significant educational issue by challenging the lack of educational leadership. He criticized the Defendants for not having gone far enough in their attempts ". . . to improve the techniques for ascertaining the abilities of District school children."¹¹⁵

¹¹⁴Ibid., 483.

¹¹⁵Ibid., 488.

On balance, for the school administration, it should be noted that the questioning of the validity of tests such as those being used was rather new to the profession. The tests had been accepted by the profession for a number of years as prima facie evidence that they did test what they purported to test. In spite of this, it might be hoped that the leaders of an educational system as large and as unique as the District would have been among the first to have raised questions about the tests and to have looked for alternative approaches.

Judge Wright continued to criticize the evils of the track system but overlooked the efforts of the school administration to deal with the problems of mis-judgments. He utilized statistics which indicated that in 1965, 820 of 1,272 students who were in or about to be placed in the Special or Basic Track were found by further expert evaluation to have sufficient academic ability to be placed in a higher track.¹¹⁶ The evil which Judge Wright saw is the fact that people; i.e. teachers and principals, would have misplaced these students which could then result in 1) lower achievement through the self-fulfilling prophecy, a position validated by Robert Rosenthal in his book Pygmalion in the Classroom,¹¹⁷ 2) competition which is unfair, and/or

¹¹⁶Ibid., 490.

¹¹⁷Robert Rosenthal, Pygmalion in the Classroom, (New York: Holt, Rinehart, and Winston) 1968.

3) the negative psychological impact of placement in the lower track when the placement was not valid.

These problems, argued Judge Wright, should cause the system to cease placing students in tracks. There were indications that Judge Wright ruled only against the track system and not against homogeneous grouping or placement of students. Yet, it seems that, in reality, it is necessary to argue against any homogeneous grouping, a position which this writer personally prefers educationally but which would receive a great deal of opposition on the part of many educators and those teachers called upon to face students each day. Judge Wright attempted to avoid this problem by arguing that such placement was appropriate if "the student's deficiencies are true."¹¹⁸

Track rigidity

Here this writer will investigate Judge Wright's Opinion of Law in regards to tracking. It is sufficient to remind the reader that given the present beliefs undergirding the educational system on the question of how to educate, there will be tendencies for any system of grouping to develop tracks. Such tracks will at any given time enclose people of one status or another into an undesirable system, if in their personal educative process they should choose to shift the emphasis of their educational pursuits.

¹¹⁸Hobson, 492.

What must be overcome, but with the reservations stated earlier, is incorrectly forcing students into and holding students in a track to which they are initially assigned. Judge Wright's interpretations overlooked the reality that significant efforts had been made, through educational processes, to overcome these evils. To declare the track system out of existence, to change the vocabulary, to change the grouping, does not cause its death; a consequence apparently overlooked by Judge Wright but recognized by some educators. This realization would have provided the court with a significant opportunity to have had an impact upon changing educational patterns. For instance, charges of mal-practice could have been filed against individual teachers who refused to alter their practices in line with the directives of the Board through administrative policies. Even though Judge Wright allowed for differential classifications which could be homogeneous, he overlooked the fact that in practice most homogeneous groupings will lock children into a stream, career orientation, or track.

Judge Wright's lack of understanding of school operation was further illustrated when he implied that grouping systems other than tracking did not physically separate children. He commented, "Students are early in elementary school sorted into homogeneous groups or tracks . . . thereby being physically separated into different classrooms."¹¹⁹

¹¹⁹Ibid., 512.

while homogeneous grouping theoretically does not necessitate the existence of separate classrooms, to achieve the goals of homogeneous classrooms the larger a system or school becomes the more physical separation becomes a reality of homogeneous grouping whether by school, classroom or area in a room.

It can be argued that the position of the Judge did not extend far enough and perhaps a better understanding of grouping or of the present theory of education would have resulted in a decree which might have eliminated grouping or classification altogether. The track system itself, which was an educational issue, does not inherently deny the constitutional rights of the student. The unique situation of the District of Columbia which made it appear to be operating out of a racist system must be a consideration if one were to understand the system's operation and its attempts to improve the education for all students. To compare Washington, D.C., to Baltimore, as Judge Wright has done, was also inappropriate in that in this writer's view the white populations and their distribution in both cities differed to some degree.

Judge Wright concluded that:

These are, then, the significant features of the track system; separation of students into rigid curricula, which entails both physical segregation and disparity of education opportunity, and

for those consigned to the lower tracks, opportunities decidedly inferior to those in the higher tracks.¹²⁰

As stated earlier, this criticism can be offered to most homogeneous grouping programs when the practices of grouping are taken into consideration. Homogeneous grouping need not be done in such a way as to subject it to these criticisms but presently it is no more a valid criticism of the track system than of most homogeneous groupings.

Judge Wright suggested that the "Defendants, therefore, have a weighty burden of explaining why the poor and the Negro should be those who populate the lower ranks of the track system".¹²¹ Again, one of the real difficulties in the present system is that education has a clean definition, a middle class bias. To provide an educational plan which is truly comprehensive may even appear to create more separation of social classes, the Negro, Chicanos, Indians, and other minority groups.

Liberal arts and classical education for individuals is a luxury afforded after financial stability. The choice of this type of education must be free and available but not required nor imposed. Programs which limit the opportunity to select a liberal arts education sometime late in the educational process must be prevented. The development of educational programs which enhance the opportunity to select

¹²⁰Ibid., 513.

¹²¹Ibid.

classical education at appropriate times in the individual's educative process must be the emphasis of our concern. This will allow us to conform to the judgment of the court with educational integrity and can reduce the necessity for the courts to become entangled in educational theory.

Judicial remedies

Judge Wright insisted that the track system shall be abandoned. Additional comment is necessary to remind us that tracking is an educational question and that the evidence put forth to declare the system unsound has not been conclusive.

Judge Wright believed that the system was designed to protect the white population against the ill effects of integrating Negro children into the system. He suggested that "Even in concept the track system is undemocratic and discriminatory."¹²² This charge, if valid, requires that significant parts of our educational system and philosophy be declared undemocratic and unconstitutional.

To substantiate the charge that it is undemocratic, Judge Wright commented that:

It is designed to prepare some children for white-collar and other children for blue-collar jobs. Considering the tests used to determine which children should receive the blue-collar special, and which the white, the danger of children completing their education wearing the wrong collar is far too great for this democracy to tolerate.¹²³

¹²² Ibid., 515

¹²³ Ibid.

The problem of incorrect assignment was real, but likewise the problem of all children receiving the same education can equally be a denial of constitutional rights. Judge Wright also unjustifiably saddled the track system with the lack of compensatory education for the disadvantaged child. This assigned one educational problem to another and separate problem without justification. And in the case of the District of Columbia not only was this without justification but it was unfair.

Parting Comments

The elements of the court's decree itself have been substantially covered in the preceding analysis. The only parting comment is that further evaluation of Board actions by the court was questionable, and that a sound procedure needs to be developed if the competence and wisdom of professional educators are to be used to improve the quality of education of the children in the District of Columbia. Equal protection under the law educationally is not enhanced by practices which do not overcome the existing problems delineated by the courts.

It is appropriate to again consider Judge Wright's own words that ". . . it is regrettable, of course, that in deciding this case this court must act in an area so alien as to its expertise."¹²⁴ This could have been avoided by

¹²⁴Ibid., 517.

his avoiding involvement in educational policy per se. It is this writer's position that Judge Wright should have taken his own advice seriously.

Clearly, the court's decision as to the constitutionality of the acts and concern with the direction to bring practices in line with the constitution would have been appropriate. Further, the court could well have insisted upon more testimony from educational experts to help clarify educational matters which required interpretation for the determination of constitutionality. Other alternatives are suggested in Chapter Five when consideration is directed to the development of processes which will enhance the continuation of separation of powers yet maintain reviewability but in a more appropriate process.

It must be noted that when there is doubt of administrative matters or legislative matters, the court is obligated to give every benefit to the administrative policy or legislative decision. The evaluation presented here leads to the conclusion that this was not the case and that it can be concluded that too often doubt was cast upon administrative policy. This, as shall be seen more clearly in Chapters Three and Four, is inappropriate.

It is necessary to once again question the adherence to the principle that the schools more than any other agency, can resolve the significant social and political issues of the day without insisting that the other elements of society act upon the same legal principles demanded of schools.

The preceding evaluation suggests that it is necessary to deal with three or four issues in a very broad overview if we are to come to any resolutions about the role of the courts in educational policy. It is clear that the challenge to this decision is appropriate. In it are examples of encroachment by the court into educational policy. What this decision makes clear is the necessity to:

- 1) determine the significance of the separation of powers doctrine in relation to educational decisions; 2) evaluate the degree to which a legislative policy determination role for the judiciary is appropriate in educational litigation;
- 3) determine the appropriateness of using judges in non-judicial matters; 4) evaluate the processes for the determination of constitutional and educational issues when the case contains mixed issues; 5) determine the value of utilizing the education profession in interpreting educational material for constitutional ends; 6) the significance of judicially determined remedies; 7) determine the value of impact statements on potential judicial remedies by the educational profession; and 8) develop alternate processes which may assure greater constitutional protection educationally for the students in the schools.

It is suggested that these points be kept in mind as well as the general outline of this particular case as the investigation proceeds. In Chapters Three and Four, as principles are developed from the literature and judicial

precedent germane to these points the reader will be referred back to this Chapter for the purpose of evaluating the consistency of the Judge's action to these principles.

CHAPTER III

THE REVIEW OF LITERATURE AND COURT DECISIONS SUPPORTING THE ARGUMENT FOR JUDICIAL RESTRAINT IN POLICY DETERMINATIONS

Introduction

Earlier in this dissertation it was suggested that the courts ought to proceed with extreme caution in their involvement in educational matters. Also stated as a concern was judicial interpretation of educational issues and policies even when the end for such interpretation is the determination of constitutionality. Because constitutional determinations often require interpretation of educational material, professional educators ought to direct considerable attention to the numerous demands which have been placed upon the courts as a result of litigation between individuals and school authorities regarding educational conflict. These conflicts create problems in the relationship between the judiciary and professional educators. These problems are of a nature which require the development and evaluation of alternatives which might more significantly utilize the competencies between both professional disciplines. However, a review of judicial decisions and legal literature is required before any attempt to develop alternatives to the present relationships between the courts and education.

In this Chapter and in Chapter Four the results of this investigation of the literature are reported. In this

chapter, the presentation centers on the review of the literature supporting the argument for judicial caution and restraint in the interpretation of material and in involvement in the policies of other agencies and fields such as education. The broad category upon which attention is focused is that of judicial review. More specifically, particular aspects of judicial review such as competency, constitutionality, arbitrariness, and actual vs. hypothetical dangers and harm are presented. Attention is also focused upon such categories as separation of governmental powers, review of administrative actions, review of legislative acts, capriciousness, reasonableness, substitution of court opinion for administrative actions, substitution of judicial opinion for legislative opinion and the relationship of the court to social, economic and political matters. There is some commentary on the issue of the uses of judges for non-judicial duties, another issue which emerged in Hobson I.

The Chapter is divided into three major sections. The first section deals with the separation of powers. The second section deals with the general concept of review. And in the third section the concern focuses on the reasoning upon which judicial review is based.

Separation of Governmental Powers: Position of the Courts

It is firmly established that the powers of government are separable and that each branch is obligated to fulfill those functions acceded to it. It is also firmly established that the legislative and administrative

branches do not have the power over the Supreme Court. The source for its functions is in the Constitution itself and of which it is the sole interpreter.

The court has stated that "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. . . . The duty of the court is, to interpret the instrument they have framed, . . ."¹ In Marbury v. Madison it was established that the Supreme Court's original grant was in the Constitution and as such could not be changed by the legislative branch nor could its duties be extended.²

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.³

Emerging in Marbury v. Madison is the familiar concept that we are governed by laws and not by men.⁴ This issue also emerges in Hobson as well as in numerous other cases and will be germane to the conclusion in this dissertation. When the courts slip into that area of administrative policy or political questions it increases the potential that the governance of a society becomes more

¹Dred Scot v. Sandford, 60 U.S. 393 (1857), 405; 15 L.Ed. 691, 700.

²Marbury v. Madison, 5 U.S. (Crunch) 137 (1803), 173-80.

³Ibid., 170.

⁴Ibid., 163. (Note also that men should be persons.)

a matter of men than of law. The law ceases to be as functional and consistent in the resolution of conflict, and who one has as a judge more firmly establishes the outcome of the decision than does the law.⁵

On balance, in Marbury v. Madison it appears that the statement by Justice Marshall applied more specifically to whether or not men (persons) would be subject to law. But it also very vividly establishes the necessity for separation of legal questions from those policy decisions which should be beyond the domain of the court.

In Georgia v. Stanton what became the specific role of the court was somewhat clarified when the court rejected the plaintiff's argument which in part stated that:

When a party to a cause justifies himself under an Act of Congress or an executive order, it becomes necessary for the court to pass upon the constitutional validity of the legislative Act or upon the legal effect of the order in question; otherwise, the court cannot administer justice. . . . [However] in doing this, the court is not exercising political power, but simply performing its own plain duty, which is entirely judicial

.
The parties in court are not to be denied their proper measure of justice, merely because the incidental effect of a just decision may be to promote the cause of public freedom.⁶

In another case, the court said, "It is an established rule for the construction of statutes, that the terms

⁵This is an issue which was the concern by some people of the District School System. It was felt that much of the outcome of the decision would be a matter of who would finally judge the case.

⁶Georgia v. Stanton, Mississippi v. Stanton, 73 U.S. 50 (1867); 18 L.Ed. 721, 722.

employed by the legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with these principles can be given them."⁷

Further affirmation of the separation of powers can be found in the court's statement that:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential . . . that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others.⁸

Also stated in the decision is concern over the successful encroachment of one branch into the affairs of another. "But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success."⁹ Similarly, in another decision the court said, "In such cases [i.e. where actions of government departments involve war or peace]

⁷Hepburn v. Gusivald, 75 U.S. 603 (1869), 607; 19 L.Ed. 513.

⁸Killbourn v. Thompson, 103 U.S. 168 (1880), 190; 26 L.Ed. 377.

⁹Ibid., 191.

the Judicial Department of this Government follows the action of the political branch, . . ."¹⁰

The scope of appropriate court determination is suggested in McPherson v. Blacher.¹¹ It is stated that the courts do determine whether the substantive issues in the case are judicial in nature and subject to judicial process. In its proper function the court will be the sole judge of appropriateness of involvement and also of the substantive material which may have to be a part of the court's evaluation when determining a legal question. The importance of this point here is to remind the reader that what sometimes appears to be an encroachment is simply the court's fulfilling its obligations. This serves to help delineate more clearly the meaning of separation of powers.

The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own.¹²

In later decisions the court appears to extend its jurisdiction when it stated, "The ascertainment of compensation is a judicial function, and no powers exist in any other

¹⁰United States v. Lee, 106 U.S. 196 (1882); 27 L.Ed. 171, 178; 1 S.Ct. 240.

¹¹McPherson v. Blacher 146 U.S. 1 (1892); 36 L.Ed. 869; 13 S.Ct. 3.

¹²Ibid., 873.

department of the Government to declare what the compensation shall be, or to prescribe any binding rule in that regard."¹³

But, while affirming what appears to be an extension of its duties, the court admits the problem of local needs and of a locale's unique influences upon a problem.

The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public use in any State.¹⁴

The court also affirms the separation of power and clarifies the issue further when it insists that decisions also must be based on situations, which are "real" and not hypothetical.

And to the judiciary the duty of interpreting and applying them [laws] in cases properly brought before the courts. The general rule is that neither department may invade the province of the other. . . . We are not now speaking of the merely ministerial duties of officials. We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.¹⁵

¹³United States v. New River Collieries Co., 262 U.S. 341 (1922), 343; 43 S.Ct. 565; 67 L. Ed. 1014, 1017.

¹⁴Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710 (1922), 717; 43 S.Ct. 694; 67 L.Ed. 1194, 1199.

¹⁵Commonwealth of Massachusetts v. Mellon, 262 U.S. 447 (1922), 488; 43 S.Ct. 597; 67 L.Ed. 1078.

In a later court statement laden with references to judicial substitution, advisory opinion and competency, there is even more precise language about separation of power. The court states, "As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions."¹⁶ Further stated in the same decision,

Such generality of objection is really an attack on the political expediency of the Hatch Act, not the presentation of legal issues. It is beyond the competence of courts to render such a decision. . . .

The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interest of litigants require the use of this judicial authority for their protection against actual interference. . . .

The Constitution allots the nation's judicial power to the federal courts. . . . Judicial adherence to the doctrine of the separation of power preserve the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants.¹⁷

In a decision in which the subject matter was educational and one which can be utilized to illustrate the shift from what appears to be caution by the court to a more active judiciary, the Court stated:

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights, it is doubtful if our

¹⁶United Public Workers v. Mitchell, 330 U.S. 75 (1946), 89; 67 Sup. Ct. 556; 91 L.Ed. 754, 766.

¹⁷Ibid., 767.

Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government.¹⁸

Here the Court took pains to argue that interference by the judiciary in this case would not make the Court equivalent to the school board. The issue was one of constitutionality; hence, the court was maintaining the separation of powers and only insisting that it fulfill its obligations under this doctrine.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures--Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. . . .

. . . One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁹

While the distinctions necessary for increased judicial activity on issues which appear to be non-judicial lack absolute clarity, judicial involvement is dependent upon judgments of unconstitutionality. This decision also raises the question of the degree of government activity when the rights of the individual are in conflict with the activities of the state.

¹⁸West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1942), 636, 63 S.Ct. 1178; 87 L.Ed. 1628, 1637.

¹⁹Ibid., 637. It might be noted here that nor should one's rights depend upon any political disagreements or identity. This point is particularly germane to Hobson.

Interestingly it can be suggested that this decision is one of strict constructionism. While the issue of constructionism is not an issue of this dissertation, the process is, because it is suggested that the court must have firmly established constitutional grounds for involvement in a case where the substantive issue is educational.

The concept of the separation of powers is, of course, a principle established for the lower courts as well as for the Supreme Court. In Corpus Juris Secundum it is stated that "The separation of governmental power . . . is provided for in practically all the American state constitutions, and such provision, in theory, effects an absolute separation of these departments."²⁰

It is also suggested that in practice these distinctions are not neat and precise; hence, it is appropriate for the various branches of government to enhance one another in carrying out the will of the sovereign. However, in this vague area, caution must be used and ". . . the true meaning, intent, and purpose of the constitutional provision of the separation of powers should be observed."²¹

The journal literature on judicial review is similar to the actual decisions of the courts; that is, there is a relatively even balance of affirmative and negative positions.

¹⁹16 Corpus Juris Secundum 483.

²⁰Ibid., 488.

An analysis of many of the justifications posed for various positions quickly leads to an awareness that in this matter there are no absolutes and that disagreements are those between reasonable men of similar intellectual competency as well as between persons of good will. It is evident that implied in the arguments is a certain righteousness and belief that the opposition, if more reasonable, would correct their wayward ideas.

Raoul Burger points out one aspect of the separation of governmental branches when he comments on a particular case and criticizes Professor Davis' comment on the case:

Equally clearly, no constitutional issue was presented in Switchmen's, for the Court stated 'all constitutional questions aside, it is for Congress to determine how the rights it creates will be enforced.'²²

Implied here is the potential for precise distinction between the powers of the governmental branches. Also implied is that political and social questions should be the domain of Congress.

Writing about the theoretical construct of democracy, another commentator, Clifton McCleskey, questioned judicial review as a democratic principle. However, McCleskey seems to avoid the tough reality of the daily conflict in the principle of judicial review. He states that what judicial

²²Raoul Burger, "Administrative Arbitrariness: A sequel," 51 Minnesota Law Review 601 (1967), 606. Citing Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943), 301.

review does mean is "that the institution of judicial review makes a system that much less democratic. Its encroachment along with other undemocratic features in this country make it necessary for us to use qualifying terms such as 'constitutional' democracy, or 'limited' democracy, or some such phrase in describing our political system."²³

A critical article about Bichel's book on the Supreme Court affirms both Bichel's position and the necessity for careful attention to principled action by the judiciary. "His [Bichel's] critical premises are admirable: 'The integrity of the Court's principled process should remain unimpaired;. . . the Court does not involve itself in compromise and expedient action.'"²⁴ To validate the correctness of assigning such a position to Bichel, Gunther further states that ". . . he approves of 'remanding to Congress for a second look.'"²⁵ In short, it is far better to keep the functions separated even if at best we can only strive toward that principle than to have the courts become the legislative

²³Clifton McCleskey, "Judicial review in a democracy: A dissenting opinion," 3 Houston Law Review 354 (1966), 365.

²⁴Gerald Gunther, "The subtle vices of the 'passive virtues'--A comment on principle and expediency in judicial review," 64 Columbia Law Review 1 (1964), 5. Citing: C.L. Black, Jr. "Mr. Justice Black, the Supreme Court and the bill of rights," Harpers 63 (February, 1961), 95.

²⁵Ibid., 20. Citing: Bichel and Wellington, "Legislative purpose and judicial process: The Lincoln Mills case," 71 Harvard Law Review 1 (1957), 165.

body by virtue of legislators making decisions with an eye to what the court will or will not do.

In an article which developed the case for court involvement, Neil Jon Bloomfield implies that the reason for court involvement should be because of a constitutional issue. Writing on integration he states, ". . . fundamental constitutional rights are involved, and the executive and legislative branches have taken very limited responsibility to date. Judicial action is presently the disadvantaged child's only hope."²⁶

A strong argument for judicial involvement in educational matters but in which the particular basis was related to the concept of separation of powers was presented in the Iowa Law Review.

The validity of public school regulation of students' hair styles is subject to constitutional attack upon at least three grounds . . . substantive due process of law under the fourteenth amendment; a denial of equal protection . . . or they may infringe freedom of speech guaranteed by the first amendment and made applicable to the states through the fourteenth amendment.²⁷

In the same article additional justification is given for judicial involvement, again on constitutional grounds.

²⁶Neil Jon Bloomfield, "Equality of educational opportunity: Judicial supervision of public education." 43 Southern California Law Review 275, (1970).

²⁷"Public schools, long hair and the Constitution," 55 Iowa Law Review 707, (1970).

"Further credence is given to the desirability of judicial intervention in the educational process when constitutional rights are implicated, because it may be the only means high school students have to redress their grievances."²⁸

The point in presenting what appear to be arguments for judicial involvement here is that these justifications are based upon the assumption that constitutional issues are the concern of the judiciary. The separation of powers implies the concept that each governmental branch has unique obligations and that the test for judicial involvement is that of constitutionality; without it, conflicts from the field of education are not open to judicial review. Judicial involvement does not mean involvement in educational matters or processes though these articles do not adequately clarify this point. The courts' function in these instances are indeed judicial and that is what is defended. But there is not any basis here to develop the position that the courts can legitimately decide educational matters.

James E. Allen, Jr.,²⁹ writing from the perspective of an educator and favoring judicial activity, states which conditions maintain the concept of separation of power.

²⁸Ibid., 716.

²⁹Former U.S. Commission of Education and Commissioner of Education of New York State.

Dealing, as they [the courts] properly must, with education not in terms of making policy or resolving conflicts in educational theories, but in terms of protection against violation of Federally protected rights, the Court has provided important guidelines for state action, clearly pointing the way back to the source--the Constitution, and most particularly, the Bill of Rights.³⁰

Principled decisions are the bases Herbert Wechsler utilizes for arguing for deference by the judiciary to other branches of government even though he argues in favor of review.

A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned to overturning value choices of the other branches of the Government³¹ or of a state, those choices must, of course, survive.³¹

Warning judges of the necessity for caution and principle by judiciary, Felix Frankfurter has written, ". . . individual judgment and feeling cannot be wholly shut out of judicial process. But if they dominate, the judicial process becomes a dangerous sham."³² Further, ". . . the emphasis on constitutionality and its fascination for the American public

³⁰James E. Allen, Jr. "The Supreme Court and public education," 39 New York State Bar Journal 61 (1967), 66.

³¹Herbert Wechsler, "Toward neutral principles of constitutional law," 73 Harvard Law Review 1 (1959), 19.

³²Felix Frankfurter, "John Marshall and the judicial function," 69 Harvard Law Review 217 (1955), 229.

seriously confound problems of constitutionality with the merits of a policy."³³

Recognizing the interrelationships of policy and constitutionality and the difficulty faced by the judiciary because of the necessity to make judgments about technical matters, Frankfurter still warns against judges becoming other than judges. "If judges want to be preachers, they should dedicate themselves to the pulpit; if judges want to be primary shapers of policy, the legislature is their place."³⁴ It can, of course, be added here, if they want to be educators, they should likewise dedicate themselves to the field of education.

Up to this point the writer's concern has been the role of judicial review in our democratic process. The discussion essentially has been limited to the constitutional conceptualization of separation of powers. It is obvious that regardless of a person's position on the issue, the conflict over the role of the judiciary remains and requires, therefore, an attempt to explore alternatives to the apparent expansion of judicial activity in educational matters.

Now the writer will direct attention to the development of judicial review in the daily activities of United

³³Ibid., 232.

³⁴Ibid., 238.

States society as it attempts to affirm the theoretical constructs of constitutionality as regards judicial review in practice. The focus turns now to judicial review in administrative law.

Reviewability of Legislative Questions, Administrative Actions: Judicial Commentary

In this section the problem of judicial encroachment into educational issues is expanded to include the concept of reviewability of acts by administrative agencies. This is necessary because the commentary on purely educational matters has been somewhat limited and to a substantial degree rather one-sided with the judiciary generally finding it prudent to avoid any significant involvement with the exception of constitutional issues. The concept of reviewability is much more adequately developed in administrative law and is not unrelated to review of educational issues. Hence, the discussion of this area of law is justifiable and illustrated.

While there is some disagreement about the matter, administrative agencies have the same basis of authority as do school officials. They exist because of legislative or executive action and are given existence to fulfill a particular function which for various reasons the executive or legislative branch of government cannot adequately fulfill.

In administrative law the reasons given for caution in judicial review are numerous and precedent for judicial

caution is well established. The purpose of review is to establish whether or not the agency acted unreasonably, arbitrarily or unconstitutionally. The concept of the separation of powers here is extended to administrative agencies. The courts themselves have affirmed that it is improper for them to encroach upon that body of the government.

Judicial involvement in what appear to have been administrative policies was limited until the advent of the equal protection clause of the Fourteenth amendment. At that point the courts did not increase the extent of review but were extending constitutional rights to greater numbers of people. Increasing numbers of administrative actions were open for review for the purpose of establishing whether or not constitutional rights were assured to individuals. Actions identified as unreasonable, capricious or arbitrary brought into question the constitutionality of such acts. Hence, there has been little change in what was allowable, but the change in what constituted constitutionality made it appear as if reviewability of actions per se had been extended. The extension was a matter of constitutionality itself.

The specific scope of judicial review is difficult to ascertain, though, because it requires precise definitions and precise definitions about court procedure seem to be as evasive an activity for the judiciary as is a precise definition of education. It is appropriate to note here that some have attempted to legally define education in rather

absolute terms without realizing that it is as difficult to do as it is to define the scope of reviewability or constitutionality.

The court's tradition of avoiding encroachment or involvement in the administration or implementation of legislation appears to be as firmly established as the concept of the separation of powers. What we do find from a review of decisions is that essentially the courts will not involve themselves in the area of administration or board's discretion. It is not for the courts to review that discretion and it is not for the courts to overturn or substitute its own idea of what a policy should be for that of the administrative agency or board. What the courts will do is to consider whether or not a decision was unreasonable, arbitrary or a denial of constitutionally protected rights. This is a problem we need to focus upon because it is the interpretation of agency actions for constitutional ends which require judicial decisions in areas in which the judicial lacks expertise. This problem is identical to the interpretation of educational issues for constitutional ends.

Where the substantive material must be interpreted by the courts for the purpose of determining capriciousness or unreasonableness, difficulties emerge. Mis-interpretation of the material can lead to otherwise unwarranted involvement. This problem is illustrated in decisions such as Hobson

and Pritchard v. Spring Branch Independent School District.³⁵

In a series of decisions based upon diverse subject matter, the courts have said that "court decisions declare but do not make the law."³⁶ "Courts have power to declare the law only; they may not make or amend it."³⁷ Even when decisions of agencies are questionable, "The courts do not have unlimited sanction to attempt the righting of every governmental act which the judges regard as wrong; their first duty is to act only within their limited power."³⁸

Stated even more firmly, "The fundamental proposition which probably no one would dispute is that a court's power is judicial only, not administrative nor investigative. A judgment may only properly be given for something raised in the course of a litigation between parties."³⁹

Also stating the position for non-involvement, a court has declared:

³⁵Pritchard v. Spring Branch Independent School District, 308 F.Supp. 570 (1970). This decision upheld the right of school authorities to control the length of a student's hair on the basis of academic performance and the need of schools to enforce rules guarding against disruptions. pp 572-79.

³⁶Hale v. Aglim, 140 F.2d. 235 (1944), 237.

³⁷United States v. Consolidated Elevator Co., 141 F.2d. 791 (1944), 794.

³⁸Bridges v. Wixon, 144 F.2d. 927 (1944), 937.

³⁹Webster Eisenlohr v. Kalodner, 145 F.2d. 316 (1944), 318.

This court finds itself in complete sympathy with the relief sought by the defendant but also finds itself as completely devoid of the power to grant it. . . .

It is the province of the judiciary to interpret the laws . . . and not to seek to correct legislative enactments or to change laws because they have given rise to consequences not contemplated by the Congress, . . . If ⁴⁰this statute is unjust, the remedy is legislative.

On balance, the courts have developed criteria for determining what is appropriately a judicial issue while at the same time they have provided warnings against over indulgences:

The sound test of judicial responsibility is not, of course, its lavishness of concern, but its measured adherence to the actual legal need of, and its authority in, the situation with which it is required to deal. Over-responsibility may be as much an abuse of judicial power and functions as irresponsibility. And in the collaboration of judicial power and function with administrative process, . . . the courts must conscientiously guard against any instinct of over protectiveness, which may unwarrantedly and needlessly, ⁴¹impede proper administrative effort or result.

In emphasizing the principle of separation of duties the court has stated, "In entering upon a consideration of this case we bear in mind the elementary principle, which cannot too often be repeated, that a court usurps legislative functions when it presumes to adjudge a law void where the repugnancy between the law and the Constitution is not established beyond a reasonable doubt."⁴²

⁴⁰Sacco v. Baltimore and O.R. Co., 56 F.Supp. 959 (1944), 960.

⁴¹Walling v. Benson, 137 F.2d. 501 (1943), 504.

⁴²National Maritime Union of America v. Herzog, 78 F.Supp. 146 (1948), 155.

The same court also stated, "So if a court be in doubt whether a law be or be not in pursuance of the Constitution where the repugnancy is not clear and beyond doubt--it should refrain from making the law void in effect by its judgment, lest it should be really repealing a valid law by a legislative act, instead of declaring it void by a judicial act."⁴³

Later, in 1963, the court stated, ". . . the doctrine of separation of power has been honored in the breach in the delegation of legislative authority to administrative agencies in our complicated modern Government. But the doctrine is still rooted firmly enough in our legal system to withstand cold winters and lukewarm judges."⁴⁴

In recent cases the principle of judicial review is significantly and firmly reiterated. As we shall see in Chapter Four the presumption is for review of administrative and agency action. For the defense of the general thesis what is pointed out here is that while there is the presumption for review it is for the determination for constitutional ends. This point has, of course, been made in relation to separation of powers and is an issue of constitutional law most similar to the question of review as related to administrative law.

⁴³Ibid., citing Tucker, The Constitution of the United States. Vol. 1, 377.

⁴⁴United States v. Manning, 215 F.Supp. 272 (1963), 289.

The scope of review is limited to those constitutional ends and the principle of reviewability does not extend to the courts' right to encroach upon other areas. While most of the judicial commentary about judicial limitations is covered in relation to specific headings such as competency later in this Chapter some recent cases are cited in reference to the limitation of the scope of review.

In 1972 in a Supreme Court decision which questioned a determination by the Federal Power Commission, the court stated, "A Court must be reluctant to reverse results supported by such a weight of carefully articulated expert opinion. . . . We recognize the relevant agency's technical expertise unless it is without substantial basis in fact."⁴⁵ Earlier a District Court stated, "While courts of law hold the power to review executive action, this power must be used sparingly. Judicial inquiry, therefore is limited to a determination that there is a 'rational basis' for the executive policies or procedures in question."⁴⁶ Later a District Court stated:

This judicial reluctance is manifest in a very large number of cases that need not be cited. More recently the Supreme Court has declared that 'when faced with a problem of statutory construction, this court shows great deference to the interpretation given the statute by the officers or agency

⁴⁵Federal Power Com'n v. Florida Power & Light Co., 92 S.Ct. 637 (1972) 644, 404 U.S. 463.

⁴⁶West End Neighborhood Corporation v. Stans, 312 F.Supp. 1066 (1970) 1068.

charged with its administration' [citing] *Udall v. Tallman et al.*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d. 616 (1965) ⁴⁷

Also recently an Appeals Court stated:

Where administrative control has been authorized by Congress, the judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body. [citing] *Mississippi Valley Barge Line Co. v. United States* 292 U.S. ⁴⁸282, 286-287, 54 S.Ct. 692, 78 L.Ed. 1260 (1934).

It is here argued that the principles found in administrative law are analogous to education in so far as the principles pertain to judicial review. While it was admitted that review was appropriate in Hobson, for instance, it was argued that there may have been encroachment upon the field of educational policy.

Commentary from legal journals specifically on questions regarding administrative law and reviewability also indicate justification for arguments favoring judicial restraint by the courts when called upon to review decisions of administrators and administrative boards. Unsurprisingly, the literature is as polarized as were the decisions by the judiciary. The polarization is reflected within particular time spans, and as such the differences reflect differences of opinion in judicial theory. These differences are as noticeable yet today as they have been through the historical development of the concept.

⁴⁷ *John V. Carr & Son, Inc. v. United States*, 347 F.Supp. 1390 (1972) 1396.

⁴⁸ *Port Authority of City of Saint Paul v. United States*, 432 F.2d. 455 (1970) 461.

For purposes of evaluation of the present status of separation of powers, it is necessary to note the differences of judicial attitude in terms of time. There was an apparent deference to administrative decisions and presumptions for reviewability until the twentieth century, as evidenced in the following: "It was in 1902 that the jurisprudence of the Supreme Court took a sudden and dramatic turn."⁴⁹ That turn was toward more judicial review.

Owen Fiss, writing specifically on conflict between the judiciary and the administration of educational processes related to the issue of racial imbalance, indicates considerable concern for overzealousness of judicial powers. He stated:

When the policy of the school board is one of disregard rather than approval, a court may be reviewing an administrative determination that imbalanced schools do not impair the educational opportunity of Negro plaintiffs or that there is adequate justification for the use of geographic criteria. Some deference should be paid to this administrative decision. . . , a court ought to respect the school board's assessment. . . .⁵⁰

As Fiss suggests, this problem represents an extremely grey area of constitutional law and he hastens to point out that his statement does not reject judicial review of a school board's action when it openly approves of plans encouraging segregation. Even allowing this disclaimer, the

⁴⁹Louis L. Jaffe, "The right to judicial review I," 71 Harvard Law Review 401 (1958), 423.

⁵⁰Owen Fiss, "Racial imbalance in the public schools: The constitutional concepts," 78 Harvard Law Review 564 (1965), 609.

concerns expressed by Fiss are germane to the concern here which is an attempt to clarify the fine line between appropriate judicial action and ultra vires action by the judiciary. Digressing for a moment here it is appropriate to indicate that in this writer's view Fiss's is a most significant attempt to deal with the problem of integration in the schools and the relationship of the courts to resolution of the conflict. Fiss relates the existence of the poles of opinion and their development as well as the complexities of the various positions. Yet within this empathetic framework he indicates the necessity for resolutions in this grey area.

Even though he argues for non-deference by the judiciary on constitutional issues such as refusal by school districts to correct racial imbalance, Fiss warns,

No court should be willing to embrace the awesome responsibility that every school board refusing to alleviate imbalance is, to some extent, bigoted. To have the likelihood of bias cast doubt upon the board's assessment of the harm and justification in every case would penalize the individual government official who makes an honest effort to resolve the problem correctly, and take the court too deeply into the treacherous quagmire of analyzing the motives of government officers.⁵¹

In an extreme position on administrative prerogative, so strong as to suggest a circumvention of constitutional guarantees, Joseph T. McElveen quoted Circuit Judge Gerwin's statement:

⁵¹Ibid, 610.

That which so interferes [with] or hinders the state in providing the best education possible for its people must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right.⁵²

Citing contrasting decisions from an earlier date, Jerry Trammell reminds the reader that the court has attempted to delineate proper functions of the judiciary and that:

Apparently the Court feels the determination of the legality of administrative action is judicial whereas actual participation in the administrative process by the exercise of independent judgment or discretion as to what the decision of the agency should have been is not judicial.⁵³

Another rationale offered for separation of duties as developed in review of administrative action is the distinction of duties as related to findings of fact and findings of law. "A theory of review grounded upon the distinction [of law and fact] rests upon a 'division of labor between judge and administrator giving full play to the particular competence of each.'"⁵⁴ Citing additional cases Bernard

⁵²Joseph T. McElveen, "The barber and the board: Constitutional aspects of administrative regulations of a student hairstyle," 23 South Carolina Law Review 150, 152. Citing: Ferrell v. Dallas Independent School District, 392 F.2d. 697 (1968), 703.

⁵³Jerry M. Trammell, "Administrative law - judicial review and separation of powers," 45 South Carolina Law Review 467, 469. Citing: Federal Radio Commission v. Nelson Brothers Bond and Mortgage Co., 289 U.S. 266 (1933); Federal Radio Commission v. General Electric Co., 281 U.S. 464 (1930); and Keller v. Potomac Electric Power Co., 261 U.S. 428 (1923).

⁵⁴Bernard Schwartz, "Judicial review of administrative action: Mixed questions of law and fact," 50 Georgetown Law Journal 684 (1962), 686.

Schwartz affirms this distinction in duties between the judiciary and administrative agencies. "'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body';⁵⁵ it is not concerned with the 'weight' of evidence."⁵⁶ More precisely stated, "Where an administrative agency is involved, . . . its findings of fact must be upheld if they are supported by only 'substantial evidence'"⁵⁷

Attempting to develop precise ground rules for judicial review, Louis L. Jaffee nevertheless has argued against judicial encroachment. "The administrative is the sole fact finder. The judiciary may set aside a finding of fact not adequately supported by the record, but, with certain exceptions, at that point its function is exhausted."⁵⁸

Commenting upon Jaffee's delineation about availability of judicial review, Kenneth Culp Davis stated that courts ought to avoid involvement in the affairs of a discretionary nature.

⁵⁵Ibid., 688. Citing: Mississippi Valley Barge Co. v. United States, 292 U.S. 282 (1934) 286-87.

⁵⁶Ibid. Citing: St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936), 51.

⁵⁷Ibid. Citing for distinction Judge Frank in *Orvis v. Higgins*, 180 F.2d. 537 (1950), 540.

⁵⁸Louis L. Jaffee, "Judicial review: Question of law," 69 Harvard Law Review 239 (1955).

Jaffee's view has merit for cases involving nothing more than finding facts and applying law. But many of the cases involve discretionary determination of what administrative policy ought to be in disciplining public employees. The courts do and should refuse to take over that function.⁵⁹

It becomes evident that there is a body of court decisions and theoretical justifications which affirm the separation of the governmental duties and the need for precise categories in administrative law and judicial review if encroachment by the judiciary upon other governmental agencies is to be avoided.

Even when arguments are presented favoring review, there is often a very careful attempt to insist that this review must satisfy particular legal processes so that it does not involve the courts in the affairs of other agencies and thereby become encroachment. Encroachment by definition must lack justification.

Numerous reasons are given for non-intervention by the judiciary which, to this point, have been discussed from the perspective and conceptualization of constitutionality and reviewability. Now attention will be focused upon the reasoning which leads to the arguments for judicial restraint. These reasons are found in both judicial decisions and the

⁵⁹Kenneth Culp Davis, "Judicial control of administrative actions: A review," 66 Columbia Law Review 635 (1966), 640. It is also relevant here to realize according to Davis' own admission that he generally favors greater review than does Jaffee, p. 636.

legal journals. The reasons range from constitutional intention for separation, that education belongs to the legislative branch of government and is a political matter, court procedures and policy which require that courts do not act as advisory agencies and the questionable competency of the courts in particular areas such as in education.

Specific Reasoning for Non-review of
Administrative Agencies

In a decision in which the subject was mining operations the court failed to act for a number of reasons, among which it stated that, ". . . it is a matter which addresses itself to the legislature . . . rather than for a court to say here . . . that it shall be the law of the state. . . ."60 Even though, as the court pointed out, "It may be wise and it may be just to require such owner to drain craters that are left by this and similar operations. . . ."61

The court's position in Independent Dairymen's Association, Inc. v. City and County of Denver⁶² is also in opposition to involvement by a court in administrative action. As stated by the court, "Debatable questions as to reasonableness are not for the courts, but for the legislature, . . . We may not set aside the ordinance because compliance with

⁶⁰Duvall v. Twentieth Century Coal Co., Inc., 104 F. Supp. 725 (1952), 728.

⁶¹Ibid.

⁶²142 F.2d 940 (1944).

it is burdensome."⁶³ And, "wisdom or expediency of the legislative enactment . . . are questions exclusively for legislative determination."⁶⁴ Of significance for recent educational decisions, the same court stated, "The proof of reasonableness must show that the classification is wholly without any rational basis"⁶⁵ and is essentially arbitrary."⁶⁶

It is elementary, but it will work no harm to reiterate, that with determination of the wisdom of legislative policies, we are in no way concerned. It is far beyond our function to decide or declare what is wise or unwise in statutory economic, political or fiscal tenets. . . . The only functions of the judiciary, . . . are so to interpret the statute . . . to determine whether a factual situation is within the contemplation of the act and whether the legislation or the actions of administrative bodies . . . infringe upon the constitution.⁶⁷

The specific relationship of the branches of government and of the concept of the court as legislative is the topic of a decision in which the court states, "While the decisions of the higher courts have frequently resulted in legislation enacted in accordance therewith, attempted legislation by the court is beyond its powers. . . . In

⁶³Ibid., 942.

⁶⁴Ibid.

⁶⁵Underlining by this writer. This is noted here because the case is already cited and the material has relevance to such decisions as Hobson. One can legitimately ask whether or not this principle was applied as well as whether or not the judiciary went out of its way to find reasons to criticize the school system.

⁶⁶Ibid., 943.

⁶⁷Corn Products Refining Co. et al. v. Federal Trade Commission, 144 F.2d. 211 (1944), 215.

other words the court cannot decree what the law, in its opinion, ought to be, and thereupon declare it so to be."⁶⁸

As recently as 1960 the concept of non-involvement was still being affirmed, "Judicial officers must interpret, not make or remake, the law."⁶⁹ In additional commentary supporting judicial caution, the court has stated, "While a court may adopt a liberal approach to the problem of construing a statute, it ought to resist the temptation to legislate."⁷⁰

Support for the right of school administration to make educational decisions can be developed from a court's statement that "Although statutory construction is a function of the judiciary, . . . the interpretation as placed on that statute by the agency in charge of its administration is entitled to great weight."⁷¹

Another court, also commenting upon the separation of particular powers, stated, "Administrative powers, with which the courts should not interfere, involve carrying of laws into effect. . . . "⁷²

In the journal literature there is considerable criticism of the courts' reluctance to be involved in administrative

⁶⁸Long Island Railroad Co. v. Lowe, 50 F.Supp. 944 (1943), 946.

⁶⁹Nash-Finch Company v. United States, 184 F.Supp. 735 (1960), 738.

⁷⁰Sutherland v. Flemming, 189 F.Supp. 712 (1960), 714.

⁷¹Department and Specialty Store Employees' Union v. Brown, 284 F.2d. 619 (1961), 627.

⁷²Kauble v. Haynes, 64 F.Supp. 153 (1946).

matters, but within this criticism there is recognition that the courts, by their actions, have affirmed and maintained the concept of separation of powers. For instance, Frank B. Strong has stated that "The Supreme Court of the United States has in general yielded to federal administrative bodies, on the point of finality, with surprising ease."⁷³

In an article discussing the problems of university discipline, the firm precedence of separation of duties is implied by the following statement: "Until recently, the judiciary has been extremely reluctant to review university discipline proceedings."⁷⁴ Quoting again from Gunther's commentary of Bichel, the desirability of separation is affirmed when he remarks on ". . . warnings against polluting the decisional process through excessive preoccupation with the political market place; . . ."⁷⁵

Implied in a discussion of immediate practical problems of integrating the schools is an argument which recognizes the separation, both that which is intended and perhaps that which becomes much more feasible in pragmatic attempts to implement integrative policies.

⁷³Frank B. Strong, "Judicial review: A tri-dimensional concept of administrative-constitutional law," 69 West Virginia Law Review 249 (1967), 255.

⁷⁴"Reasonable rules, reasonably enforced--guidelines for university disciplinary proceedings," 53 Minnesota Law Review 301 (1968), 315.

⁷⁵Gunther, 5.

In view of the enormous variety of local conditions which might influence a school board to adopt one system of school organization instead of another, perhaps the best that we can expect from the courts in this area is to insure that the political bodies remain neutral as far as race is concerned. It is difficult to find⁷⁶ in the constitution support for any greater duty.

Philip B. Kurland, in a discussion of equal educational opportunity, presents a most interesting and sober point to those who have indicated satisfaction with the courts' leadership and involvement in the issue of reapportionment. This point is of interest here because this involvement finds many who are inclined to offer the courts' reapportionment decisions as justification for judicial involvement in protecting a constitutional right and as an illustration that judicial involvement is highly successful. Kurland reminds us that

The third element, judicial control, was not really present in those cases. The judiciary has no adequate sanctions that it could have brought to bear on recalcitrant states. It didn't need them because of the failure of opposition. The states could have thumbed their noses at judicial orders in the same way that individuals have shown contempt for the judicial power. Fortunately the decline of the 'rule of law' has not yet extended to the actions of all American states.⁷⁷

Germane to this discussion is the point that there may have been too many claims for judicial involvement and

⁷⁶John Kaplan, "Segregation, litigation and the schools, Part II: The general northern problem," 58 Northwestern Law Review 157 (1963), 186.

⁷⁷Philip B. Kurland, "Equal educational opportunity: The limits of constitutional jurisprudence undefined," 35 The University of Chicago Law Review 583 (1968), 594.

that when the judiciary goes beyond its domain its decisions may be to no avail. To illustrate this point Kurland reminds his reader that in the 1968 reapportionment cases the decisions seemed to work because of public acquiescence. However, suburbia, which acquiesced on reapportionment because of a gain in its power, was among the least inclined to acquiesce in equal educational opportunity decisions.⁷⁸ The actions of the public and of politicians in late 1971 and early 1972 indicates that Kurland's statements were indeed prophetic.

Further, Kurland said that "The national and state legislatures have the capacities to supply the wherewithal to put the plans which assure equal educational opportunity into effect. The judiciary has neither."⁷⁹ While Kurland was pessimistic that the court would avoid encroachment, he indicated that on other matters the court had no difficulty maintaining separation of powers by refusing to hear litigation. "I do seem to recall that the Court recently rejected the opportunity to resolve the problems of the Viet Nam War."⁸⁰

In a discussion of administrative law as it pertains to agency action and in terms for which it is not inappropriate to suggest that the courts might give the same pause to

⁷⁸ Ibid., 593.

⁷⁹ Ibid., 600.

⁸⁰ Ibid.

maintaining the separation of powers in relation to educational litigation, Jaffee states, "There can, however, be no denying that courts once overeager to substitute their judgment for agency action are more and more reluctant to do so."⁸¹

In most reasoning offered for non-involvement by the judiciary in the affairs of other governmental agencies there is a wide range of complexities. Attempts by individuals to resolve the issue in their own beliefs and actions by appeal to authorities is most difficult. In the final analysis there appears to be a degree to which one appeals to an a priori basis for developing a particular statement of belief rather than another respected but contrasting point of view. Perhaps it is sufficient here to state that any position on the issue of judicial review must take into account the separation of powers as a legitimate reason for the case against court involvement in educational policy. The immediate resolution can only be that of a continuing process and reasoned development.

The case for caution in judicial review here takes into account constitutional aspects of separation of powers and the development of ruling case law during which there was considerable encroachment by the judiciary of the development of administrative law in which the separation of powers and the unique function affirmed in the separation of

⁸¹Louis L. Jaffee, "Judicial review: Question of fact," 69 Harvard Law Review 1020 (1956), 1054.

powers is affirmed. The same rules in administrative law do appear to be applicable to educational policy. In fact, Kurland appears to go so far as to suggest that even in the general concept of equality of educational opportunity there is reason to maintain a rather strict concept of separation of power.

The discussion to this point has focused upon the Supreme Court and the Federal Court system and does not apply to the lower courts of the individual states. In essence, if the state constitution allows it, or the legislature prescribes particular functions lower courts do not operate under the same restriction of separation of powers as do the federal courts. The lower courts, however, are bound by the concept that their actions must fulfill constitutional requirements which, of course, demand adherence to the due process clause of the Fourteenth Amendment.

What this writer wishes to affirm here is that while it is appropriate in the legal sense for the lower courts to involve themselves in non-judicial matters, there are compelling reasons which should require lower courts to give attention to the validity of the reasons for the superior courts' non-involvement in the affairs of the other branches of government. While these reasons are developed in the sections immediately following, some of the reasons were implied in the preceding sections by such comments as Kurland's reference⁸² to the fact that the judiciary does

⁸²Kurland, 600, also Supra, p. 132.

not have the wherewithal to carry out its decisions affecting the legislative and executive branches of the government.

The debate over whether or not judges should have non-judicial duties imposed upon them or whether judges should take non-judicial matters upon themselves provides more arguments for maintaining the separation of powers. This point is most germane because Hobson is the primary example of judicial involvement in this dissertation. The first issue in Hobson I was whether or not the appointment of the District of Columbia School Board, a non-judicial function carried out by the District Judges, was constitutional. There is considerable evidence that this, too, is a perplexing problem, to which our practices provide little security for those looking for absolutes.

Most interesting is the fact that Judge Skelly Wright argued against non-judicial functions for judges even though he was willing in the Hobson decision to move rather boldly into social and educational concerns. ". . . as Judge Wright argued in dissent, [in Hobson I] judicial integrity may be similarly threatened whenever the court appoints administrators whose duties are wholly unconnected with the 'judiciary.'"⁸³

⁸³"Recent cases, courts -- particular courts -- District court for the District Court of Columbia may properly appoint school board members," 81 Harvard Law Review 702 (1968), 705. In reference to: Hobson v. Hansen, 265 F.Supp. 902 (1967).

Noting the increase in scope of non-judicial duties of judges, Roger O. DeBruler warns of potential problems if such a practice continues. He cites some historical references in attempts to clarify how the meaning of appointments has changed. "The participation of the judges has grown from simple power to appoint appraisers and officers which are in some way ancillary to the judicial function, to the power to participate in the decision to govern such as in the Conservancy Act and the School Reorganization Act."⁸⁴

DeBruler further notes the reasoning for caution and appeals to Wright's dissent in Hobson I.

The power to appoint boards and participate in board functions embroils the judge in social and political disputes and hinders him in maintaining his impartiality as a judge. This impediment created by the appointive power is summed up by Judge Skelly Wright in the recent case of Hobson v. Hansen, wherein he states, quoting from Judge Cardozo: "... Public confidence in the judiciary is indispensable to the rule of law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity. . . ."⁸⁵

In the 1940's the Senate Committee on the Judiciary was asked to submit a report on what was considered a "... growing practice of drafting judges to fill executive posts."⁸⁶

⁸⁴Roger O. DeBruler, "Non-judicial duties of Indiana Trial Judges," 3 Indiana Legal Forum 1 (1969), 4.

⁸⁵Ibid., 11.

⁸⁶U.S. Senate, Committee on the Judiciary, Report on the Use of judges in non-judicial offices in the Federal government, 80th Congress, 1st Session., 1.

The position taken by the committee was that to assure the continued independence of the judiciary, **great caution should be exercised** even in instances where the judge might serve in other capacities as contrasted to being compelled to do so, which is unconstitutional. While the Committee did not recommend legislation against the practice at that time, it did declare, ". . . that the practice of using Federal judges for nonjudicial activities is **undesirable**. The practice holds great danger of working a diminution of the judiciary. It is a deterrent to the proper functioning of the judicial branch of the Government."⁸⁷

The reasoning which leads to the conclusion that the judiciary can better serve and maintain a greater degree of credibility with the people if it is not called upon to involve itself in non-judicial matters appears to be as appropriate for affirming the position that the courts and judges ought to be cautious about involvement in the evaluation of substantive material in cases when the issues may be non-judicial in nature.

The essence of the arguments here suggest that regardless of the reasons for the initial separation of powers the idea of separation continues to be a valid argument for the most effective and just governmental operation.

⁸⁷Ibid., 6.

Even when constitutionality is at issue it is possible to question judicial involvement in interpretation of non-legal material. Writing specifically on cases involving educational matters but which turned to questions of constitutionality, at least one author suggests that even though "Judicial invalidation on constitutional grounds is a remarkable power, . . . it is only as secure as its social acceptance. Frequent use of this power with respect to marginal matters is not likely to add prestige to the judicial branch."⁸⁸

Hence it can be argued that even though the court many times seems to be proceeding appropriately because a constitutional issue is at stake, it treads upon very thin ice if the utilization of constitutionality appears to stretch the imagination. Some writers feel we need to be cautious about judicial involvement even on such a generally accepted basis as constitutionality. This writer feels compelled to indicate that although such arguments exist, he is uneasy about them. The uneasiness stems from the fact that such matters as student grooming and student attire, and integration, the issues in so many recent court cases, have been seen by some judges and persons as constitutionally marginal questions. This writer feels strongly that these issues are firmly constitutional matters and that educators must hold

⁸⁸ Paul G. Haskell, "Judicial review of school discipline," 21 Case Western Reserve Law Review 211 (1970), 244.

unequivocally to these as constitutional issues if they are to assure equal protection to students within the educational institution. The directions taken in the spring of 1972 by some of the populace on bussing seem to indicate some validity for this uneasiness.

In what appears to be identified as an educational problem, the question of integration as affirmed in the Brown decision, questions are now being raised on the basis of the concept of the separation of powers. This writer hastens to add that he supports the Brown decision and its initial impact toward school integration. However, it is without difficulty that one finds literature about Brown which supports the argument for the continuation of the separation of powers. Some writers hold that because the outcome subsequent to Brown failed to bring about integration that the failure is because of judicial encroachment. The argument has been presented that the essential basis for the Brown decision was constitutional. Some writers argue that the contention of constitutionality can be challenged and that the cause of integration may well have been better served had not the courts attempted to serve as school boards. One particular argument is that the courts have become the boards by virtue of affirming what must be done to integrate rather than what cannot be done to maintain segregation. This writer does not accept these points within the argument but the argument is one which has gained some credibility during the intervening time between

1954 and 1973. The argument has been phrased thus: "The constitutional legitimacy for Brown in this author's view is shaky and a more fundamental basis is required in order to abolish racial distinction in educational opportunities."⁸⁹

Stated a bit differently but with similar implications is the following statement:

As in many important litigations, the reported opinions do not, by any means, tell the whole story. The transcript of testimony and the exhibits filed in court shed a great deal more light on the issues involved and there is hardly an active citizen of the city who cannot shed further light on one facet or another of the controversy."⁹⁰

Even appropriate directives can contribute to continued lack of achievement of the very thing a school board may have intended to abolish. For example, with integration, "The great majority of the white children . . . rather than be outnumbered two to one by Negroes, chose to avoid entering the Lincoln School and either enrolled in parochial or other private schools, or moved out of the area,"⁹¹

Another similar warning is stated:

In other communities it is unrealistic to anticipate any voluntary response to the court's elaboration of the equal-educational-opportunity

⁸⁹Albert J. Cimini, "Problems in the case of de jure segregation in education: Equal protection of the laws as fundamental human rights," 6 New England Law Review 115 (1970), 123.

⁹⁰John Kaplan, "Segregation, litigation and the schools; Part I: The New Rochelle Experiences." 58 Northwestern Law Review 1 (1964), 5.

⁹¹Ibid., 7.

principle. In such cases it may be illusory to hope for any real improvement of the Negro's educational opportunity by simply obliging a school board to alter the racial composition of the schools; no one pretends that integration is anything more than an enormously important first step.⁹² A court dealing with the problem in such a setting must also take into account the anticipated hostile reaction, which will limit the effectiveness of any correctional obligations. Some correctional measures--like the total abandonment of geographic criteria--may engender such resentment on the part of whites that they will either withdraw from the public school system or from the city altogether. No social institution, and especially no court, can afford totally to disregard the empirical consequences of its actions.⁹³

Philip B. Kurland warns of the ineffectiveness of court action. It is possible to infer from Kurland's writing the necessity for maintaining separation of powers if we are to fulfill the obligations required by the discipline of education. ". . . The demand for a constitutional principle of equal educational opportunity to be derived from the equal protection clause is not directed toward the problem in education from which our society is suffering."⁹⁴

Another illustration of how one simple aspect of the matter affects the attempt to bring about court-ordered integration is seen in the following passage:

And if, as the Brown case certainly indicated, one of the ingredients of adequate educational opportunity is the availability of good students, how does the Court propose to keep them in the public school systems? To date the hope has been based on local autonomy. But when that is gone?"⁹⁵

⁹²Citing Klopff and Laster, eds., Integrating the Urban School, 1963, 97-103.

⁹³Fiss, 616. Underlining by this writer.

⁹⁴Kurland, 592.

⁹⁵Ibid., 598.

In short, proponents of the position requiring the continuation of the principle of separation of powers seem to be justified if efforts by the courts to integrate through intervention in the educational process provide the criteria for evaluation. It might also be inferred that in other matters, educational in nature, judicial involvement will not be any more successful.

Essentially the argument for judicial non-involvement, based on the conceptualization of disagreement between reasonable men, is that on many issues educational in nature there are diametrically opposed positions held by persons of similar intellect and wisdom. These differences are found both in the particular discipline of education as well as in law and because of this the judiciary should be quite sensitive to lack of absolutes. Because these differences are real, the courts should be most careful in affirming remedies and imposing one alternative in particular situations. Deference should be given to educational expertise when paradoxes exist between the judge and the education experts.

Commenting specifically on Hobson and also supporting the contentions of Chapter Two, Pamela K. Quinn attacks the case on these very grounds.

In reply to certain of the courts imprecations of the District's school system, the factual situation of Hobson might be interpreted in ways other than the court did. Some of these alternative interpretations are especially plausible given a somewhat more traditional interpretation of the equal protection guarantee.⁹⁶

⁹⁶Pamela K. Quinn, "Hobson v. Hansen, a substantial step in the evolution of the equal educational opportunity of equal protection," 29 University of Pittsburgh Law Review 149 (1967), 161.

In some of the litigation on desegregation decisions there are illustrations which possess implications for judicial caution based upon disagreement of reasonable persons. The disagreement is over both legal and educational issues and should cause us to pause before seeking social change through the courts. The courts' decisions have the potential for attaching god-like authority to the decision even when the wisdom involved is no greater than in that of other fields of endeavor.

To illustrate differences on such issues as segregation and how to remedy it, and germane to Hobson per se, is a statement by John Kaplan.

Despite certain specifically racial problems, it seems that the problem of de facto segregation is in the main a class problem. This is not to say that it does not affect Negroes primarily, or that they should be any less interested in combatting it. Rather it suggests that the remedy of artificial racial integration is not a completely appropriate one.⁹⁷

Commenting more specifically on how differences of opinion might affect decisions and outcomes, Fiss states in an article on limits of remedial obligations to correct imbalance that:

Only in rare instances -- when the school board completely defaults -- need the court, with guidance from plaintiffs and amici, devise a plan and ensure compliance by use of contempt power.

In judging the adequacy of a school board's remedial plan the court must not ignore certain

⁹⁷Kaplan, "Segregation, litigation and the schools; Part II: The general northern problem," 207.

critical factors. First, the court must recognize that the empirical and normative judgments it has made do not command immediate and universal assent. For this reason a court must proceed with care, respecting honest differences of opinion and attempting to preserve public confidence in the judicial system.⁹⁸

Turning again to review of administrative actions and an article by Harvey Saferstein, he argues that neither the doctrine of committed to agency action of the Administrative Procedure Act which implies nonreviewability nor Raoul Berger's reading the doctrine out of the A.P.A. which implies review of "every claim of abuse of agency discretion,"⁹⁹ resolves the problem of judicial review of agency action. He also comments that:

Judge Friendly, who would also in effect seem to read the doctrine out of the A.P.A., has suggested that the abuse-of-discretion standard could be used as the criterion for review if it is defined more narrowly to cover only actions alleged to be 'arbitrary, fanciful, or unreasonable,' which is another way of saying that discretion is abused only where no reasonable man would take the view.¹⁰⁰

Saferstein also points out that the use of abuse of discretion so narrowly defined does not adequately resolve the conflict.¹⁰¹ The point here is that on such questions as

⁹⁸Fiss, 613.

⁹⁹Harvey Saferstein, "Nonreviewability: A functional analysis of committed to agency discretion," 82 Harvard Law Review 367 (1968-69) see pp. 374-376.

¹⁰⁰Ibid., 375. Citing: *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d. 715 (1966), 718; and *Delna v. Market St. Ry.*, 124 F.2d. 965 (1942), 967.

¹⁰¹Ibid., 376.

reviewability there is significant conflict within the legal profession about what the scope of review ought to be. These disagreements represent differing positions which are the positions of honest men attempting to resolve problems faced by the judiciary, legislative intent, and administrative agencies. Such disagreements exist about education issues and caution should be used in affirming one position as more correct especially when the affirmation is to be made by a professional group whose major function is not education.

Perhaps one of the most forceful statements which illustrates the inescapability and perhaps desirability of disagreement and which also is addressed to educational opportunity is as follows: "All plans to achieve equality of educational opportunity . . . must be judged by whether they work and by whether they are among the wide range of alternative that are constitutional."¹⁰² It is for the courts to limit themselves to the test of constitutionality. Here the differences between reasonable men are perhaps less numerous. On remedies the courts could allow greater flexibility for differences of belief in the testing of alternatives.

A particular problem in school integration illustrates how decisions which do not take into account differences and

¹⁰²Ronald Brown and Geraldine Reed, "Case Comments," 5 Harvard Civil Rights and Civil Liberties Law Review 488 (1970), 497. Underlining by this writer.

which are made without regard to consequences can come back to haunt those who hopefully were to be helped.

Again in the South as in Norwalk and Brice, though the tactics are different, 'Negro students and parents from Atlanta, Ga., to New Iberia, La., have boycotted and demonstrated to try to force the white authorities to reopen Black schools that were closed to achieve integration. . . . ' One experienced observer has said that Blacks seem more interested in keeping control of their affairs than in asking for help from any white judge.¹⁰³

Finally, the following is again quoted, a quote which simply reflects that with Brown there is disagreement even on the so-called legal aspects of the case. "The constitutional legitimacy for Brown in this author's view is shaky and a more fundamental basis is required in order to abolish racial distinctions in educational opportunities."¹⁰⁴

It is possible to summarize the position in the following way: On most issues which face the courts there is usually disagreement about what constitutes the most valid approach for resolution of conflict. When the issue is one of constitutionality the judiciary is obligated to fulfill its function of judging constitutionality and can affirm its position with authority. Even here the courts must act cautiously to avoid attributing constitutionality where it does not exist. When the issue is not constitutional and disagreement occurs, the courts ought to avoid over indulgence

¹⁰³ Ibid., 499. Quoting New York Times, Oct. 13, 1969; 52:5.

¹⁰⁴ Cimini. "Problems in the case of de jure segregation, p. 123. Supra, p. 143.

in the affairs of other fields of endeavor. This allows other agencies to test and affirm positive actions which may better achieve the goals requested by the litigants. The decisions in Brown I and II and their progeny and the events of recent days give considerable credibility to this position. While this writer is most uneasy about potential regression in the development of civil rights theory, he accepts the cautions about judicial encroachment presented in this section. These cautions influence the attempt to develop more acceptable resolutions to the conflict between the judiciary and education which are presented in Chapter Five.

In judicial decisions the principle of honest disagreement among men of good will is affirmed. "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, Such measures, . . . fall within the discretion of the Executive in the exercise of his authority to maintain peace."¹⁰⁵ On balance it is necessary to indicate that in this decision it was affirmed that discretion is open to review.

In United States v. Big Bend Transit Co. et al. there is an excellent statement on judicial restraint and the reaffirmation of the intent of the Supreme Court.

¹⁰⁵ Sterling v. Constantin, 287 U.S. 378, 399; 53 S. Ct. 190; 77 L.Ed. 376, 386.

I am frank to state that I do not approve of the Act of March 3, 1905, . . . I am opposed to the policy of all Acts of a similar nature. However, one cannot read the decisions of the Supreme Court in the last few years without fully concluding that it is the conviction of that Court that courts should not interfere in the operation of Government just because the particular judge of the court disapproves of the policy of the Government. . . . When Congress . . . delegates to an executive certain powers subject to the standards provided in the Act, that executive is supreme in the delegated field. It does not lie with the courts to interfere just because they dislike what was done. The test of the correctness of the doctrine and its permanence comes when the Court is compelled to accept it to uphold acts of the Congress¹⁰⁶ or of the executive of which the judge disapproves.

Questions Political in Nature Should be Resolved by the Legislative and Executive Branches. Education is One of Those Political Questions.

As mentioned in Chapter One, education has been identified by the judiciary as a political right and not a constitutional right, though it must be recognized that under the due process clause of the Fourteenth Amendment the lack of educational opportunity brings education into the realm of constitutionality.

Some of the most important reasoning for non-involvement by the courts in educational matters turns on the judicial interpretation that education is a political rather than a constitutional issue. This interpretation in turn legitimatizes the use of a considerable body of literature on the judiciary and on questions political in nature by arguing for caution

¹⁰⁶United States v. Big Bend Transit Co. et al., 42 F.Supp. 459 (1941), 475.

by the judiciary when deciding issues which in fact are educational in nature.

The argument here is based upon the premise that political issues must be left to the political process. In this manner the particular issues might be resolved more appropriately and in a way which allows for greater accountability by those making the decisions. To illustrate, even the Brown decision in which the issue appeared to be much more constitutional than educational and heretofore clearly defined as such has come under questioning in relation to its real outcome. The charge, as we shall see, is that the remedies were based on too narrow an awareness of how to educate as well as on faulty social science knowledge.

It might be noted that the journal literature on this issue is indeed vast and is only briefly summarized herein.

Desegregation, so often the substantive matter in the decisions deliberated about here, is again the issue which provides the basis from which arguments against non-involvement are developed. The potential failure of remedies to achieve what the courts have hoped for illustrate too well the point that the courts may be no more successful than the institution of education in enhancing desegregation of the schools. Whether this is what ought to be happening is not the point. The point is that students are receiving inferior education during a time when educators might provide more adequate education had the responsibility and expertise not been directed from the educational authorities to judicial authorities.

For instance, "If the white community does not accept the necessity of integration, and there is no indication that it is so predisposed at present [citing Alsop] then it may effectively block any implementation of corrective measures by moving further into the suburbs or by sending its children to private schools."¹⁰⁸ Even though presenting an argument for court involvement in forcing schools to live up to responsibilities to overcome segregation, R.M. Rader alludes to the problem which results from remedies which are not sensitive to the necessity of resolving political and social issues attending desegregation.

So long as a substantial portion of the white community remains hostile to school integration, no rule can guarantee actual racial mixing; white parents would still have the option of sending their children to private schools or moving to an all-white community.¹⁰⁹

Indicating that subjective considerations become a part of any consideration for the equalization of educational opportunity, David K. Cohen argues for leaving these matters to the educators. To attempt to resolve the problem, ". . . raises many very difficult issues of educational policy, and it even further reduces the likelihood that a judicial

¹⁰⁸ Neill G. McBryde, "Constitutional Law -- de facto segregation-- the courts and urban education," 46 North Carolina Law Review 89 (1967), 100.

¹⁰⁹ R.M. Rader, "Demise of the neighborhood school plan," 55 Cornell Law Review 594 (1970), 610. On this point it should be added that well-to-do white parents can make those choices. These factors continue as issues. *Bradley v. School Board of the city of Richmond, Virginia*, 338 F.Supp. 67 (1972) reversed 462 F.2d 1058, 93 S.Ct. 936, and *Bradley v. Miliken*, 338 F.Supp. 582 (1971).

standard including subjective resources could be framed."¹¹⁰

Further, ". . . it is difficult to see how such subjective competencies can be subjected to formal regulations and control by school systems, let alone judicial enforcement."¹¹¹

Cohen also suggests that the issue of desegregation in the schools may demand a political and social resolution rather than a change in educational structure or policies. "Indeed, the research suggests that elimination of racial differentials in school achievement may depend upon the elimination of racial differentials in the distribution of social and economic class."¹¹²

In what now appears to have been an overly optimistic statement of the direction of the courts in education as indicated by the enormous amount of litigation in the courts, John Kaplan states, "The battle over de facto segregation is now moving into the political arena where it belongs."¹¹³ This statement can still be affirmed even in light of attempts to deal with bussing and desegregation through the legislative process.

¹¹⁰David K. Cohen, "Defining racial equality in education," 16 U.C.L.A. Law Review 255 (1969), 276. Citing: McGinnes v. Shapiro, 293 F.Supp. 327 (1968), 335-36.

¹¹¹Ibid., 277.

¹¹²Ibid., 278.

¹¹³Kaplan, "Segregation litigation and the schools. Part II: The general northern problem," 211.

In a less optimistic statement but one suggesting the necessity of utilizing political and social means to resolve the problem of segregation as well as implying potential resolution through the kind of education which will truly change behaviors of people, Kurland states:

I expect that the essential reason for failure is to be found in the fact that the American public, whatever its pious declarations, has not been prepared to accept the Supreme Court's notions of its constitutional obligations . . . Where the governmental resistance was subdued, [in preventing integration] individual parents managed, to a great extent, to effect an escape from the imposition of the rule. . . .¹¹⁴

Kurland further questions the utilization by the courts of a single minimal standard demanding equality because it could result in the complete breakdown of the political and social process essential to education.¹¹⁵ In a firm reminder of the necessity for caution by the courts in involvement in educational matters because of their political aspects, Kurland states:

Finally, one of the difficulties with resort to litigation to solve such problems as confront us is that we thereby tend to absolve from responsibility those more competent and appropriate to afford solutions. The federal and state executives have the resources for the necessary research to develop appropriate answers. . . . The national and state legislatures have the capacities to supply the where-withal to put the plans into effect. The judiciary has neither.¹¹⁶

¹¹⁴Kurland, 595.

¹¹⁵Ibid., 597-98.

¹¹⁶Ibid., 600.

In commentary on Hobson, we find further support for the affirmation that educational matters should be left to the educators or in this particular case to the proper political or legislative branch of government. ". . . It seems wiser to allow school boards, educational personnel, and sociologists of education to investigate the problem more fully, before the courts step in with a constitutional mandate."¹¹⁷

There is considerable judicial comment on this topic and here again it is briefly summarized, strengthening the journal commentary.

It has been asked, in court decisions, if the courts should ". . . seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, and if they did whether they would become the organ of political theories."¹¹⁸

Social practices are also issues on which judges are to avoid substituting their ideas for others. Yet this problem is most complex and significant because the court recognizes the necessity for changed thinking by agencies to assure appropriate action based upon societal changes. Also inferred is the idea that agency change will reduce the chance for substitution by the judiciary of agency policy decisions. The point here for educational policy is that the profession

¹¹⁷Quinn, 165.

¹¹⁸United Public Worker v. Mitchell, 330 U.S. 75 (1946), 90; 67 S.Ct. 556; 91 L.Ed. 754, 766.

should offer leadership in creating a more functional educational process.

For example courts have claimed that:

It remains for the lawmaking body to courageously and intelligently take up its responsibilities to amend and clarify and synchronize the patent system with the times and the technological age in which we live and not for this court to judicially legislate its individual ideas of the appropriate social and economic practices that should prevail in the light of the modern age as substitutes for stabilized regulation by statute.¹¹⁹

Likewise, and at approximately the same time, the courts separated judicial questions from agency and professional questions and ruled that ". . . the questions raised by petitioner are medical, scientific and administrative, rather than judicial. The judiciary is simply called upon in cases such as this to ascertain whether the practitioner is restrained of his liberty by due process of law."¹²⁰

Of importance here is the point that the courts felt that the agency was not illustrating that its leadership was adequate. This could have been used as an excuse for judicial intervention. But the courts reminded the agency of its obligation and refused to enter into what the courts identified as agency policy making. While the courts in recent decision have felt that the educators have not provided leadership, they have too often seemed determined to intervene rather than to follow this principle.

¹¹⁹

Smith, Kline and French Laboratories v. Clark and Clark, 62 F.Supp. 971 (1945), 922.

¹²⁰

Kauble v. Haynes, 64 F.Supp. 153 (1946).

In two recent district court cases, the courts have continued to affirm judicial caution on political matters. One court recently while affirming particular grounds for reviewability nevertheless stated, "This court agrees that judicial intervention into the area of the political arena or internal political affairs must be approached with great caution and restraint."¹²¹ Another district court called upon to consider gerrymandering of an election district reminds us once again that "Plaintiffs would lead the federal courts into a new 'political thicket' of unmatched density, that of political gerrymandering."¹²² The court also indicates the appropriateness of particular involvement even in terms of remedies. The court stated "The task of drawing congressional district lines, within the confines of Baker v. Carr (citation omitted) . . . is appropriately left to the state legislatures."¹²³ The Supreme Court recently also stated:

It is well established that the federal courts will not adjudicate political questions (citation omitted). In Baker v. Carr (citation omitted) we noted that political questions are not justiciable primarily because of the separation of powers within the Federal Government.¹²⁴

¹²¹

Miller v. Bartunek, 349 F.Supp. 251 (1972), 255 (citation in quote omitted).

¹²²

Wendler v. Stone, 350 F.Supp. 838 (1972), 840 relying on Baker v. Carr 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d. 663 (1962).

¹²³

Ibid.

¹²⁴

Powell v. McCormack, 89 S.Ct. 1944, 1962, 395 U.S. 486, 518 (1969).

Finally, in an appeals court decision it is pointed out that education falls into the category of a political question. However, the reader is reminded that usually educational questions are referred to more generally as legislative or administrative issues. However, the court recently stated, "Although the pros and cons of progressive education are debated heatedly, a principal function of all elementary and secondary education is indoctrinative--whether it be to teach the ABC's or multiplication tables or to transmit the basic values of the community."¹²⁵ Also in the same decision the court stated "Accordingly, the courts consistently have affirmed that curriculum controls belong to the political process and local school authorities."¹²⁶

The literature and judicial decisions are not in any absolute sense conclusive as to judicial involvement in political issues. However, there is a well-developed reasoning which indicates that there should be at least judicial caution on this matter and that any movement into political, social, or legislative matters should be done only with careful explanation in terms of constitutionality. Yet, even on matters of constitutionality the judiciary must be sensitive to the possibility that judicial remedies may not achieve the goals

¹²⁵James v. Board of Education of Central District No. 1 Etc. 461 F.2d. 566 (1972) 573 relying on "Note, Developments in Law--Academic Freedom" 81 Harvard Law Review 1045, 1053 (1968).

¹²⁶Ibid and citing Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d. 228 (1968).

necessary for removal of the problems upon which litigation was based any more effectively than the action of other agencies or branches of government.

Competency as the Basis for Policy Determination:
Competency of Judiciary in Non-Judicial Matters Questioned.

The reasoning this writer considers to be the most valid in arguing for caution by the judiciary in non-judicial matters turns upon the question of competency. Throughout this Chapter the question of competency has been related to other reasons for judicial restraint. Here competency will be considered by itself. The importance of this reasoning is seen as the relationship of competency to judicial policy making which has failed to accomplish what the courts had hoped to achieve is discussed. This failure is especially noticeable in the area of equal opportunity educationally.

Once more it is noted that there is a vast quantity of literature on this particular topic. Hence, the literature is only briefly summarized here. The reasoning presented in this section provides the strongest basis for the arguments for judicial restraint. Many writers argue that educational matters should be left to educators even when educators are in error, at least in matters involving student discipline. Even though this seems extreme, it is not without precedence. The courts have treated the business world similarly; that is, with a hands-off policy.

While this writer finds it difficult to accept the concept of hands-off, he must take into account the earlier

section on disagreement between reasonable men and concede that individuals within the judiciary disagree on particular judicial issues and that they have made mistakes even in their own fields; that is, those fields where their competency is superior to the credentials they might present for involvement in educational policy. This fact alone should generally cause pause for any judge willing to prescribe remedies educational in nature even when attempting to assure the achievement of constitutional goals.

Commenting upon student discipline, Paul G. Haskell has suggested, ". . . that the courts allow experts in other fields such as public school administration considerable elbow-room in their work even if it results in some mistakes, particularly where the student interest involved does not seem to be of great importance."¹²⁷

While raising questions of competency, a difficulty with this statement is the interpretation of the importance of student interest, both to the students and to the school personnel. For instance, in the case of hair length and style, the issues are hardly frivolous or if they might have been so, they cease to be frivolous when school personnel made certain by their action that there is a confrontation between pupil and school authorities or when non-conformity has meant expulsion and has had a resulting impact on a student's pursuit of education.

¹²⁷Haskell, 242.

An excellent and perhaps a classic example of the significant consequences to the individual is the women dismissed from Eastern Normal State College in 1924 for riding in a rumble seat smoking cigarettes.¹²⁸

Haskell also states that, "It stands to reason that the school authorities know more about maintaining order in the corridor and concentration in the classroom than judges do."¹²⁹

In a statement which perhaps can be challenged on the basis of its implication that there has been little legislative involvement in educational matters in the past, judicial competency is again an issue. Also implied in the statement is the problem of judicial remedy for education in the theoretical framework contrasted to knowledge and awareness of the problems and benefits of remedies in practice. As stated before, this appeared to be one of the major problems in Hobson. The implication is that the judiciary does not have the experience and in this sense the competency to determine the educational remedies.

In an extensive article, "Reasonable rules, reasonably enforced -- Guidelines for university disciplinary proceedings,"¹³⁰ it is pointed out that judicial review does not

¹²⁸Tanton v. McKenney, 197 N.W. 510 (1924).

¹²⁹Haskell, 243.

¹³⁰53 Minnesota Law Review 301, (1968).

cause undue harshness but that constitutional principles must be maintained. While arguments are made that the university must be precise about its procedures there is an explanation about the reason for judicial caution:

Judicial review of institutional decision may lead courts into Professor Chafee's 'dismal swamp' where judicial logic, applied to internal conflicts, may lead to extreme results. Historically educational institutions have had a great deal of freedom and autonomy, derived from the notion that academic freedom is a 'sine qua non' of intellectual advancement. Both legislatures and the judiciary have respected this feeling and accordingly have minimized their intervention.¹³¹

In the same article the author points out the role of specific expertise in decision making even though he is developing a delineation which would sanction judicial review. "Obviously, problems of academic performance and academic dishonesty such as cheating and plagiarism are unique to educational institutions. These evaluations should be left to educators because of their experience and expertise in such matters."¹³²

In another article, which is critical of the court's remedies in Brown though supportive of judicial involvement in affirming equal educational opportunity, the problem of specific competency is well stated.

Perhaps the most disturbing aspect of the Brown court's acceptance of questionable social 'facts' is the structure of the judicial inquiry which makes it virtually impossible to get all relevant evidence before the court. . . . the courts shape the content

¹³¹

Ibid., 316

¹³²

Ibid., 326.

¹³³

Bloomfield, 282

of the information they receive to aid in educational policy making.¹³³

Competency of the courts is specifically questioned in court attempts to resolve such an issue as bussing. Is the court more competent to resolve this issue than are school personnel? A challenge to the Norwalk plan, put forth by a court, illustrates what is being questioned.

The 'Norwalk' court reacted to the Board's plan [that of allowing or requiring bussing of black and Puerto Rican children to white schools] like federal courts reacted to plans promulgated in Southern states under compulsion of the 'Brown II'. . . ; it was over-solicitous. . . it ignored the function of equal protection in the racial area,. . . it reinforced the implication of racial inferiority. . . . ¹³⁴

Kurland suggests that the courts curb their over-zealousness to become involved in educational matters and that those whose competency obligates it should be held responsible for developing alternatives for assuring constitutionally acceptable equal educational opportunities. The precise point is that those in charge of school desegregation, such as school personnel, should be more competent and responsible in assuring the success of desegregation. Even though they may not be, the implication is that they are at least as competent as the judiciary.

Let's place the responsibility where it belongs. Let's permit the states an opportunity to experiment with different answers to these difficult problems and free them to undertake the experiment. Perhaps

¹³³

Bloomfield, 282.

¹³⁴

Brown and Reed, 495.

after a consensus has been developed as to what the right answer is, or the right answers are, the Supreme Court will be in a position to put them into effect.¹³⁵

In a calm statement and one that carefully delineates the role of the court in such things as an accounting decision, Jaffee commented, "If in the opinion of the court expertise is relevant to the solution of the problem, the court will feel that it is operating under a comparative handicap in determining the application of statutory purpose to the case at hand."¹³⁶

While side-stepping the polarized position of judicial intervention in administrative agency decisions and arguing for consideration of competency in attempting to decide upon the validity for intervention in a particular instance, Kenneth Culp Davis stated, "Substitution of judicial for administrative judgment should depend upon comparative qualification of the administrative body and of the court to decide each question Judicial review should be no more than supervisory wherever detailed knowledge of technical problems is requisite."¹³⁷

A review of judicial action supports much of the literature just discussed. In one decision it has been

¹³⁵Kurland, 600.

¹³⁶Jaffe, "Judicial Review: Question of law." 265.

¹³⁷Kenneth Culp Davis, "To what extent should the decisions of administrative bodies be reviewable by the courts?" 25 American Bar Association Journal 770 (1939), 778.

stated, "In dealing with the complex problems of adjusting holding company systems in accordance with the legislative standards the Commission here has accumulated experience and knowledge which no court can hope to attain."¹³⁹

In an earlier decision, the concept of competency was stated even more clearly:

Congress met these difficulties [of not being able to know all the ways people would circumvent laws and defining the whole gamut of remedies for policies] by leaving the adoption of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility--the responsibility of exercising its judgment in employing the statutory powers.¹⁴⁰

A district court has recently stated "Administrative bodies acquire fine degrees of expertise in their areas of responsibility, and it is this expertise to which courts give deference when reviewing administrative decision."¹⁴¹ Another district court states the principle similarly "We are limited to determining whether there is warrant in the law and in the facts for the action taken by the administrative

¹³⁹

American Power and Light Company v. Securities and Exchange Commission, 329 U.S. 90, 112; 67 S.Ct. 133, 146, 91 L.Ed. 103 (1946).

¹⁴⁰

Phelps Dodge Corporation v. National Labor Relations Board, 313 U.S. 177 (1940), 194; 61 S.Ct. 845, 852; 85 L.Ed. 1271.

¹⁴¹

Ashley v. Richardson, 346 F.Supp. 101 (1972), 102.

official, and in doing so we must afford recognition to the presumed 'expertise' of the administrator in the field involved and only rarely, says Mr. Justice Douglas, are we justified in disturbing it."¹⁴²

What has been illustrated is that there is at least a legitimate reason to suggest that because the function of the court is not the development of competency in fields other than the judiciary, it ought to avoid prescribing remedies for problems even when they have a constitutional base. Even those authors and cases which suggest court involvement do not handle competency extremely well but tend to avoid the issue by suggesting that judges are as competent to determine remedies as are many of the professionals in a particular field. It does seem that the question of competency provides a basis for more clearly delineating what the proper role of the courts ought to be, that is, separating the issues more clearly and deciding judicial issues. The judiciary should then ask that the remedies be developed and provided by the agency, discipline, or field involved in the dispute or litigation. This point is taken up again in both Chapters Four and Five where the discussion focuses upon the arguments for judicial involvement (Chapter Four) and in the development of alternative approaches for resolution of the dilemma (Chapter Five).

¹⁴²Driscoll v. Northwestern National Bank of St. Paul. 349 F.Supp. 245 (1972) 248 citing Douglas' dissent in First National Bank in Plant City, Fla. v. Dickinson, 396 U.S. 122, 140, 90 S.Ct. 337, 346, 24 L.Ed.2d. 312 (1969).

Impropriety of the Judiciary Substituting its Policies for those Developed by Another Governmental Body or Agency.

Another reason presented for limited judicial involvement in the affairs of other governmental branches and agencies is that the courts ought not substitute their opinion for agency opinions. The justification for non-substitution is to some extent interrelated to the arguments just presented and which were based upon the question of competency. "The courts have wisely refrained from substituting their judgment for the educational expertise of the administration."¹⁴³

Dealing with the complex problems which arise in any attempt to determine precisely functions of particular governmental branches or agencies, Bernard Schwartz developed distinctions between matters of law and matters of fact. Once this principle is established, he reasoned, then it is possible to determine improper court substitution. To best illustrate this point it is necessary to quote Schwartz' own argument for the separation. "A theory of review grounded upon the distinction [law-fact] rests upon a division of labor between judge and administrator, giving full play to a particular competency of each."¹⁴⁴ Schwartz also states:

¹⁴³"Reasonable rules, reasonably enforced--guidelines for university disciplinary proceedings," 315. Citing Connelly v. University of Vermont, 244 F.Supp. 156 (1965).

¹⁴⁴Schwartz, 686.

Though the reviewing court must reexamine agency factfinding, this does not mean that such findings are to be handled like findings of law, . . . where the challenged finding is one of fact, the court cannot substitute its judgment for that of the administrator. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'¹⁴⁵

In short it can be stated that the principal is one of absolute non-substitution. Judicial judgment ought not be substituted for the judgments of agencies or governmental branches. It is the court's function to determine when issues are judicial and then to pass judgments on those issues. When agencies step beyond their area of competency and attempt judicial decisions, court involvement is essential. However, when this is the case it is a judicial matter rather than judicial substitution. Even when the actions of agencies must be reviewed for judicial determination of legal or constitutional matters, the court should avoid substituting its judgment for the agencies' on factual matters or actions.

Commenting upon judicial substitution for legislative actions, the Supreme Court has stated, that ". . . respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."¹⁴⁶ In still another case, the court stated, ". . . it is also well settled that the scope of judicial review is not unlimited, and that in such a proceeding

¹⁴⁵Ibid., 688.

¹⁴⁶Shaughnessy v. United States, 345 U.S. 206 (1952), 216; 73 S.Ct. 1178; 97 L.Ed. 956.

the Court has no authority to substitute its judgment of fairness for that of the agency, even though it might disagree with the agency's ruling, . . ."¹⁴⁷

Commenting upon the related category of statutes, the court stated that, "Where the statutory language is clear and unequivocal, there is no basis for arguing that it should be tortured or amended by judicial construction to bring about what the court might consider a more desirable result."¹⁴⁸

In another decision most germane because it deals with substitution of judicial conclusion for administrative conclusion when the judiciary reaches a different conclusion based on the same evidence, the court said, "And it is a generally recognized principle that a court may not disturb an administrative ruling supported by substantial evidence, even though the court, upon a consideration of all the evidence, might have reached a different conclusion."¹⁴⁹

In still another decision, "Even if we were disposed to disagree with the result reached by the Commission, we cannot substitute our own judgment for that of an administrative agency especially constituted, empowered and competent to decide such issues."¹⁵⁰

¹⁴⁷Williams, et. al. v. Bowels, 56 F.Supp. 283 (1944), 284.

¹⁴⁸Gulf Tide Stevedores v. Vories, 119 F.Supp. 708 (1953), 711.

¹⁴⁹WaWa Dairy Farms v. Willard, 56 F.Supp. 67 (1944), 70.

¹⁵⁰North-South Freightways v. United States, 55 F.Supp. 696 (1944), 698.

The Supreme Court commenting particularly on substitution for administrative decisions has stated, "Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment."¹⁵¹

Further restriction upon judicial substitution can be deduced in a court statement that: "The courts have never undertaken to control the discretion of an administrative officer or board. . . ."¹⁵² In another decision: Courts are not free to make a different choice if the agency has thoroughly considered a problem and come to a rational conclusion."¹⁵³

One court stated: "This court is fully mindful of the well established principle of law expressed in numerous reported cases that a court will not substitute its judgment for that of the administrative official in making a decision entrusted to the latter's discretion by Congressional enactment. . . ."¹⁵⁴

In the decision of the same vintage as Hobson is another reaffirmation for the separation of governmental powers. Even

¹⁵¹Swayne and Holt, Ltd. v. United States, 300 U.S. 297, (1937), 304; 57 S.Ct. 478.

¹⁵²Lehr v. United States, 139 F.2d. 919 (1944), 923.

¹⁵³Community and Johnson v. United States, 156 F.Supp. 440 (1957), 442.

¹⁵⁴Automobile Sales v. Bowles, 58 F.Supp. 469 (1945), 471.

while asserting one specific condition for involvement, the court stated that it ". . . has no right to inject itself into the supervision of state schools. . . ." ¹⁵⁵

Judicial decisions in which the subject matter is educational add more support to the arguments for non-substitution. ". . . The court should not substitute its judgment for that of the School Board in areas where the exercise of judgment does not violate some principle of the law." ¹⁵⁶ Another decision of Hobson vintage, which goes against the school board but avoids specifying educational policy and which cited Hobson, seems to provide an example of the fulfillment of judicial responsibility without overstepping the bounds and involving the courts in policy determination. In this decision, the court said that "The particular location of schools, as well as curriculum, maintenance, and operation, is a matter normally vested by law in the various school boards. . . ." ¹⁵⁷

After Hobson a different court decided against the school board on a constitutional basis and insisted that present policies and statutes prevented the fulfillment of the Fourteenth Amendment but enjoined that ". . . the defendants shall take affirmative action to disestablish school

¹⁵⁵Gross v. Board of Education, City of Knoxville, 270 F.Supp. 903 (1967), 918. Affirmed 406 F.2d. 1183.

¹⁵⁶Mapp v. Board of Education of City of Chattanooga, 203 F.Supp. 843 (1962), 851. Affirmed 319 F.2d. 571.

¹⁵⁷Griggs v. Cook, 272 F.Supp. 163 (1967), 169.

segregation and eliminate the effects of prior unlawful conduct in the operation of the school system."¹⁵⁸

As in Hobson, the court required the filing of reports which would indicate compliance of affirmative action and the court retained jurisdiction.

In the recent decision of Swann v. Charlotte-Mecklenburg Board of Education the roles of school authorities and judges are again reaffirmed. "It is still to this day the local School Board, and not the court which has the duty to assign pupils and operate the schools. . . ."¹⁵⁹ Later in the same case, "The purpose of this court is not to criticize the School Board, . . ."¹⁶⁰

In a case which affirms specific conditions for involvement the court reiterates the necessary distinction for court involvement and separation of powers. "We reach our conclusions independently, [of the school board and of the Department of Health, Education and Welfare] for, while administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards . . . is peculiarly a judicial function."¹⁶¹

This principle of non-substitution is generally upheld in even more recent decisions. As the reader will note in Chapter Four judicial substitution of remedies may be found

¹⁵⁸United States v. School District 151 of Cook County Illinois, 286 F.Supp. 786 (1968), 800.

¹⁵⁹Swann v. Charlotte-Mecklenburg Board of Education, 300 F.Supp. 1358 (1969), 1361.

¹⁶⁰Ibid., 1372.

¹⁶¹Bowman v. County School Board of Charles City County, Virginia, 382 F.2d. 326 (1967), 328.

in integration questions. The integration question is an exception and a court of appeals as recently as 1973 stated:

This Court in Ferguson Supra, 430 F.2d. @ 859, said that fact findings by academic agencies, 'when reached by correct procedures and supported by substantial evidence, are entitled to great weight, and the court should never lightly substitute its judgment for that of the board.'"162

In an earlier, but also recent appeals court decision, the court refused to interfere with a school board decision in the building of a new high school thereby implying that it would not substitute its judgment for that of school authorities unless the Plaintiffs could have proven racial discrimination or intent to discriminate through the building of the new high school.¹⁶³

In another recent appeals court decision the court stated the principle a bit differently. The court stated:

We are satisfied that the school authorities have acted with consideration for the rights and feelings of their students, and have enacted their codes, including the ones in question here, in the best interest of the educational process. A court might disagree with their professional judgment, but it should not take over the operation of their schools.¹⁶⁴

In a district court decision of similar vintage, the court reminds us that "It is important to remember that judicial powers may be exercised only on the basis of a constitutional

¹⁶²Duke v. North Texas State University, 469, F.2d. 829 (1973), 838.

¹⁶³Banks v. Munice Community Schools, 433 F.2d. 292 (1970), 294-295.

¹⁶⁴King v. Saddleback Junior College District, 445 F.2d. 932 (1971), 940 citing Epperson v. Arkansas 393 U.S. 97, 104, 89 S.Ct. 266 21 L.Ed.2d, 228 (1968).

violation. Remedial judicial authority does not put judges automatically in the shoes of school authority whose powers are plenary."¹⁶⁵ In another district court decision it was stated perhaps even more firmly that:

This Court cannot and will not substitute its judgment for that of the Board of Trustees who acted on reasonable grounds to maintain order and to insure respect by the students for their teachers, principal and superintendent. . . . If our institutions are not allowed to rule themselves, within reasonable bounds, as here, then others will rule them and destroy our educational institutions and system which are the touchstone and foundation of any progressive democracy, which owes its very existence to the fact that it is a government of laws and not of men.¹⁶⁶

Judicial substitution of remedy is at best questionable even when there has been a constitutional issue raised. There is no argument here against judicial action on the constitutional matter but it is firmly established that substitution of judicial remedy is inappropriate. There are particular functions to be served and when the judiciary begins to prescribe remedies they overstep their function and can weaken the judicial function. The concept of substitution, or one should say non-substitution, illustrates the point well.

¹⁶⁵Sando v. Alexander City School Board, 330 F.Supp. 773 (1971) 774 and citing Swann v. Charlotte -- Mecklenburg Board of Education 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d. 554 (1971).

¹⁶⁶Brown v. Greer, 296 F.Supp. 595 (1969) 602.

The Courts' Function is Not that of an Advisory Agency for Other Governmental Branches of Agencies.

It will be argued in Chapter Five that educational policy cannot be determined by the judiciary because numerous educational decisions must be made upon the basis of projected consequences and hypothetical situations. Much of the process of developing an improved educational system does require that attention be given to unproven possibilities and hypothetical conjecture. Advisory decisions are based more upon what is to come rather than what has already happened. Therefore, education cannot really be benefitted by advisory decisions because of the inappropriateness of judicial consideration essential to sound educational policy developments.

It is quite clear that the courts' own interpretation on advisory judgments is that they should not make them. Litigation must be based upon actions which have already happened, not upon those which might happen someday.

This position has been affirmed by William L. Morrow, even though the subject matter was a constitutional issue; namely, that of birth control. "Thus the court has no authority to pronounce an abstract opinion upon the constitutionality of a state statute."¹⁶⁸

¹⁶⁸"Legislation and constitutional courts: What lurks ahead for bifurcation." 71 Yale Law Journal 979 (1962), 999.

Hence, it is appropriate to argue that because the courts are limited in their advisory role functions and are not to base decisions on hypothetical or projected actions, then the courts ought to avoid policy decisions in the field of education. Attempts to develop educational remedies which might help resolve issues which lead to litigation requires considerable involvement in the hypothetical constructs of what might happen if act X is undertaken in situation Y. Educational personnel must abstract before the fact if they choose to lead and to fulfill the function demanded of their profession by society. The courts should insist that the educators fulfill the function of leadership in putting forth remedies to overcome justiciable problems presented in litigation. In this way the court more clearly fulfills its proper function of justiciable conflict and does not encroach upon the function of educators.

Judicial commentary on advisory opinions is similar to the journal literature. For instance, "The Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive."¹⁶⁹ Even in the dissenting opinion of the case, the role of the courts is firmly stated when William O. Douglas wrote:

But no matter how substantial and important the questions, they are now beyond judicial review.

¹⁶⁹Chicago and Southern Air Lines, Inc. v. Waterman SS. Corp., 333 U.S. 103 (1947), 113; 68 S.Ct. 431; 92 L.Ed. 568.

Today a litigant tenders questions concerning the arbitrary character of the Board's ruling. Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of laws. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision.¹⁷⁰

The court has also stated that academic questions (academic in the sense of hypothetical) are also to be avoided by the courts. "It follows that he asks us to answer an academic question for him, which the courts consistently decline to do."¹⁷¹

In a decision in which the question of the Supreme Court's deference to state courts was under discussion the Court stated: "Such a course would be inconsistent with our constitutional inability to render advisory opinions"¹⁷². In another instance, the court directed its attention to the complexities involved in deciding on the appropriateness of advisory opinions because of the melding of "constitutional requirements and policy consideration."¹⁷³ However, the Court did in the discussion reaffirm the ban on advisory opinions. "Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions

¹⁷⁰Ibid., 117.

¹⁷¹National Maritime Union of America v. Herzog, 78 F.Supp. 146 (1948), 154.

¹⁷²Bell v. State of Maryland, 84 S.Ct. 1814 (1964) 1821, 378 U.S. 226, 237. 12 L.Ed.2d. 822.

¹⁷³Flast v. Cohen 88 S.Ct. 1942 (1968) 1951, 392 U.S. 83, 97, 20 L.Ed.2d 947.

on federal courts."¹⁷⁴ The Supreme Court has also indicated that earlier opinions on this matter still prevail. For instance in Golden v. Zwickler¹⁷⁵ the court quoted "'The federal courts established pursuant to Article III of the Constitution do not render advisory opinions. . . .'"¹⁷⁶ The final Supreme Court decision quoted in this section indicates the necessity of a live or contemporary issue, and the continuation of the ban on advisory opinions. The Court stated "The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of laws."¹⁷⁷

In an appeals court decision in which the subject was integration and in which certain individuals had been found guilty of civil contempt the court stated in discussing one part of the case that "The fact that the court conditions the relief on future compliance does not make the issue justiciable. . . . The breadth of the court order can only be tested by the actual facts. . . . To render an appellate decision at this time would be to give an advisory opinion

¹⁷⁴Ibid., 1950, 96.

¹⁷⁵89 S.Ct. 956 (1969), 394 U.S. 103, 22 L.Ed.2d. 113.

¹⁷⁶Ibid., 959 and quoting United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947).

¹⁷⁷Hall v. Beals, 90 S.Ct. 200 (1969), pp. 201-202, 396 U.S. 45, 48, 24 L.Ed. 214 relying on Golden v. Zwickler, supra, n. 175; Baker v. Carr 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d. 663; Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293.

on abstract facts. This we have no power to do so."¹⁷⁸ Another appeals court stated: "Of necessity, the opinion of this court dealt with the posture of the factual situation presented. We do not conceive it to be the function of the reviewing court to give advisory opinions in the nature of administrative guidelines. . . ."¹⁷⁹

In a decision which that court concluded that particular actions required federal jurisdiction the court nevertheless stated in way of a reminder that:

We reiterate what we have previously said that before any case can be considered by a federal court under Section 1983 the forbidden deprivation must be complete and final. Otherwise, the courts would merely be advancing advisory opinions, which they may not do so under Article 3, Section 2 of the Constitution."¹⁸⁰

Finally one other earlier appeals court decision is noted here. It is noted because the need for judicial caution is noted during the formation of a legal principle. This issue is germane to our consideration of Hobson and to alternatives which are developed in Chapter Five. The court stated: "An

¹⁷⁸United States v. Watson Chapel School District No. 24, 446 F.2d. 933 (1971), 940. Certiorari denied 404 U.S. 1039.

¹⁷⁹Collin v. Chicago Park District, 460 F.2d. 746 (1972), 760.

¹⁸⁰Hawkins v. Town of Shaw, Mississippi, 461 F.2d 1171 (1972), 1173.

advisory opinion as to a necessarily hypothetical case is particularly undesirable where, as here, the applicable legal principles are in a formative and uncertain state."¹⁸¹

In short, there is a firm position about advisory roles played by the judiciary. Interrelated to advisory positions are such concerns as abstraction and hypothetical speculation. All of these factors, it can be argued, are not conducive to proper judicial functioning in litigation. Yet these are proper concerns for educators and perhaps essential to leadership by the profession. Hence, it is even more inappropriate for the judiciary to become ensnared in educational policy because it involves the judiciary in processes which are generally rejected as the proper consideration for judicial functioning.

Courts and Agency Discretion

Agency or commission discretion is so firmly established according to some writers that even when abused, any particular issue brought before the court should be returned to the commission or agency for remedy rather than the judiciary's imposing a remedy. It is here suggested that the same discretion be given to the field of education. "Thus, on finding an abuse of discretion, the court should have remanded to the

¹⁸¹Corsican Productions v. Pitchess 338 F.2d 441 (1964) 443.

commission for further findings; it should not have imposed on the commission what it thought would be appropriate disposition of the case. . . ."¹⁸²

Stating the position more firmly, G.Ganz wrote an article on discretion with the intent to establish ". . . that where a discretion has been conferred on any person, his exercise of that discretion ought not to be controlled by the courts so long as it is exercised honestly and the prescribed procedure is not fundamentally abused."¹⁸³

In short, the argument here is to some degree based upon competency. Deference is given to bodies and agencies because they were created to fulfill particular functions. Supposedly persons fulfilling agency responsibilities are as competent if not more so in the particular fields and while the judiciary decides when the issue is an abuse of discretion it ought to defer to the agency for further action.

Another point germane to the Hobson decision is found in the court statement: "That the evil might have been stamped out by still more lenient measures . . . is without our concern, for in the imposition of penalties Congress has a wide discretion."¹⁸⁴ And on another occasion: "Where a determination has been left to an administrative body, the delegation will

¹⁸²"Abuse to discretion: Administrative expertise v. Judicial surveillance." 115 University of Pennsylvania Law Review 40 (1966-67), 46.

¹⁸³G. Ganz, "The limits of judicial control over the exercise of discretion." 1964 Public Law 367 (1964).

¹⁸⁴Smolowe v. Delendo Corporation, 136 F.2d. 231 (1943), 240.

be respected and the administrative conclusion left untouched."¹⁸⁵

Also, in another decision:

We have repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. . . . That judgment, if based on substantial evidence of record, . . . is controlling even though the reviewing court might on the same record have arrived at a different conclusion.¹⁸⁶

The courts have been clear on administrative discretion in preventing substitution of judicial opinion: "There can be no judicial interference with the exercise of administrative discretion, either in the conduct of the proceedings or in the officer's conclusions, provided they are supported by substantial evidence."¹⁸⁷

In another decision, the same court also commented upon court determination of wisdom, stating: "A question of wisdom or expediency of an administrative act is not to be decided by a court."¹⁸⁸ Courts have even gone so far as to uphold administrators acting erroneously; "The mere fact

¹⁸⁵United States v. Big Bend Transit Co. et al., 42 F.Supp. 459 (1941), 466.

¹⁸⁶Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218 (1943), 227; 63 S.Ct. 589.

¹⁸⁷Midwest Farmers v. United States, 64 F.Supp. 91 (1945), 101.

¹⁸⁸Kauble v. Haynes, 64 F.Supp. 153 (1946), 154.

that he might be acting erroneously or perhaps even torturously does not vest the courts with jurisdiction to interfere."¹⁸⁹

In one decision since Hobson the court argued, "This court is unwilling to interfere in any manner with the operation of the school system, except where, and only to the extent that the Constitution requires it."¹⁹⁰

Another principle related to agency discretion and which also seems to have been overlooked in Hobson but which raises an important issue to be resolved in judicial activity in education is found in an earlier case where the court declared that "The administrative determination is entitled to have the doubt resolved in its favor."¹⁹¹

In more recent decisions the statements of the courts appear to uphold the principle of agency discretion. For instance in a district court decision the court stated: "The school board is the representative of the people and should have wide latitude and discretion in the operation of the school district, including hiring and rehiring practices. Such local autonomy must be maintained to allow continued democratic control of education as a primary state function. . . ."¹⁹² In a decision noted earlier for different reasons and in which the court required a new hearing for an expelled

¹⁸⁹United States v. Stewart, 234 F.Supp. 94 (1964), 98.

¹⁹⁰Whitfield v. Simpson, 312 F.Supp. 889 (1970), 896.

¹⁹¹Jones v. School Board of City of Alexandria, Virginia, 179 F.Supp. 280 (1959), 284. Affirmed 278 F.2d. 72.

¹⁹²Apple v. Mountain Pine School District 342 F.Supp. 1131 (1972), 1137.

student the court still noted that "School authorities must be given discretion within wide limits to find facts and assess their significance. . . . Of course, school authorities must have some discretion in developing fair procedures."¹⁹³ A decision which rejected the School Board's claim to a particular act as being within their discretion the court acceded that as a principle, "School boards of course have broad discretion in discharging their responsibilities, and developing desegregation plans is 'ordinarily' within that discretion."¹⁹⁴

In a recent appeals court decision the court was firm about the discretion of the school board. The court stated that ". . . Boards of Education retain substantial discretion in controlling the educational process in their schools, [citation omitted]."¹⁹⁵ In another appeals court decision in litigation over a Federal Communications Commission decision the court stated the complexity and the principle most clearly when it stated:

The central point is the confirmation of the courts 'supervisory' function, to review agency decision and assure that there has been conformance with pertinent requirements of law, and its responsibility of restraint,

¹⁹³Dejesus v. Penberthy 344 F.Supp. 70 (1972), 74.

¹⁹⁴Moss v. Stamford Board of Education, 350 F.Supp. 879 (1972) 880 citing Allen v. Asheville City Board of Education, 434 F.2d. 902, 905 (4th Cir. 1970).

¹⁹⁵Russo v. Central School District No. 1 Towns of Rush Etc. N.Y. 469 F.2d. 623 (1972) 631.

to avoid intrusion into the area of discretion, and choice of policy, vested by Congress in the agency.¹⁹⁶

And in another decision dealing with order in a school the discretionary authority of school authorities was affirmed. "They [school authorities] have inherent authority to maintain order and hence have latitude and discretion in formulating rules and regulations and general standards of conduct."¹⁹⁷ In yet another earlier appeals court decision dealing with student conduct the court stated: "There can be no question of the right of school officials to prescribe and control conduct in the schools. . . . School officials must be given wide authority in maintaining discipline and good order on campus."¹⁹⁸

Finally the Supreme Court in a recent decision on school integration and one that held when school authorities default in their responsibility to integrate, courts then have the power to fashion remedies, nevertheless stated that "School authorities are traditionally charged with broad power to formulate and implement educational policy including prescribing a racial ratio. . . . To do this as an educational

¹⁹⁶Greater Boston Television Corporation v. F.C.C.
463 F.2d. 268 (1971) 280.

¹⁹⁷Tate v. Board of Education of Jonesboro, Ark.,
Special School District 453 F.2d. 975 (1972) 978 citing
Esteban v. Central Missouri State College, 415 F.2d. 1077
(8th Cir. 1969) cert. denied, 398 U.S. 965, 90 S.Ct. 2169,
26 L.Ed.2d 548 (1970).

¹⁹⁸Bright v. Nunn 448 F.2d. 245 (1971) 249.

policy is within the broad discretionary powers of school authorities; . . . however, that would not be within the authority of a federal court."¹⁹⁹

Agency discretion is a firmly established principle in the concern over judicial-agency relationships. It is based upon related justification such as questions of competency. However, even in the conflicts where it is less clear that the agency or administrative acts were unquestionably appropriate discretion is still acceded to the agency. It has also been pointed out that educators and school boards have discretionary power to act. To bring the significance of another point more clearly into focus the reader is reminded that administrative decisions should have doubts resolved in their favor if at all possible and that agency action should stand if any possible reason exist for such action. One of the concerns of Chapter Two was that in Hobson the discretion of the school administrator was questioned. It appeared that, if at all possible, doubt was cast upon administrative action rather than to find possible reasons for such actions.

Further clarification of this issue and additional defense for agency discretion are developed in the related section which follows on arbitrariness, reasonableness, fairness and capriciousness.

¹⁹⁹Swann v. Charlotte - Mecklenburg Board of Education, 91 S.Ct. 1267, (1971) 1276, 402 U.S. 1, 16 28 L.Ed.2d 554.

As Long as an Administrative Decision is Reasonable,
Fair, Non-capricious, and Non-arbitrary, the
Court Must Let the Decision Stand

The concepts of fairness, reasonableness, arbitrariness, and capriciousness are used as a basis for assuring that governmental bodies or agencies will act appropriately and according to their legislative charge. When any are abused, judicial intervention is warranted. However, when these concepts are related to such concerns as competency or the fact that reasonable men can be expected to disagree the case can be made for judicial caution. There is no particular reason to believe that the judiciary can more accurately decide matters of fairness, reasonableness, arbitrariness or capriciousness than can those in education. If the actions which lead to undesirable consequences are unconstitutional then the courts' demand for remedies which are constitutional can be effective. However, even if the basis for questionable actions is constitutional the court should remain cautious in prescribing remedies because as indicated earlier the court should not substitute its opinion for that of established agency, legislative or executive discretion. Both the judiciary and authors of journal articles have presented reasoning which verifies and clearly illustrates this argument.

So long as the rules are reasonable and reasonably enforced, the courts' involvement should cease even if the reasonable rules appear to be mistaken. For instance, "The

court in Burnside v. Byers [363 F.2d. 744] held that a reasonable regulation is one which measurably contributes to the maintenance of order and discipline in the school."²⁰⁰

Another point germane to the reasoning here as well as to Hobson is the necessity that the party of challenge provide the proof that the actions of legislative branch are arbitrary.

When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.²⁰¹

Recently a district court in rejecting a claim of constitutional violation in regards to a hair length regulation stated that:

It is not for this Court to say that the action of the student body . . . acted without any basis in reason. Turning . . . to the judiciary itself, . . . if a courtroom bailiff attempted to appear in court with the hair style . . . of the wild man from Borneo, every federal judge in the land could readily find reason for excluding him from the courtroom. . . . The matter of decorum in the courtroom stands on no loftier rational nor constitutional basis than does decorum in the classroom, . . .²⁰²

This Court accordingly concludes that the regulation of hair length on male students at Bradley Central High

²⁰⁰"Reasonable rules, reasonably enforced", 335.

²⁰¹Borden's Farm Products Co., Inc. v. Baldwin, 293 U.S. 194 (1934), 209; 55 S.Ct. 187.

²⁰²Brownlee v. Bradley County, Tennessee Board of Education, 311 F.Supp. 1360 (1970) 1367, (affirmed 4-3 F.2d. 205.

School was neither arbitrary nor capricious nor was devoid of reason.

A court has also indicated that school authorities "may impose reasonable rules designed to assist in the fulfillment of the educational mission. . . . The liberty guaranteed by the Fourteenth Amendment implies the absence of arbitrary restraint, not immunity from reasonable regulations."²⁰³ Another court while upholding the charges brought against a school board in a class action suit stated, in dismissing the claim by one defendant, that "the request [by the Superintendent] . . . was based upon objective and legal standards which were reasonable. . . ."²⁰⁴

An appeals court recently held that "The issue [determination of constitutional rights based upon test of unreasonableness] should not turn on views of a federal judge relating to the wisdom or necessity of a school regulation controlling the length of hair worn by a male student in a state public school."²⁰⁵

In an appeals decision which dealt with a National Labor Relations Board decision but most germane to Hobson and to the general reasoning of reasonableness, the court stated that "Administrative action may be regarded as

²⁰³Gere v. Stanely 320 F.Supp. 852 (1970) 857 and citing West Coast Hotel Co. v. Parrish 300 U.S. 379, 393, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

²⁰⁴James v. Beaufort County Board of Education, 348 F.Supp. 711 (1971) 718, affirmed 465 F.2d 477.

²⁰⁵Freeman v. Flake, 448 F.2d. 258 (1971) 261 cert. denied 405 U.S. 1032 Douglas J. dissenting.

arbitrary and capricious only where it is not supportable on any rational basis."²⁰⁶ For an action to be judged as capricious or arbitrary an appeals court reminds us that "A court has no warrant to set aside agency action as arbitrary or capricious when those words mean no more than that the judges would have handled the matter differently had they been agency members."²⁰⁷ In one other recent appeals court decision the court stated that even though the particular matter contained doubt, it "is not [for the court] to give an independent judgment of our own, but to determine whether the expert agency entrusted with regulatory responsibility has taken an irrational or arbitrary view of the evidence assembled before it."²⁰⁸

In a recent decision in which the Supreme Court was called upon to determine the constitutionality of a state statute the Court, after noting that the review was a limited one, stated: "We do not inquire whether this statute is wise or desirable, or 'whether it is based on assumptions scientifically substantiated' Roth v. United States 354 U.S. 476, 501 (1957) (Separate opinion of

²⁰⁶Carlisle Paper Box Company v. N.L.R.B. 398 F.2d 1 (1968) 6.

²⁰⁷M. Steinthal and Co. v. Seamen 455 F.2d 1289 (1971) 1299 quoting selves in Calcutta East Coast of India and East Pakistan/U.S.A. Conference v. Federal Maritime Commission 130 U.S. App. D.C. 261, 264) 399 F.2d. 994, (1968) 997.

²⁰⁸Unimed Inc. v. Richardson 458 F.2d 797 (1972) 789.

Harlan, J.). Misguided laws may nonetheless be constitutional."²⁰⁹

Finally in a Supreme Court decision concerned with conflict of a College president and students over the formation of a local chapter of Students for a Democratic Society, the court stated that "A college administration may impose a requirement, such as may have been imposed in this case, It merely constitutes an agreement to conform with reasonable standards respecting conduct."²¹⁰

The reasoning presented in this Chapter is not analyzed or criticized herein. The purpose has been to illustrate that there is a significant theoretical basis for the argument for judicial restraint and caution when asked to pass judgment on educational matters. This reasoning emerges both from the judicial decisions and from the legal literature.

The literature discussed and presented in this Chapter does give credibility to the thesis of this writer; that is, that the courts ought not act ultra vires and that they ought to be most cautious when interpreting and judging educational policy. However, while the writer adheres to this general thesis, it is not justifiable to present this reasoning without also illustrating the arguments presented for judicial involvement. This conflict between the poles serves as the

²⁰⁹James v. Strange, 407 U.S. 128, 133, 92 S.Ct. 2027 32 L.Ed.2d. 600 (1972).

²¹⁰Healy v. James 408 U.S. 169, 193, 92 S.Ct. 2338 33 L.Ed.2d. 266 (1972).

basis for the presentation of more careful separation of powers. This will be done in Chapter Five.

The presentation of both arguments does not detract from the necessity to resolve this issue but illustrates that dichotomies do exist and that there is a wealth of literature indicating a basic disagreement between reasonable men. The disagreement indicates that the present judicial practice is far from satisfactory and that there is a need to attempt to resolve these poles into a mode of operation which is perhaps less tenuous and which will provide a bit more comfort for those attempting to provide the best possible education.

Before developing a proposal for resolving some of the conflict, the writer will now turn to the decisions and body of literature which supports or perhaps demands the involvement of the courts in legislative, executive, agency and educational areas.

CHAPTER IV
REVIEW OF THE LITERATURE AND COURT
DECISIONS SUPPORTING GREATER
REVIEW OF EDUCATIONAL
LITIGATION, ISSUES
AND PROBLEMS

Introduction

Arguments supporting judicial review as well as those for increasing the scope of judicial review have been well established. The arguments for extending review to more educational issues are as well developed as are those for judicial restraint. The validity of both of these positions will apparently require different resolutions to the problem of judiciary activity in educational issues. It is therefore necessary to present the arguments for judicial review as they appear in the literature and in decisions by the judiciary.

Both positions have an impact upon possible resolutions to the problems resulting from judicial encroachment upon education. To understand each position provides a better comprehension of the conflict and enhances the potential for greater precision in the delineation of the issues in the conflict. If the professions can improve the delineation between educational policies and constitutional issues and distinguish one from the other, then the degree of conflict between the judiciary and educators may be reduced.

Hence, while the general thrust of this writer's argument encourages restraint in judicial review of educational policy, the arguments favoring increased judicial review have merit and must be presented if one is to understand the basis for the alternatives presented in Chapter Five. It is necessary to present these arguments to indicate the scope and complexity of the problems of the appropriate degree of judicial review.

It can be argued that the two positions cannot be juxtaposed but are in fact extensions of one another. That is, when issues are identified correctly they are either in the courts' domain or not. When they are within the domain of the court, then the judiciary must act; when they are not and the court acts upon them, it is encroachment. However, the problem is not so easily resolved because it becomes a question of issue identification. And this, then, is essentially an extension of the initial conflict between judicial restraint and increased judicial review.

This chapter is organized in much the same manner as was Chapter Three for ease in contrasting the arguments. There are two main divisions: The first deals with the concepts of constitutionality and reviewability; the second presents the specific reasons for review based on the discussion in the first section.

Constitutionality and Reviewability

A position firmly established and maintained

throughout the history of the United States is that the court will yield to no one on matters of constitutional determination. There is little if any argument with the fact that the court is obligated to deal with such matters. Even while pointing to judicial timidity by the Supreme Court in the review of administrative actions, Frank R. Strong stated that when,

There was pressed upon the Supreme Court of the United States the proposition that it should in effect further yield its function of constitutional judicial review by according essential finality to administrative fact determination decisive of constitutional issues of federalism or private right, the Court balked in a celebrated series of decisions. . . .¹

Matters of constitutionality are, without qualification, open to judicial review. For instance, even in matters of the President's cabinet, executive discretion does not allow the President to overlook the constitutional rights of its members. The ". . . President can nevertheless not be permitted to fire a cabinet officer because he discovers him to be a Catholic or a Jew."²

The integration of schools, an issue which all too often is perceived as an educational issue rather than a constitutional one, provides an example of the ease with which courts can assert the obligation for review because of

¹Frank R. Strong, "Judicial Review: A tri-dimensional concept of administrative-constitutional law," 69 West Virginia Law Review 249 (April, 1967), 257.

²Raul Berger, "Administrative arbitrariness and judicial review," 65 Columbia Law Review 55 (January, 1965), 78.

constitutional basis. Involvement by the courts has been affirmed in these matters.

For instance, ". . . fundamental constitutional rights are involved, and the executive and legislative branches have taken very limited responsibility to date. Judicial action is presently the disadvantaged child's only hope."³ It can be argued that court involvement is imperative and that "The pace and procedures of integration will continue to be litigated thereby placing the courts, at least for the immediate future, in the posture of educational administrators."⁴

Another issue which is usually assumed to be educational in nature, but which in essence is constitutional, illustrates how the concepts of encroachment and involvement can be separated. In an article dealing with student appearance it is stated that:

The validity of public school regulation of students' hair styles is subject to constitutional attack upon at least three grounds. . . . [which are] substantive due process of law under the fourteenth amendment; . . . a denial of equal protection . . . or they may infringe freedom of speech guaranteed by the first amendment and made applicable to the states through the fourteenth amendment.⁵

Arguing specifically for court intervention in what

³Neil Jon Bloomfield, "Equality of educational opportunity: Judicial supervision of public education," 43 Southern California Law Review 275 (1970), 275.

⁴Ibid.

⁵"Public school, long hair and the constitution," 55 Iowa Law Review 707 (1970), 708-09.

appear to be educational matters, it is stated that:

Further credence is given to the desirability of judicial intervention in the educational process when constitutional rights are implicated, because it may be the only means high school students have to redress their grievances.⁶

The general trend regarding the matter of student appearance had been that schools could control appearance because, it has been argued, of the right of school authorities to maintain discipline and a satisfactory learning environment. Hence, these issues were seen as educational. Any move by the judiciary to intervene is perceived to be a matter of encroachment. If, however, as some writers and courts maintain, these are issues which are constitutional in nature, then the judiciary is remiss by not intervening. As shall be observed in the review of the court cases the problem is to determine whether the question of appearance is constitutional or educational. It is the necessity of determining such an issue which leads to the alternatives suggested in Chapter Five. The division of the courts indicates that the judiciary itself may not be the best governmental branch to adequately separate and determine such problems.

Appealing to the question of appropriate student appearance for a catalyst, the writer pauses here to explain the distinction between encroachment and appropriate review. While this writer takes the position that the judiciary does

⁶Ibid., 716.

not legislate and ought not to intervene, his research on this issue has provided the basis for greater comfort about much of the present judicial activity. Many of the conflicts or apparent conflicts in judicial involvement in educational policies result from inappropriately determining some issues to be educational policy when in fact they are constitutional. Hence, even though this writer feels strongly about maintaining separation of powers, specifically judicial responsibility separate from educational responsibility, most of the issues before the courts at the present time are not educational matters but are constitutional. Therefore, they are issues properly before the courts. The problem is how the basis for assigning an issue to the domain of the judiciary or education is to be developed.

Let us attempt such a delineation. Matters of integration, dress regulations and bussing are not educational matters. They are issues which require much time and attention by educators. They are issues in which judicial decisions may require new legislation. However, that does not make them matters of educational policy. But when the courts insist that the school personnel take particular steps which require a reordering of educational priorities or when they insist on particular affirmative actions by schools rather than declaring particular acts unconstitutional, they raise questions about their authority and constitutional mandate to act upon the issue. To illustrate, the reader is reminded that the basic issues in Hobson

were constitutional, but, the court moved beyond these issues and became inappropriately enmeshed in policy determination and implementation within the school system. This process or action, which shall be noted in Chapter Five creates conditions for a continuing denial of constitutional rights in that it can increase the amount of time required to develop acceptable educational policies consistent with constitutional requirements.

Similarly, former Commissioner of Education James E. Allen, Jr. suggested a proper role for the courts in the judicial and educational processes when he states:

Dealing as they properly must, with education not in terms of making policy or resolving conflicts in educational theories, but in terms of protection against violation of federally protected rights, the court has provided important guidelines for state action, clearly pointing the way back to the source--the Constitution and most particularly, the Bill of Rights.⁷

Further support for constitutionally requiring judicial involvement in the matter of desegregation, even though admitting the lack of influence of the Brown I decision, is found in such statements as:

However strange these concepts [that of not requiring affirmative action to desegregate] may seem in the light of Brown I holding that segregation itself renders educational opportunities inherently unequal and thus constitutionally offensive [citing Brown I, 492-95], they continue to govern substantial numbers of decisions.⁸

⁷James E. Allen, Jr., "The Supreme Court and public education," 39 New York State Bar Journal 61 (February, 1967), 66.

⁸"Notes: Desegregation of public schools: An affirmative duty to eliminate racial segregation root and branch," 20 Syracuse Law Review 53 (February, 1968), 56.

Even when it is admitted that there is an argument for the separation of powers some authors, such as Bernard Schwartz, argue for the constitutional principle of judicial involvement. "This division of labor is not, however, inexorably carried out, for constitutional principles require some judicial review upon facts as well as law."⁹

Constitutional rights should not fall victim to arbitrariness in the separation of powers. "That boundary line [between constitutional and legislative] should not be regarded as a barrier to the assertion of a litigant's constitutional rights."¹⁰

In short, it is argued that while separation of powers is an underlying principle of our governmental system, there are constitutional grounds for involvement in the matters of other governmental branches and for judicial reviewability of the actions of other agencies.

There are three categories which will be used for arguing the constitutionality of judicial review and involvement in educational issues. First, by its very charge in the constitution, the determination of constitutionality is solely the court's domain. Hence, in those areas where

⁹ Bernard Schwartz, "Judicial review of administrative action: Mixed questions of law and fact," 50 Georgetown Law Journal 684 (Summer, 1962), 687.

¹⁰ "Legislative and constitutional courts: What lurks ahead for bifurcation?" 71 Yale Law Journal 979 (April, 1962), 1011.

there are questions of whether an issue may be constitutional or educational it is for the courts and the courts only to make such determination. Second, when an individual litigant's rights or freedoms are at issue in agency actions, then judicial review and involvement is appropriate to protect those rights or to determine the constitutionality of the action. And third, when due process is at stake in agency or legislative matters judicial involvement is constitutionally required because the denial of due process is also a constitutional matter and protected by the fourteenth amendment.

In numerous decisions by the judiciary the issue of judicial involvement and its constitutionality have been discussed. In some cases the court was attempting to justify its own involvement. At other times the commentary has been an attempt to clarify or delineate the problems of involvement. A few of these decisions will be cited to illustrate the firmness of this concept, to clarify those special conditions for involvement and to provide a basis for judging whether or not Hobson as well as other decisions have deviated from this principle. Even if there is not any deviation one must consider the problem of interpretation of specialized material upon which a court decides whether or not it should become involved in a particular litigation because of a constitutional question. Poor interpretation of specialized material possibly can lead the judiciary into the morass of inappropriate policy determination or, perhaps worse, can encourage the court not to act when it is constitutionally obligated to do so.

In any matter, be it educational or otherwise, a constitutional issue requires that the court hear the issue providing there is a particular litigable issue and not one which is hypothetical or academic. For instance, a court has stated, "But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. . . . Equal protection of the laws is something more than an abstract right. It is a command which the state must respect. . . ."¹¹

The courts can obviously become involved in the case of errors by another governmental branch. ". . . the courts follow such interpretation [those of administrators] unless the error is clear."¹² [citation omitted] But even here there is the reservation that the error must be completely evident and not speculative. It is also recognized that the courts do have some legislative power by their right to clarify words and phrases used by other agencies. Clarification of such ambiguities is a legislative action and as such affirms that the judiciary function is also legislative.

For example, those rights criminal and civil, that are measured by what is 'reasonable,' really grant to courts such a 'legislative'

¹¹Hill v. State of Texas, 316 U.S. 400, 406, 62 Sup. Ct. 1159, 1162, 86 L.Ed. 1559 (1962).

¹²Bailey v. Richardson, 182 F.2d. 46 (1950), 52.

power, although we call the issues questions of fact. They require of the judges the compromise that they think in accord with the general purposes of the measure as the community would understand it. We are of course aware of the resulting uncertainties involved in such an interpretation; but the alternatives would be specifically to provide for each situation that can arise, a substitute utterly impractical in operation.¹³

Other courts affirm that it is judicial policy to become involved for the purpose of prescribing remedies or sanctioning the actions of other governmental agencies.

This court has not hesitated to fashion judicial remedies to the realities to assure actual enjoyment of constitutional ideals. In voter registration cases, for example, history taught us much. History taught us that it is not enough to forbid discrimination in the future.¹⁴

Speaking educationally, the same court stated, "Similarly, history--a long ten years of history--taught us that in school segregation cases time made increasingly more stringent sanctions essential."¹⁵

Utilizing judicial review to assure constitutionality is affirmed by the courts when they issue statements like:

It is only insofar as the lawmakers purport to act as 'administrators' of the local schools that they, as well as others concerned, are sought to be restrained from implementing measures which are alleged to violate the Constitution. Having found a statute unconstitutional, it is elementary that a court has power to enjoin all those charged with its execution.¹⁶

¹³Yin-Shing Woo v. U.S., 288 F.2d 434 (1961), 435.

¹⁴Brooks v. Beto, 366 F.2d 1 (1966), 24.

¹⁵Ibid., 25.

¹⁶Bush v. Orleans Parish School Board, 188 F. Supp. 916 (1960), 922.

Affirming a constitutional basis for the involvement, another court states, "This court is unwilling to interfere . . . except where, and only to the extent that the Constitution requires it."¹⁷

Further, while stating that the court has no right to inject itself into the supervision of schools, a court insists that it must do so if ". . . there is a clear disregard of the plaintiff's constitutional rights."¹⁸

Another court has stated even more firmly its right to involvement along constitutional lines and in a way which defends its doing so against the doctrine of non-substitution.

Moreover such a procedure [ordering school board to put forth an alternate plan to the one in question] is proper in recognition that the Court should not substitute its judgment for that of the School Board in areas where the exercise of judgment does not violate some principle of the law.¹⁹

This is a most significant point which effectively illustrates that most educational decisions are, or ought to be, decisions which are constitutional in nature or based on the protection of civil rights.

¹⁷Whitfield v. Simpson, 312 F.Supp. 889 (1970), 896.

¹⁸Goss v. Board of Education, City of Knoxville, 270 F.Supp. 903 (1967), 918. Citing Olson v. Board of Education of Union Free School District No. 12, Malverne, N.Y., 250 F.Supp. 1000, 1009-1010.

¹⁹Mapp v. Board of Educational of Chattanooga, 203 F.Supp. 843 (1962), 851. Citing Kelly v. Board of Education of the City of Nashville, 6 Cir. 270 F.2d. 209; Cert. denied 361 U.S. 924, 80 Sup.Ct. 293, 4 L.Ed.2d. 240.

Several other statements which support this theory are: "It is the court's duty to assess any public assignment plan in terms of the Constitution which is still the supreme law of the land."²⁰ The same court states later that its purpose is ". . . to lay down some legal standards by which the Board can deal further with a most complex and difficult problem."²¹ Another court states it similarly, ". . . the definition of constitutional standards, controlling the actions of states and their subdivisions is primarily a judicial function."²²

In other federal cases the role of the judiciary is affirmed on a constitutional basis. A court stated:

Pursuant to the Fourteenth Amendment and Title IV of the Civil Rights Act of 1964 this court has jurisdiction to hear and decide all issues . . . including policies with respect to the assignment of students, the allocation of faculty and staff the transportation of pupils and the educational structure.²³

²⁰Swann v. Charlotte-Mecklenberg Board of Education, 300 F.Supp. 1358 (1969), 1361. 397 U.S. 978, 90 S.Ct. 1099 25 L.Ed.2d. 389 (1970).

²¹Ibid., 1372.

²²Bowman v. County School Board of Charles City County, Va., 382 F.2d. 326 (1967), 328.

²³United States v. School District 151 of Cook County Illinois, 286 F.Supp. 786 (1968) 797 cert. denied 402 U.S. 943; affirmed 404 F.2d. 1125 and citing United States v. Jefferson Board of Education 372 F.2d. 836 (1966) affirmed en banc. 380 F.2d. 385 (1967) cert denied Board of Education of City of Bessemer v. United States 389 U.S. 840, 88 S.Ct. 77, 19 L.Ed. 2d. 104 (1967); Lee v. Macon County Board of Education 267 F.Supp. 458 (1967) affirmed Wallace v. United States 389 U.S. 215, 88 S.Ct. 415, 19 L.Ed.2d. 422 (1967).

The same case was brought into court at a later date and the court again stated:

This Court retains jurisdiction of this matter for all purposes, including enforcement and issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this Order upon the presentation of relevant information with respect to new school construction, the District's financial position on any other matter. ²⁴

In a decision which illustrates the necessity of judicial involvement to protect the Constitutional rights of children by virtue of the fact that the principle was so well established in *Barnette* the court issued an injunction "restraining the Board of Trustees of Pinetop Elementary School for excluding the plaintiffs from attendance at the school solely because they silently refuse to rise and stand for the playing or singing of the National Anthem."²⁵

In another decision a court stated:

Since the Brown case, . . . school districts are required to . . . operate a constitutional school system. Since then there have been innumerable desegregation cases . . . , which have made it abundantly clear that the district courts not only have jurisdiction, but are required to supervise school desegregation controversies within constitutional limits as interpreted by the Brown decision. ²⁶

²⁴ United States v. School District 151 of Cook County Illinois, 301 F.Supp. 201 (1969) 238 affirmed with modification 432 F.2d. 1147 (1970). (Modification allowed K-2 children in one school to be exempt from transfers, see p. 1151).

²⁵ Sheldon v. Fannin, 221 F.Supp. 766 (1963), 775.

²⁶ Dermitt Special School District of Chicot County v. Gardner 278 F.Supp. 687 (1968), 690.

Courts have also found it necessary to become involved in tract selection for new school construction to protect Constitutional rights.

Normally, of course, a court of the United States would have no legitimate concern with the adequacy or inadequacy of a tract of land . . . , but when the inadequacy of the tract is one of the potent factors rendering the proposed construction a violation of a federal court order designed to protect the Constitutional rights of citizens, then the inadequacy of the site becomes a matter of legitimate concern to a United States Court.²⁷

In Wade v. Board of School Commission of Mobile County, the court continues to affirm the principal in commenting upon a state law. Noting that an act by the legislature probably did not intend to encourage actions contrary to court orders regarding the transfer of pupils, the court stated that even if it were the intent,

Then to that extent it would be an unconstitutional law, [and an attempt to] apply the state act, would be in direct contravention of the Mandates of the Supreme Court of the United States and the Fifth Circuit Court of Appeals and their interpretation of constitutional principal.²⁸

Finally and again on the issue of integration, an appeals court stated:

Moreover, the district court correctly required . . . that the plan submitted should specifically provide for pupil assignment on the basis of a unitary system of non-geographic attendance zones or a plan for

²⁷Bivins v. Board of Public Education and Orphanage for Bibb Co., 284 F.Supp. 888 (1967), 894.

²⁸336 F.Supp. 519 (1971), 523.

consolidation or pairing of schools or both.
 . . . The court likewise properly ordered an
 end to racial discrimination in the employment
 of teachers and school personnel and in
 school activities and properly required new
 school construction be effected with the
 objective of eradicating the vestiges of the
 dual school system.²⁹

These cases, in short, indicate precedent for
 involvement in problems resulting from educational institu-
 tions and processes but not for involvement in educational
 policies. Statutes, local laws or decisions by administrators
 which disregard constitutional guarantees, or which are
 applied in such a way as to be unreasonable, capricious,
 or arbitrary, require judicial review and judicial remedy.
 In these incidents the judicial involvement is not in
 educational policy and does not establish precedent for
 such. In such instances it is a matter of protecting
 constitutional rights and the issues turn on judicial matters
 not educational policies or theory.

Up to this point the writer has looked at some
 specific reasoning for judicial involvement but the focus
 has been on the general concept of the constitutionality
 of judicial review. Now he will turn his attention to the
 specific reasoning justifying the arguments for judicial
 intervention in legislative and political matters. It is
 necessary to note here that the reasoning may not always

²⁹ Felder v. Harnett County Board of Education,
 409 F.2d. 1070 (1969), 1074.

justify the involvement of the courts. For instance, one cannot really justify judicial review by stating that the courts have the time to review an issue but because the matter of time was used in Chapter Three as a reason for non-involvement some attention is required in this Chapter to counter the earlier presentation. This is also true of such reasons as competency and non-judicial duties for judges. On these issues there is not necessarily a positive argument but there are counters to the negative reasoning presented for preventing judicial review and activity in legislative and political matters.

The Reality of Judicial Review of Legislative,
Administrative and Educational Issues

Increasing judicial involvement is a firmly established trend. Commentary which affirms the direction of more judicial involvement in non-judicial matters is well developed and can even be found in the same literature which speaks for judicial caution.

Roger DeBruler states:

The participation of the judges has grown from simple power to appoint appraisers and officers which are in some way ancillary to the judicial function, to the power to participate in the decisions to govern such as in the Conservancy Act and the School Reorganization Act.³⁰

³⁰Roger O. DeBruler, "Non-judicial duties of Indiana Trial judges," 3 Indiana Legal Forum 1 (Fall, 1969), 4.

Ironically there is a degree to which the court becomes involved in sanctioning particular educational policies even when these particular actions are arbitrary or even capricious. Sometimes the rejection of a matter by the judiciary can still indicate increasing judicial power in supporting particular educational policies.

A classic example of this is presented by Joseph T. McElveen. Arguing for increased judicial review and noting that the judiciary should probably take student litigation on such things as hair styles seriously, McElveen suggested that there is judicial disagreement with this argument. He cites a particular circuit court's statement:

Noting that the students had exhausted administrative remedies which they had used, the circuit court justified the principal's action saying, ' . . . That which so interferes (with) or hinders the state in providing the best education possible for its people must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right.³¹

Often the commentary about judicial involvement in education focuses on issues resulting from attempts to bring about social balance. Drawing upon that particular problem, Owen Fiss writes:

³¹Joseph T. McElveen, "The barber and the board: Constitutional aspects of administrative regulation of a student's hairstyle," 23 South Carolina Law Review 150 (Fall, 1971), 152. Citing Ferrell v. Dallas Independent School District, 393 F.2d. 697 (1968), 703.

The inadequacies most directly related to racial imbalance are precisely those that most defy objective measurement. Because some uncertainty is irreducible, considerations of judicial administration may prompt the courts to construct this theoretical link by creating presumptions of academic inadequacy in racially imbalanced schools; the burdens and costs of constant litigation, may make it fair to require some means of integration, thus insuring that attention is paid to the quality of education in all schools of the community. This approach would relieve courts from constant evaluation of educational needs and from meddling in the administration of the school systems through a series of fragmented decrees, such as those commanding a fairer distribution³² of teachers, or the construction of a new school.

What Fiss seems to be suggesting is that some firm affirmative directions by the court for a particular educational problem can possibly allow both the courts and educators to better fulfill their professional obligations. The time burden on the court is reduced. Also a firm basis upon which educators can act is established. The removal of the constant school litigation resulting from racial considerations will allow the judges to keep their minds on constitutional matters. The court directives will also require administrative decisions in areas in which the court now meddles, such as teacher distribution and student placement. All of this helps to remove the judiciary from

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Owen Fiss, "Racial imbalance in the public schools: The constitutional concepts," 78 Harvard Law Review 564 (1965) 605. Citing: U.S. Commission on Civil Rights, Civil Rights U.S.A. - Public Schools, Cities in the North and West, 1962.

decisions on matters which may not have any real effect upon fulfilling constitutional demands.

An interesting historical note is the past willingness of the court to assert itself in administrative affairs and statutory matters and to override the decisions of others. In the development of an argument for judicial utilization of the reasonable alternative Francis D. Wormuth and Harris G. Mirkin state:

In 1878 the Supreme Court struck down a Missouri statute which forbade bringing into the state any Texan, Mexican, or Indian cattle between March and November 1 of any given year. Apparently this was an honest attempt to exclude hoof and mouth disease.³³

They also point out that in Minnesota v. Barber³⁴ the court upset inspection laws of meat coming into that state by saying, "If the price of interstate traffic in wholesome meat was the consumption of diseased meat by the citizens of Minnesota they must eat diseased meat."³⁵

At a later point in the history of the courts, according to these authors, the courts have at least moved to requiring that unreasonable alternatives be struck down and by implication leaving open the doors for administrative affirmation of the reasonable alternative.

³³Frank D. Wormuth and Harris G. Mirkin, "The Doctrine of the reasonable alternative," 9 Utah Law Review 254 (1965) 257. Citing: Railroad Co. v. Husen, 95 U.S. 465 (1878).

³⁴Minnesota v. Barber, 136 U.S. 313 (1890).

³⁵Wormuth and Mirkin, 258.

In 1957 Justice Frankfurter wrote an opinion for a unanimous court in which he adopted what might be called the doctrine of the unreasonable alternative: The legislature might not blanket in the innocent with the noxious, . . . Michigan forbade any bookseller to carry any book containing language 'tending to the corruption of the morals of youth' . . . 'The incident of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.'³⁶

Germane to the problem is that the authors are affirming in the first instance that values were in conflict and the court overrode what were reasonable administrative or legislative alternatives to a particular problem. Later the courts ruled out unreasonable alternatives and should now affirm an active role in determining the most reasonable of alternatives. Hence, in educational matters, the courts should be actively involved in educational policy in that they can rule on such conflicting values as integration vs. the neighborhood school, the need for reasonable rules to maintain discipline vs. freedom of expression, and the use of biased tests vs. the maintenance of academic measurements and standards.

It has been suggested that over-zealous judicial supervision of administrative decisions results in a less adequate functioning of administrative agencies. However, as implied earlier in a discussion of Fiss's comments about judicial involvement in educational matters, Louis L.

³⁶Ibid., 280. Citing *Butler v. Michigan*, 353 U.S. 380 (1957) 381 and 383 respectively.

Jaffe also suggests that judicial involvement enhances the opportunity for the administrator to fulfill his or her professional obligations. Jaffe states, "The frightened, timid, unenterprising administrator may hide behind judicial negatives. But the positive and conscientious administrator will be freed from an obsessive preoccupation with the limits of power."³⁷

Affirming that there is a history for judicial review and in a sense judicial involvement, Jaffe says, "It was in 1902 that the jurisprudence of the Supreme Court took a sudden and dramatic turn."³⁸ That turn was the presumption of reviewability.

Jaffee argued for less concern about separation of powers as a pure categorical form. He based his argument upon the possibility that the government functions more adequately with less separation of powers. In another article Jaffe develops additional arguments for increased judicial involvement. In fact, Jaffe moves the concept of judicial review out from under the guise of a consideration of due process and places it firmly in the preserve of judicial power. "Due process emphasizes the protection of individual rights or interests. Judicial power emphasizes the control

³⁷Louis L. Jaffe, "The right to judicial review, I," 71 Harvard Law Review 401 (1958), 407.

³⁸Ibid., 423.

of executive action and can be used to support judicial intervention even when individual rights are not involved."³⁹

Stating his own position on separation of powers as it functions Jaffe argues and reasons for cooperation between branches, hence affirming judicial involvement. "I am adverse to a legal philosophy which insists on completely rigid roles, which stifles and discourages creative expression and interchange between judges and executive."⁴⁰ Even though this statement deals with the executive rather than administrative agencies it is most significant for consideration in Chapter Five. Here it is utilized as part of the case which can be developed from the literature for affirming judicial involvement in agency actions and in other fields of human endeavor, such as education.

This statement by Jaffe also suggests that non-judicial duties for judges would be considered appropriate. Even though it is a separate concept, the reasoning used to affirm the principle of non-judicial duties for judges is similar to that used in defense of judicial involvement generally. Hence, here it is simply suggested that non-judicial duties are appropriate and that this writer need not go into a long presentation of the arguments because the arguments are so similar to those previously

³⁹Louis L. Jaffe, "The right to judicial review, II," 71 Harvard Law Review 769 (1958), 798.

⁴⁰Jaffe, "Judicial review, I," 404.

presented. Yet, it is necessary to direct attention to this specific point because as the reader will recall there was a significant case presented that non-judicial duties for judges were inappropriate and indefensible.

In a Senate Judicial Committee report it is indicated that while there is legislative uneasiness about judges carrying out non-judicial duties it is appropriate for the judiciary to take on non-judicial duties. The commission stated in conclusion: "It is a deterrent to the proper functioning of the judicial branch of the government.

[However] The committee is not now disposed to recommend legislative action."⁴¹ At that point the committee deferred to the executive branch for maintaining appropriate utilization of judges. Following the conclusion of the article the committee provided a list of the recent federal judges fulfilling non-judicial duties.

A rather interesting incongruity appears, in this writer's judgment. The legislative branch foists upon the courts non-judicial duties and has even attempted to require the Supreme Court to take on additional duties. By doing so it would appear that the legislative branch weakens its own opposition to the judiciary when it may desire to charge the Court with encroachment in legislative matters.

⁴¹U.S. Senate Committee on the Judiciary, Report on the Use of Judges in nonjudicial offices in the Federal Government, Executive Report No. 7; Senate 80th Congress, 1st session. Nomination of Hon. Marvin Jones and Hon. John Coshie Collet. July 2 (legislative day April 21), 1947, p.7.

In an article which suggests judicial caution and the maintenance of separation of powers Frank R. Strong implies that judicial review even for purposes of ascertaining facts may be necessary upon occasion and when this is so the courts will obviously proceed to intervene.

Only where the administrative process fails to live up to quality standards normally achieved by it must the courts take over the burden of ascertaining the facts decisive of substantive constitutional claims, primarily those arising from direct constitutional limitations on government powers.⁴²

In short, there is a significant body of literature by proponents of judicial involvement to counter the arguments presented by opponents of judicial involvement when the latter reasoned that separation of powers was intended by the Constitution and that government functions best if that separation is maintained. Likewise, the widespread though uneasy acceptance of non-judicial duties for judges further affirms the arguments of the proponents of judicial involvement and are in contrast to the arguments put forth by opponents of judicial involvement.

In some recent decisions which address themselves to judicial review of Agency action, the Supreme Court has stated:

Earlier in this Term in *City of Chicago v. United States* 396 U.S. 162, 164, 90 S. Ct. 309, 311, 24 L.Ed.2d. 340 (1969) relying on *Abbott Laboratories v. Gardner*, 387 U.S. 136,

⁴²Strong, "Judicial review . . .," 275.

140, 87 S.Ct. 1507, 1510, 18 L.Ed.2d. 681 (1967) we noted that 'we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is "persuasive reason to believe" that Congress had no such purpose' citing Association of Data Processing Service Organization v. Camp 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 and Barlow v. Collins 397 U.S. 15, 90 St.Ct. 832, 25 L.Ed.2d. 192. Section 2 of the Act of 1910 contains no language displaying a Congressional intention to make unreviewable the Secretary's⁴³ approval or disapproval of an Indian will."

In an appeals court the principle was also stated:

We begin with the well established principle, only recently restricted by the Supreme Court, that 'there is no presumption against judicial review and in favor of administrative absolutism. . . .'⁴⁴

In a later appeals court decision which takes into account the need for administrative flexibility the Court nevertheless stated that:

The need for administrative flexibility does not of itself preclude an agency hearing a judicial review, but we must take care lest we kill the goose in our solicitude for eggs.⁴⁵

It is appropriate here to direct attention to two separate but related issues; namely, that of the overburdened caseload of the courts and that of judicial involvement to compensate for judicial mistakes. The issues are related in the sense that if judicial involvement is considered

⁴³Tooahnippah v. Hickel, 90 S.Ct. 1316, 1321, 397 U.S. 598, 25 L.Ed.2d. 600 (1970).

⁴⁴Feltke v. U.S. Steel Corporation, 424 F.2d. 331 (1970) 334 and citing some cases as cited in quote from Tooahnippah v. Hickel Supra n. 43.

⁴⁵Hahn v. Gottlieb, 430 F.2d. 1243 (1970) 1246 (footnote citation omitted).

necessary then these issues must be resolved to assure the proper function of the judiciary. They were put forth in Chapter Three as part of the argument against judicial activity in other fields. There is no better place to deal with these issues than at this point because to deal with them separate from comments about separation of powers would have them appear quite isolated. Here because of the relationship to separation of power there significance is better understood.

In Chapter Three it was argued that to have the judiciary involved in non-judicial matters places a burden on courts already overloaded with cases. If more burdens or pressures are placed on the courts then they will simply not be able to carry out their unique function adequately. This point was affirmed earlier in this Chapter when Fiss was arguing for particular judicial intervention to better assure constitutional rights.⁴⁶

There can be no direct answer to that argument, but a counterclaim can be stated: If judicial involvement is appropriate and desirable for increased validity in the functioning of society, then time and procedures must be found for the courts to be involved. This point and its resolution is taken up fully in Chapter Five. Suffice it to state here that the point of time was not a valid question in

⁴⁶Supra, p. 212.

the argument for judicial restraint. If function requires involvement, then processes can be developed which will allow judicial involvement and yet not require the courts to reduce their standard of performance in judicial matters.

The second related issue, that the courts must increase judicial involvement in other disciplines to compensate for judicial mistakes, carries with it a historical concept. The judicial system has judged mistakenly in the past on issues, constitutional in nature, whose consequences spill over into such fields as education. It is therefore necessary for the courts to finally take affirmative action in the policies of other fields to correct contemporary problems emerging from those earlier decisions. The bulk of bussing and integration problems as found in education are cases in point. The present unwillingness to correct the problem of de facto segregation of communities enhances the continuation of the same difficulties and processes of the past.

This is certainly an issue in such decisions as the District court reversal of Bradley v. School Board of City of Richmond in 1971.⁴⁷ And before that recent decision the magnitude and complexity of the issue was suggested by Oliver Schroeder, Jr., when he stated:

⁴⁷Bradley v. School Board of City of Richmond, 388 F.Supp. 67 (1971).

Basically the reason for today's legal turbulence over racial segregation, desegregation, and integration arises from the slavery system in Anglo-American history. When slaves were introduced to the legal system in America in 1619, no place existed to receive this new type of human relationship. In the homeland of the common law, the Englishman had divested himself of slave and serf relationships centuries before. Even when serfdom or slavery existed, the persons involved had legal rights as human beings recognized by law. When the African slave was introduced to the common law society, no human personality with legal rights was recognized. To solve legal complications which arose, the law grasped for applicable rules. These rules were found in the law of chattels; the slave came to be considered exclusively a chattel and in this way the legal problems which arose were easily solved.

How different were the legal experiences with a slave system in other segments of the Western world. The Roman Empire recognized slavery; yet the slave was a human personality. He owed his labor in bondage to his master; but he had legal rights. He could marry and have a family. He was free to travel about within certain geographic areas, much larger areas in size than the slave in Southern United States. He could often buy his freedom, and he was recognized as an entity for legal process as party or witness. Much the same story could be told for the Spanish slavery system in the colonies of Latin America. Here even the Roman Catholic Church had a place for the spiritual personality of the slave. The priest could sanction the master for ill-treatment of the slave who was after all a fellow-Christian. The Spanish legal system was keyed to a slavery legality in the Sixteenth Century in Latin America, because the homeland itself was still experiencing a slavery system with the Moors as late as the Fourteenth and Fifteenth Centuries.

In the Seventeenth Century, the Anglo-American common law lost touch with a slave system incorporating viable legal rights for the slave as a human personality. No other slave system in human history so completely dehumanized a man under the rule of law. The African slave in Southern United States had no spiritual personality. He was not a fellow-Christian and had no legal personality.

And what is most devastating, he could not even acquire such status when granted his freedom for the United States Constitution prohibited it. So said the United States Supreme Court in the Dred Scott case. Today's cattle prod used so unwisely by some officers of the law is a stark reminder that the slave was not a man with legal rights and duties; rather he was a chattel without legal recognition as a person--property like cattle.

The fourteenth amendment completely reversed our legal concept of the Negro slave; not because it imposed duties on the states to provide due process of law and equal protection of the law, not because it granted legislative authority to Congress to effect these great concepts. The real power in the fourteenth amendment lies in bestowing citizenship on the slave. The elimination of slavery by the thirteenth amendment is secondary. A free man without citizenship remains legally inferior, but with citizenship he becomes a complete human personality.

A century ago American law truly reversed legal history. Regretfully, the common law system in America failed the Negro even as a slave. We must be sure it does not fail him as a citizen. How to achieve this goal has been suggested in this Symposium by two able lawyers and a respected judge. Their legal beliefs differ widely, but their scholarly analysis can serve each reader well as individual beliefs are worked out for man's most challenging issues of racial understanding and equality.⁴⁸

Substitution of Judicial Opinion for Agency or Legislative Opinion is Appropriate

In a guarded statement on the need for court intervention in desegregation of schools ("guarded" in the sense that plans for integration must pass the test of reasonableness), Robert L. Carter presents a statement

⁴⁸"Symposium: DeFacto school segregation," 16 Western Reserve Law Review 475 (1965), 476-77.

from which one can infer the necessity of judicial intervention and the substitution of legal or judicial beliefs for those of educators or agencies. It is a statement which also reminds the reader of the grey areas in the disagreements between reasonable men because it is in his statement of what education ought to be that a mandate for a particular category of action by educational leaders is found. Carter states:

Education also involves the training of persons to be productive, . . . and to assume duties and responsibilities of citizenship in a democracy. Part of this latter aspect of education requires that a child be taught to believe in democracy, but he can only believe if he has opportunity for a future role of some worth. These purposes are not served in a racially imbalanced school, and the necessary consequence of the racial isolation is alienation from society.⁴⁹

Kenneth Culp Davis in one of his early writings admits that the necessity of technical knowledge should discourage overzealous judicial review of administrative agencies. He did not, however, accept this distinction as precise and unquestionable. But instead he argued for other criterion as the basis for actual substitution of judicial belief or action. "Substitution of judicial for administrative judgement should depend upon comparative qualifications of the administrative body and of the court to decide each question."⁵⁰

⁴⁹ Ibid., 530.

⁵⁰ Kenneth Culp Davis, "To what extent should the decisions of administrative boards be reviewable by the courts?" 25 American Bar Association Journal 770 (1939), 778-79.

In United States v. Manning⁵¹ the case for court involvement is affirmed when the court justifies the use of appointed voting referees.

The State (co-defendant) attacks the use of voting referees as an inseparable part of the plan by which the courts take over the duties which are properly administrative in character.

There is nothing new about the idea of court-appointed judicial officers. . . . The court's use of such representatives is in line with the traditional authority the courts of equity exercise.⁵²

This concept of court-appointed referees will be taken up again in Chapter Five as a desirable alternative to the action of the court in such decisions as Hobson. In essence it will be argued that such referees would enhance the functions of the courts.

In another case the court said, "Statutes should not be construed as directory when that construction would result in serious impairment of public or private interest intended to be protected by such statute. . . . The construction and interpretation of a statute are judicial functions, and when administrative interpretations and judicial constructions conflict, the latter must prevail."⁵³

Incidentally, it is proper here to suggest that had Superintendent Hansen been advised of the court's attitudes

⁵¹United States v. Manning, 215 F.Supp. 272 (1961).

⁵²Ibid., 292.

⁵³United States v. One 1960 Ford, 213 F.Supp. 562 (1962), 563.

on the construing of statutes more freely to carry out the intent rather than the letter of the law, it might have been possible to avoid some of the difficulties which the school system found itself in 1967. That is, in this writer's view, there was the tendency for Hansen to find it necessary to follow very precisely Board and Congressional directives at the cost of appropriate educational leadership.

Affirming the courts' particular role, "The judiciary is simply called upon in cases such as this, to ascertain whether the petitioner is restrained of his liberty by due process of law."⁵⁴ In another case, ". . . the courts may not step in and either stay or compel executive action unless the executive official was acting in excess of his statutory authority or transgressed a Constitutional limitation."⁵⁵

Summarizing the commentary on substitution by the judgements of the court for administrative decisions, one can conclude that as a general principle the courts will not substitute their judgment. However, in judicial literature there can be found basis upon which the court will find it necessary to substitute its judgment in place of an administrative decision. As stated by a particular court, it will substitute its judgment if " . . . it

⁵⁴Kauble v. Haynes, 64 F.Supp. 153 (1946), 153.

⁵⁵United States v. Stewart, 234 F.Supp. 94 (1964), 98.

clearly appears that the administrative decision was not based on substantial evidence or that it was arbitrary and capricious."⁵⁶

Questions, Political or Educational in their Essence, Are Not Categorically Outside the Domain of Judicial Review.

Numerous arguments were presented in Chapter Three which indicated that questions of a political or educational nature were properly placed outside the domain of the court. It will be recalled that these matters were thought to be the proper concern of the legislative branch of government and as such should remain in the domain of that branch because its bodies are more directly accountable to the people and these are matters which should be subject to the judgment of the people.

However, there is a body of literature in which can be found the opposite view firmly established and from which the conclusion can be drawn that the courts are political and legislative and can better fulfill their functions when this is recognized and that the judiciary should direct its attention to competently dealing with these matters. In much of the literature in which the above argument is presented there are qualifications and cautions presented but the theoretical construct remains firm in spite of those cautions.

⁵⁶
Automobile Sales Co. v. Bowles, 58 F.Supp 469 (1944), 471.

Mauro Cappelletti has suggested that ". . . the role of the American Supreme Court is now openly admitted to be partly political. . . . Nor does the Court seem to avoid politically delicate questions as zealously as it once did, as is illustrated by its social discrimination and reapportionment decisions."⁵⁷ While this quote does not provide the reasoning for court judgment in these areas the point is that there is historical evidence of court activities in what appears to be legislative matters. However, the question must be raised whether or not the reference to discrimination and reapportionment are actually political or if they do in fact come under the category of constitutional matters. The reason for noting this delineation here is to draw the reader's attention to such questions so that in Chapter Five the development of the position that many so-called educational issues are, in fact, constitutional in nature will have a reference point. If such issues are constitutional then one can only suggest that the courts are better fulfilling their legitimate charge.

In situations where integration of schools is a primary concern it is a historical and contemporary fact

⁵⁷Mauro Cappelletti, "Judicial review in comparative perspective," ⁵⁸California Law Review 1017 (1970), 1051.

that actions have been taken by the judiciary. Given this fact arguments are developed for increased judicial involvement to assure that we overcome segregation. Even though the issue is civil rights and the principle of court involvement is extremely clear, the consequential events are evidence that issues which appear to be in the legislative domain have been affected by and decided upon by the judiciary. "While it is difficult to determine with precision the effects and consequences of laws and court action, these case studies [studies of integration efforts in eight cities] clearly suggest that court action and inaction, as well as statutes, can and do have a significant effect with regard to the outcome of social policy."⁵⁸

Arguing for a minimum of what the courts ought to do, in the same article it was stated, "At a minimum this ambiguity status of benign social classification should be eliminated. While legal doctrine cannot alone secure integration, it should at all events not become a significant barrier to this objective."⁵⁹

In a much stronger statement regarding court intervention in political matters, and most germane here because the author's statements are specifically directed to the

⁵⁸"Affirmative integration: Studies of efforts to overcome defacto segregation in the public schools," 2 Law and Society Review 11 (1967), 103.

⁵⁹Ibid., 104.

problem of education and because of our familiarity with the author in Chapter Two, J. Skelly Wright stated that "The political thicket having been pierced to protect the vote, can likewise be pierced to protect the education of children."⁶⁰

Continuing with articles whose substantive matter is integration, Owen Fiss suggests that this is a matter that perhaps cannot be placed in the political arena and argues for judicial action as a more appropriate process for handling school integration. If it is a political matter then Fiss too appears to be affirming judicial involvement in the political arena. Though it is necessary here to proceed somewhat cautiously because Fiss is stating more specifically which of these two branches, judicial or political, ought to be making the decisions about educational integration.

Whether this suggestion [of submitting school] integration to the political arena is valid . . . may well be doubted. The virtues attributed to the political process are its ability to weigh all the relevant competing interests before reaching a negotiated solution, and its ability to fashion remedies arguably more flexible than those afforded by the judicial process. Yet, in many communities Negroes have either been excluded from this political process altogether or severely limited in power . . . to delegate further the task of making critical empirical and normative

⁶⁰ J. Skelly Wright, "Public school desegregation: Legal remedies for de facto segregation," 40 New York University Law Review 285 (1965), 305. Citing Baker v. Carr, 369 U.S. 186 (1962).

judgments to the political process might well involve greater human and social cost than establishing a tradition of judicial review.⁶¹

Arguing generally for judicial intervention Fiss also said, "The reach of these propositions [generally that imbalance is unacceptable for a series of reasons] cannot be ignored: They provide the framework for constitutionally permitting and sometimes requiring radical reform of the status quo."⁶²

One of the strongest statements on judicial attention to political activities was made by Dean Alfange, Jr. He stated:

The alternative--and, it would appear, the only alternative that reasonably can be expected to lead to an enlightened constitutional jurisprudence--is that judges overcome their sometimes almost pathological distrust of themselves and recognize that they do have a legitimate political function to perform.⁶³

Also speaking out in favor of more judicial involvement in political matters, Roscoe Pound has commented upon some of the apparent reasoning for lack of judicial involvement up to the present time. "It seems clear that the settled doctrine of judicial avoidance of deciding political questions has its basis in judicial caution rather than in legal philosophical analysis."⁶⁴

⁶¹Fiss, 612.

⁶²Ibid., 617.

⁶³Dean Alfange, Jr., "The relevance of legislative facts in constitutional law," 114 University of Pennsylvania Law Review 637 (1966), 639.

⁶⁴Roscoe Pound, Judicial review: Its role in inter-governmental relations," 50 Georgetown Law Journal 653 (1962), 660.

This category will be referred to again in Chapter Five as this writer attempts to develop a potential alternative which might make the relationship of the judiciary to education more comfortable and more functional. Suffice it to say here that there are firm arguments favoring judicial intervention into the so-called political arena. And to allow the judiciary to participate in that arena categorically allows it into educational matters. Following is a discussion of a closely related category; that of judicial competency in non-judicial fields.

Questions of Competency do not in Themselves Deter
Judicial Involvement

Writing generally in favor of judicial review and in answer to those critics who might challenge the legitimacy of review on the basis of judges' competency in technical or non-legal matters, Harvey Saferstein stated, "With an adequate record and sufficient time the courts have found themselves able enough students in various fields of technical expertise."⁶⁵ To be comfortable with this statement requires that some attention be given to the problems created by the backlog of cases faced by many courts. Most judges do not have the time to gain more and more education. Likewise, as shall be developed in Chapter

⁶⁵Harvey Saferstein, "Nonreviewability: A functional analysis of 'Committed to agency discretion,'" 82 Harvard Law Review 367 (1968), 384.

Five, while it may be possible for a judge to develop this expertise, it may not be one of the better alternatives for assuring better public education nor is it necessarily a wise use of judicial time.

With a degree of caution, Louis Jaffe suggests that the judiciary is competent to judge areas which appear to be somewhat in the grey area between a question of law and a question of fact.

But when there arises the question [of] what legal consequences to attach to an accounting decision, it is a question of law. The judgment of the expert may, so we have seen, be relevant to the decision, but it cannot by reason of its 'pure' quality, its specifically expert character, transform a question of law into a question of fact and so insulate the decision from legal judgment.⁶⁶

Implying that perhaps indecision is sometimes hidden behind the cloak of expertise, Jaffe also stated, "We may close this paper and round out its thesis by a reference to two cases which underline the proposition that judicial review guarantees the deeply human claims of the individual against the pretensions of the merely expert."⁶⁷

The strongest statement this writer found on the issue of judicial competency was made by Kenneth Culp Davis. He stated the concern in the following manner:

⁶⁶Louis Jaffe, "Judicial review: Question of law,"
⁶⁹ Harvard Law Review 239 (1955), 269.

⁶⁷Ibid., 276.

The sweeping generalization, often made, that members of administrative bodies are experts as compared with judges is accurate only in the sense that administrators by reason of specialization may be more familiar with particular subject matter. However technical a problem may be, intelligent and trained judges having little initial specialized knowledge may often muster greater expertness than second-rate administrators having technical experience but lacking ability and training required for comprehending relevant principles of justice.⁶⁸

Such a strong statement and its implication about a competency differential between professions makes it impossible for this writer not to comment upon the potential for some judges to be second-rate and of judges to be less concerned with justice than politics. Given these counter points the implication that the judiciary ought to be the final authority in non-judicial matters again becomes questionable.

Davis partly answers the criticism just offered, or at least provides the opportunity to deal with the total situation of second-rate administrators or second-rate judges rather than just second-rate administrators. He said, "Each agency must be studied separately; reviewability should vary as quality of personnel varies."⁶⁹ If one extends the quality of personnel to include judges as well as administrators then it seems that

⁶⁸Davis, 775.

⁶⁹Ibid.

the position is appropriate. Competency is the determining factor. When the judiciary is competent and any agency or administrator is not, then it may be appropriate for the judiciary to act.

Reacting to the plea that lack of competency should cause judicial restraint, the Supreme Court stated:

But we act in these matters not by authority of our competence but by the force of our commission. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this court when liberty is infringed.⁷⁰

Abuse of Discretion Requires Judicial Review

The presentation in Chapter Three indicated that the administrative agencies or administrators have considerable latitude if not complete latitude based upon expertise in determining policies and actions. Some even argue that the administrator has complete discretion. However, when the administrative body or administrator acts in a capricious, arbitrary or unreasonable manner there is an abuse of discretion. In a sense then, the administrator may have discretion but it is subject to review and as such becomes conditional upon the judgments of the judiciary.

It is precisely this point which at first appears to be an adequate resolution in the question of review

⁷⁰West Virginia State Board of Education v. Barnette, 63 S.Ct. 1178 (1943), 1186, 310 U.S. 624 (1942), 640.

and which helps to more clearly delineate the difficulties in determining the role of judiciary. However, reasonableness which is conditional upon the judiciary is not comforting unless one believes that the judiciary is generally more competent in all disciplines than the professionals trained in those fields.

There is a significant difficulty in determining what is unreasonable. Though perhaps of more concern is the willingness of the courts to let stand unreasonable administrative decisions which they deem reasonable because of lack of administrative competency. The immediate case in point is the issue of student hair length and the equating of length to scholastic grade-point averages.⁷¹ When the courts let stand such administrative decisions they are judging unreasonable actions to be reasonable.

In any event there are numerous examples of courts determining administrative actions to be an abuse of discretion. However, once abuse of discretion is ascertained there is often considerable debate about what affirmative action should be prescribed to the agency or administrator. This is certainly one of the major issues in Hobson. While it seems logical that the courts ought not substitute their opinion for that of administrative opinion the literature verifies that this has upon occasion been done.

⁷¹Ferrell v. Dallas Independent School District, 261 F.Supp. 545, 393 F.2d. 697 (1968). Certiorari denied 393 U.S. 856, 89 S.Ct. 98 (1968).

Thus, on finding an abuse of discretion, the court should have remanded to the Commission for further findings; it should not have imposed on the Commission what it thought would be an appropriate disposition of the case, thereby foreclosing the further exercise by the Commission of the discretion vested in it by Congress.⁷²

Deference and racial imbalance provide the basis for further consideration of acceptance of the right of the court to become entangled in discretionary aspects of administrative decisions. Quoting Owen Fiss as he deals with racial balance in the schools:

However, it is difficult to determine the proper extent of deference. In discussing whether it was constitutionally permissible for the school board to undertake correctional measures voluntarily, it was suggested that a court ought to respect the school board's assessment of the evils of the imbalanced school and the benefits and costs of correctional measures, even if the court would have resolved the issue differently. To suggest now that the court need not show the same degree of deference when a school board decides not to correct an imbalance is neither contradictory nor paradoxical. The deference given the school board's determination in the former situation derives from a judgment that correctional measures do not threaten a constitutional value so basic as to demand close judicial scrutiny. However, when the school board refuses to correct the imbalance, a basic constitutional value--the equality of educational opportunity--may well be threatened. This possible threat entitles a court to refuse to defer to the administrative assessment underlying the school board's policy of disregard.⁷³

⁷²"Abuse of discretion: Administrative expertise v. Judicial surveillance," 115 University of Pennsylvania Law Review 40 (1966-67), 46.

⁷³Fiss, 610.

Even though the role of discretion is firmly established, Louis Jaffe still suggests that discretion is conditional, if tested, upon the courts' interpretation. He states, "We may for our present purpose define discretion as a power to make a choice within a class of actions. Despite such discretion, normally a court will review an agency's choice in order to determine whether it is within the permissible class of actions."⁷⁴

The courts have provided considerable discussion on this topic in their decisions. Commenting upon the significance for a board or agency once the right of discretion has been given to it by the legislature, one court stated, "In view of this broad discretion vested in the board, this court can only interfere in the event of an arbitrary exercise of abuse thereof."⁷⁵ Justification for involvement of the courts when discretion is abused is stated thusly: ". . . in the absence of an abuse of discretion, the school authorities, and not the court, shall prescribe proper disciplinary measures. . . ."⁷⁶ Ruling Case Law is also quoted in this same decision on the matter of abuse of discretion; "'The courts will not interfere with the exercise of discretion by school

⁷⁴Jaffe, Judicial review, II," 774.

⁷⁵Christian v. Jones, 32 A.L.R. 1340 (1924), 1342; 100 So. 99 (1924).

⁷⁶Tanton v. McKenney, 33 A.L.R. 1175 (1924), 1177; 197 N.W. 150.

directors in matters confided by law to their judgment, unless there is a clear abuse of the discretion, or a violation of law."⁷⁷

Judicial statements on statutes indicate the same position of need for court involvement when they are incorrect or arbitrary. "Continuous practical construction of and proceedings under a statute by public officers in discharge of their duties should control and be followed, unless manifestly wrong."⁷⁸ The court has no right to intervene ". . . so long as the ruling is not of the arbitrary character referred to."⁷⁹

Further, "The court concludes that the Commission's construction of the statute is clearly erroneous and that a different construction is plainly required."⁸⁰ And, "The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."⁸¹ The court has also stated that the ". . . interpretation of the statute

⁷⁷Ibid., 1178; Citing 24 R.C.L. 575.

⁷⁸United States v. 1,960 Acres of Land Etc., 54 F.Supp. 867 (1944), 832.

⁷⁹Williams v. Bowles, 56 F.Supp. 283 (1945), 284; Citing: 42 American Jurisprudence, Subject Public Administration Law, Section 209.

⁸⁰Interstate Commerce Commission v. Love, 77 F.Supp. 63 (1948), 67.

⁸¹National Maritime Union of America v. Herzog, 78 F.Supp. 146 (1948), 155.

by the administrative branch of the government should not be interfered with unless clearly unlawful."⁸²

More recently and also in statutory law, judicial involvement in order to right wrongs is reaffirmed. "The rule of strict construction of exemptions upon which plaintiff relies should not be applied to the extent of requiring a result contrary to the clear intent of the law. Neither should the rule attributing great weight to contemporaneous administrative ruling be applied to require the Court to follow such rulings when they are found to be clearly wrong."⁸³ And, "Moreover, it [plaintiff's contention] would wholly ignore the administrative interpretation, which is entitled to great weight unless clearly wrong."⁸⁴ More firmly stated as a reason for action is the courts' statement that ". . . the construction of a statute is a matter ultimately for the Courts to determine. Where the Commission's construction is clearly erroneous, the rule contended for does not apply."⁸⁵

⁸²Cohn v. United States, 103 F.Supp. 188 (1951), 190; Citing McCarl v. U.S., 42 F.2d. 346, 346.

⁸³Interstate Commerce Commission v. Yeary Transfer Company, Inc., 104 F.Supp. 245 (1952), 247 (Citation omitted).

⁸⁴Sharp v. United States, 108 F.Supp. 745 (1952) 748.

⁸⁵J-T Transport Company v. United States, 185 F.Supp. 838 (1960), 850 (Citation omitted).

Reaffirming that administrative rules may not be unreasonable, the court has stated, "In order to be binding upon and enforceable by the courts, administrative interpretation either of the law or regulations having the force and effect of law must be in harmony with and tend to effectuate the cardinal purposes of the law, and may not be unreasonable."⁸⁶

In the decade of the 1940's, a court stated that "While an interpretive administrative regulation consistent with the statute has great weight, [however] one which operates to create a rule out of harmony with the statute, is a mere nullity."⁸⁷

More recently affirming erroneous or inconsistent application of rules as reasons for judicial involvement the court has stated, "The administrative interpretation by a Commission of one of its rules or regulations is of controlling weight unless plainly erroneous or inconsistent."⁸⁸ The courts admit that officials have a great deal of latitude in their exercise of discretion, but the ". . . officials are always bound by the requirements that the rules and regulations must be reasonable."⁸⁹

⁸⁶Bowles v. Seminole Rock and Sand Co., 145 F.2d. 482 (1944), 484.

⁸⁷Hamilton National Bank v. District of Columbia, 156 F.2d. 843 (1946), 846.

⁸⁸Greene v. Dietz, 143 F.Supp. 464 (1956), 470.

⁸⁹Calbillo v. San Jacinto Junior College, 305 F.Supp. 857 (1969), 858. Citing Ferrell v. Dallas Independent School District, 393 F.2d. 697 (1968) and others.

For the proponents of judicial review and judicial involvement, discretion is in essence conditional upon the judicial interpretation. Purists may argue that discretion is categorically the right or responsibility of those in whom certain powers have been vested. If review indicates unreasonableness, arbitrariness or capriciousness then discretion has not existed and in this sense there is no real judicial involvement or interference in discretion. It also appears that an administrator's or administrative agency's actions are subject to review for final determination of acceptable class of action. The opposite of this position was presented in Chapter Three.

As in the earlier discussion of separation of powers, parts of the discussion of discretion were focused upon the concept of unreasonableness, arbitrariness or capriciousness. These concerns will continue to surface in the discussions of what is required of the judiciary when discretion is judged to have been abused by the administrators.

The Judiciary is Responsible for Providing Relief when
Administrators or Administrative Agencies Act
Capriciously, Arbitrarily and/or Unreasonably.

The logic of the argument which requires judicial intervention because of capriciousness, arbitrariness or unreasonableness seems to be without opposition. However, there is some question about how the judiciary handles the matter after the determination and disagreement over what may be unreasonable. This same difficulty was mentioned

in Chapter Three while examining the opposite idea of what the courts ought to do.

Some proponents seem to want to avoid the conflict by suggesting that unreasonable is almost absurd and is that which no reasonable man would do under any condition. In our present conflicts over bussing and integration plans this approach would hardly suffice for either of the positions. For instance in one article the statement reads, "Thus, if an agency reached a completely unreasonable result after weighing the relevent facts, the court should set that finding aside."⁹⁰ Yet the same article puts forth, almost immediately, a disclaimer, "Because the balance is so delicate, however, the courts should, and probably do, avoid striking down agency action unless they feel competent to find that the agency has clearly acted unreasonably, and thereby'abused its discretion.'"⁹¹

Implying the extreme position one must take before being unreasonable but affirming the right of the judiciary to determine unreasonableness, Raoul Berger states:

Reasonable judgments, even if mistaken, must be accepted by the individual as part of the cost of living in an ordered society. But when unreasonable, they are insufferable; and if they are to be sustained--indeed if constitutionally they can be--it should be after the most painful

⁹⁰"Abuse of Discretion: Administrative expertise v. Judicial surveillance," 42.

⁹¹Ibid.

deliberation, rather than by resort to easy shibboleths.⁹²

In many decisions the courts have struck down rules, such as those regulating hair length of male students, as being unreasonable. However, illustrating how the principle of reasonable rules might be applied in this problem it is possible to find such commentary as "If a student refused to wash or bind his hair, or to take other precautionary measure, he could be refused admission to the classroom, lab or shop until the specific safeguards were observed."⁹³

Jaffe comments on the role of judicial review of administrative actions. While precisely limiting the court he suggests that the court is the real authority in determining arbitrariness. "Does this [i.e., not making decisions which might be made by others] argue against 'judicial intrusion'? Yes, if the judiciary forgets its role and tries to run the show. No, if it limits itself to the questions of illegality or arbitrariness."⁹⁴

Summary

Two statements from Kenneth Culp Davis provide cause for reflection about the question of review. Even though he was commenting upon judicial review of administrative action his comments summarize well the problem faced in our present concern of judicial review and education. He stated:

⁹²Berger, "Administrative Arbitrariness," 94.

⁹³"Public schools, long hair, and the Constitution," 710.

⁹⁴Jaffe, "Judicial review, I," 407.

Because these two opposing philosophies [that of administrative rights and social concern and private rights and legality] are widely adhered to, the American democratic idea probably requires that neither should prevail to the extinction of the other and that political will should determine the emphasis. There are no absolutes.⁹⁵

Before attempting to present one position or the other too firmly while yet recognizing the need to live with the grey-ness which becomes absolute on the basis of the decisions of any given day, Davis also states:

Solely by reason of agreement with the opinion of the Mr. Justice Brandeis in the Southwestern Bell Telephone Co. case, one may very reasonably believe in limiting judicial review of methods of valuation. And one who favors liberality toward claimants in workmen's compensation cases may consistently advocate increased judicial review in West Virginia where the commissioner is strict and the court liberal and increased administrative finality in Michigan where courts are less liberal than the commission.⁹⁶

This brings the debate to perhaps a most inconclusive point. As was indicated in Chapter Three the literature and decisions reveal well developed and well defined cases for judicial restraint. Likewise, to this same point the literature and decisions reviewed in this Chapter reveal a well developed and defined case for judicial aggressiveness.

Also in summary it should be stated that this conflict between two well developed positions and with their qualifiers and delineations provides the framework for the development of

⁹⁵Davis, "To what extent should the decisions....," 780.

⁹⁶*Ibid.*, 780 and 803. Citing *Missouri ex el Southwestern v. Public Service Commission*, 262 U.S. 276 (1923), 289; and *Demastes v. Commissioner*, 112 W.Va. 498, 165 S.E. 667 (1932); and *Ginsberg v. Burroughs Adding Machine Co.*, 204 Michigan 130, 170 N.W. 15 (1918).

a position that enhances the concept of separation of powers and at the same time does not reject the judicial role. Such a position as shall be seen in Chapter Five is not a middle of the road position or compromise. In the position as developed attempts were made to utilize the reasoning presented through our Chapters Three and Four. In the development of the position, consideration was given to the differences of opinion and to the position of Davis as presented in the above quotes. Namely, that if the polarizations are valid and people do act on a belief in one position or the other they should do so with humility, and a willingness to develop a more comfortable position on judicial review.

Let us now turn our attention to the implications that these positions have for education and to the development of alternative processes in judicial review.

CHAPTER FIVE

CONCLUSIONS AND ALTERNATIVES FOR JUDICIAL REVIEW OF EDUCATIONAL POLICIES

At the onset of this Chapter it is perhaps appropriate to remind the reader of the general thesis of this dissertation and of the reasons for the statement of that thesis. Perhaps it is also of value to indicate the development of that thesis from the original hypothesis which served as the catalyst for the research. The research caused some modification of the original hypothesis. This modification however did not negate the purpose of the study and contributed significantly to the types of alternatives to be suggested in the last section of this Chapter.

The hypothesis was that the courts ought not involve themselves in legislative matters. Dialogue and initial research altered this to the hypothesis that it may be obligatory because the judiciary is a part of the legislative process by virtue of interpretation of laws and of the wording of laws. Such a position is reflected in the thinking of some educators and others when it is suggested that decisions such

as Brown, Tinker and Carr are proof positive that the Courts do appropriately legislate. For instance Garber has stated that:

As they interpret statutes and constitutional provisions, and as they rule on constitutionality of legislative enactments and school board rules and actions, they are in reality making educational policy. For example, when the United States Supreme Court (1954) in the famous Brown case declared segregation of pupils on the basis of race and color was unconstitutional and when that same Court (1963) declared Bible reading in public schools was unconstitutional, that Court was, in effect, making policy.¹

However, still unsatisfied and in conflict with the last part of the above statement, the hypothesis became that while legislative acts by the judiciary may be acceptable it is still not appropriate for the judiciary to become involved in policy determination or formulation in a field such as education. To illustrate this distinction this writer put forth a hypothetical situation from the field of medicine. The argument was that it might be possible that few persons would disagree with the right or obligation of the judiciary to make a determination that a physician or hospital might be required to treat any patient regardless of his or her ability to pay for such care. On the other hand, few would

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Garber, Lee O., and Reutter, E. Edmund Jr. The Yearbook of School Law 1970. (Danville Illinois, The Interstate Printers and Publisher Inc. 1970) p. 15. See also same title in series 1963, p. 7 (Garber sole author); 1968 p. 18 (same authors); 1971 p. 13 (Garber with Seitz, Reynolds).

agree that the physician should be directed by the court as to what particular diagnosis, procedures or remedies ought to be used whenever symptoms A, B and C occurred, especially if all symptoms occurred simultaneously. This writer argued that this was analogous to education and that the judiciary has, upon occasion, in education, proceeded to this particular level of policy determination.

This process resulted in the development of the primary general thesis, that while it is theoretically appropriate, the judiciary still ought to practice extreme restraint when called upon to involve itself in legislative matters or policy determinations. While such a thesis appears cautious such a position is also implied by John S. Brubacher in a discussion on due process at the university level. In the conclusion in his overview he states that:

There seems to be little doubt that the courts should continue to fulfill their long-standing role of examining whether there is legal authority for whatever acts are taken in the course of the daily life of the academy. (b) There is little disagreement, too, that in general the courts should not examine the discretion exercised under the guise of authority. The expertise of the courts is the law, not policy in higher education. . . . In the case of the First Amendment the intervention of the Courts in university discretion seems to have been warranted and salutary.²

²John S. Brubacher, The Courts and Higher Education, San Francisco Jossey-Bass Inc. 1971, p. 145.

Evelyn Fullbright indicates a similar thesis though one that appears to be a bit less cautious in reference to United States Supreme Court decisions. She states that: "It is alarming to note the criticism of late that is being launched against the United States Supreme Court for its shaping of educational policy pertaining to the curriculum and other phases of the public schools."³ She suggests such criticism is unfair and that the Supreme Court is cautious in its intervention and will intervene only in certain specified circumstances. She states:

The tribunals of the nation . . . only have the authority to adjudicate the particular cases that are brought to the courts. Unless it appears that the act of a school agency has been unconstitutional or illegal or unless an action has amounted to an abuse of the power vested in the school authority the courts will not interfere with the discretionary action of school officials.⁴

Even though both Fulbright and Brubacker are less cautious than this writer the concerns expressed by them indicate that the appropriate degree of judicial review of educational policies is still an open question.

However, this writer believes that the general thesis is valid, even when the judiciary must decide constitutional issues in particular litigation. It is also believed that the judiciary does not necessarily improve education by assuming responsibility for the determination of educational policy. In fact, it has been argued that when court actions

³Evelyn R. Fulbright and Edward C. Bolmeier. Courts and the Curriculum Cincinnati, The W. H. Anderson Co. (American School Law Series) 1964, p. 3.

⁴Ibid., 160.

are ultra vires it is possible that the educational benefits for students may actually decrease.

The extension of judicial restraint to Constitutional questions is a concern because of the trend of increased judicial actions in the review of educational procedures and in the development of educational remedies. Yet at the same time, the judiciary sometimes appears reluctant to pass judgment on emergent educational conflicts which appear to be constitutional in nature. This undesirable state of affairs requires that alternatives be developed which have potential for improving the situations now faced both by educators and by judges when they are required to protect the constitutional rights of citizens in the educational process and to yet assure sound educational practices.

The complexity of the problem and the undesirability of the present situation regarding judicial review and education have been the topics of Chapters Two, Three and Four. However, so we can more clearly focus upon the relationship of the alternatives to be presented in this Chapter to the arguments presented for judicial caution, these arguments are recapitulated.

The decision in Hobson v. Hobson illustrated the problems that can befall the judiciary when it attempts to improve education. The problems result when the court acts in an area where expertise is lacking and in an area where faulty interpretation of material leads to debatable judicial remedies. These problems and alternative interpretations

of evidence were presented throughout Chapter Two. It is further argued that decisions such as Hobson require "all deliberate speed" in the development of alternatives if the constitutional rights of students are to be protected in the educational process. It was argued that in the Hobson decision the court may have acted ultra vires but that even if not, the interpretation of the material was faulty, and hence the decision questionable. The Court, even though upheld on appeal, did not develop remedies which gave evidence of strong potential for improving the education to be received by the students living in and attending the schools of the District of Columbia.

The beginning of an uncomfortable paradox was presented in Chapter III when the argument was developed for caution on the part of the judiciary when acting on issues whose content make questionable whether it ought to be defined as a judicial matter. It will be remembered that the arguments supporting an extremely cautious judiciary were developed from case law as well as legal literature. The point here is that there are well-developed and valid arguments which insist that the judiciary should refrain from deciding matters which belong in the domain of other governmental agencies. It was also argued that the judiciary should refrain from deciding matters which belong in the domain of a discipline or profession as well as matters which require specialized expertise. Areas which require specialized expertise also often require extensive hypothetical dialogue prior to any

judicial decision. Such hypothetical dialogue is inappropriate for the judiciary.

However, these arguments were countered by the presentation in Chapter Four. There the position was developed that the courts not only should be involved with matters which are constitutional but that there are numerous reasons for judicial involvement in matters which appear to be non-judicial or policy matters. An argument was presented which went so far as to suggest that the judiciary not only has the competency to decide matters not strictly in the judicial realm but that the judiciary is as competent as are so-called experts in various fields, and such competence allows the judiciary to determine remedies or policies when provided with sufficient background material.

What is interesting to note, and which helps lead to the dilemmas resulting from these conflicting positions, is the fact that while each position is valid, there are well developed qualifiers in each body of literature. The dilemma we must deal with, as it now appears, is that of selecting between two well developed positions put forth by reasonable men of good will and of similar abilities. The existence of such a well developed duality points to the uncomfortable situation that this problem has presented to us throughout the history of the judiciary in the United States. The point as it affects education is that neither position, that of judicial caution or judicial involvement, has been satisfactory in its application. Perhaps some alternative procedures

as well as a more precise delineation of separation of powers might be suggested which will help the courts in the myriad of court cases involving interpretation of educational material and which might provide remedies for problems arising in the field of education. While any absolute position on separation of powers is not acceptable to this writer in any attempt to provide equal protection under the law educationally, the concept does provide a focal point for developing alternatives and for reminding the judiciary and educators of existing legal and professional obligations.

In terms of what is not happening educationally in many schools today, this writer feels that it is necessary to consider the impact of a related issue not discussed earlier in the dissertation. That issue is the impact that even negligence decisions have upon actual classroom organization and atmosphere as well as the potential contained in them for requiring that some philosophical positions be rejected as a basis for developing the learning process in the school. It is interesting to note that on the part of educators there is apparently more fear of what the courts might do rather than what the courts have done in the area of negligence. The fear of having to face the prospect of trial even knowing one will probably win affects the emotional response of a teacher or administrator at any given point. This fear affects the classroom performance and organization of many teachers. The concern, especially in terms of classroom control, with how a particular act might be perceived in court, rather

than whether it is appropriate or educationally sound is often detrimental to the teaching/learning situation. Many teachers and educators can recall admonishments by administrators and instructors about what might happen in court, especially in the case of classroom discipline.

If all of this served to create more rational behavior on the part of educators this might be appropriate. But it seems to this writer that such concerns contribute to the development of a pseudo-environment, an environment dissimilar to the real world and sterile in terms of human experiences and processes. This is not to suggest that we create artificial hazards but only that we recognize that all environments which allow for life worth living are loaded with a certain degree of risk. Teachers find it necessary to keep students in their seats and in line as well as to insist that they stop at the top of stairways. Requiring students to remain within the physical boundaries of the room is also a result of such concern. In some school districts students cannot be allowed to do such "environmental activities" as opening windows. This is in order to reduce the chances of litigation by an injured student.

Teachers are requested to develop teaching styles which conform to such concepts of control and to do what is necessary to control groups of children. The implication is that what is good in handling the group is good for individual children, an implication some educators believe is not necessarily true. As a result, less emphasis is placed on changing the learning

environment. Little attempt is made to alter the way buildings are constructed, or to improve judicial awareness of the educational implications of the attitudes they have helped to create. By emphasizing control educators fail to fully recognize the environment outside of the school and fail to deal educationally with an environment and processes which involve elements of danger for pupils as well as adults.

Reference is made to the area of negligence because it is an area that in terms of judicial activity, few would disagree that judicial activity is valid. Yet, even though it is a valid concern there is often a vast area for disagreement about what constitutes negligence. Determination of negligence, either based on an act of commission or omission, can have significant impact on the educational process. In those cases where an act is so categorically negligent by almost anyone's standard for acting prudently there is little problem of excessive influence by the judiciary. But here, attention is being called to areas more grey in essence.

The following example might serve to illustrate the point on negligence. Few would argue that a request by a teacher of a kindergartener to open a window which could only be reached by standing on a chair or climbing on a wall shelf is certainly in the realm of teacher negligence. However, a request by a teacher to open a window, if operating properly and not requiring such things as excessive reaching or standing on a make-shift ladder, is not a negligible act. Yet, the very fear that it might be considered negligence

requires that some teachers not be allowed to permit students to open windows.

Another area in which negligence is implied is when a teacher allows a pupil to be out of the room and, hence, not in the physical presence of a teacher or responsible adult. Such an implication, to this writer, is unreal. The implication is that with an adult present children will not be subject to harm. This simply does not recognize the dangers that children must face without adult supervision in the non-school environment.⁵

Another interesting point, and one which has been alluded to throughout the dissertation but not dealt with specifically is that some in the legal profession seem to consider education as fair game for review and judgment.

The argument is upon occasion put forth that educators so disagree among themselves that it becomes necessary for others to determine what ought to be done educationally. There appears to be some feeling that this results from educators who are too weak or cowardly to take a strong public position on any educational matter.⁶

⁵In no way am I suggesting here that we should not attempt to remove danger from the environment. However, it appears unrealistic to develop a restrictive and sterile environment when society itself is not such. Also it must be noted that the fear teachers have here is more apparent than real in that the judiciary allows considerable discretion.

⁶This position is difficult to document but this writer has heard it presented by Dr. George Johnson who at that time was Professor of Education and teaching Education Law at Michigan State University East Lansing, Michigan. The conversation took place during a discussion with Dr. Johnson about Hobson and in the summer of 1967. This writer has also heard the same position presented by lawyers and law students as well as colleagues.

Such a position can easily lead to decisions expedient in nature. Such expediency can lead to a hierarchy of values in which the sought for ends receive the highest priority regardless of the processes used for bringing those ends about. In such a situation change becomes the end and who initiates the change or who is involved in developing the change is of little consequence. The difficulty here, of course, and also in the arguments supporting such a position, as seen throughout this dissertation, concerns the problem of evaluation and judgments about the correctness of the ends as well as who determines the basis for such evaluation and judgments. Because an absolute criterion for what is educationally sound is so difficult to develop, the claim that other professionals may make to equal competency in education is difficult to refute.

It may well be that education as a discipline is faced with considerably more controversy than are other fields such as law and medicine, though this writer feels that this is not in reality the case. In both instances beyond the technical and descriptive aspects of these disciplines and as illustrated repeatedly in Chapters Three and Four, at least in the case of law, there is certainly considerable dialogue and disagreement over various legal principles and positions. Likewise, as suggested in an article⁷ explaining the opinions of Supreme Court Justice Hugo Black and the development of his legal position, Justices take differing positions as a result of their own legal and intellectual development.

⁷Charles Reich A., "Mr. Justice Black and the living constitution" 76 Harvard Law Review" 673 (1963) see full article but especially pp 673-682.

Such issues, as need for standards for judgment, encroachment, and vague but developing expertise are perennial issues on which varying positions have been developed and argued about many times.

In short, the legal profession cannot presume, as suggested in Chapters Three and Four, that it can be any more precise about education than about theory in its own field. Perhaps when lawyers feel that the problem is so simple that there should be little reason for educators to be in conflict over an issue, attention might be directed to the fact that more awareness, more knowledge and more information might make them as unsure as educators about dictating particular outcomes. It seems all too often that a little knowledge causes one to see things too simply and to act without an awareness that the consequences of those acts may well fail to remedy a situation or may create even a more difficult situation.

This point, of course, is of significance in that the judiciary is obligated not to speculate about hypothetical situations, while educators ought to be evaluating the potential of hypothetical alternatives. Hence, we have another reason for directing attention to an alternative which hopefully will help resolve this problem. A resolution is required which will increase the input of educators in the judicial process by allowing educators to be directly involved in the evaluation and interpretation of educational material as well as to evaluate the projected educational consequences of judicial remedies.

Mentioned earlier when the problem of standards was first raised is the issue of whether the standards will be based on criteria which are absolute or criteria which are relative in nature. This requires some attention, because one of the alternatives suggested in this Chapter is based upon the principle of separation of powers. However, within the particular principle is the concept that the principle of separation of powers is best maintained through the use of legitimate, though perplexing, cooperation between the judiciary and education. The appeal to the principle of separation of powers implies a rather absolute standard whereas the concept of cooperation implies a relative or situational standard. Implied herein is a dichotomy which requires some explanation.

The evaluation to determine whether or not some action can be termed educationally appropriate requires a standard. This writer is not suggesting that any one group has the sole claim to competency even within its own discipline. What he is suggesting is that because of the difficulty in developing closure about what might constitute education, the courts should be extremely cautious about interfering and ought to find a way to utilize the knowledge of the professionals even when educators are in disagreement over what education is. It is possible that a dialogue could help distinguish educational issues from non-educational issues and could provide the court with positions about the potential impact a particular remedy might offer to education.

Clarification of and the improved interpretation of material are also possibilities for increased judicial and educational cooperatives. The specifics for the achievement of this cooperation will be presented a bit later in this Chapter.

Attempts by educators to determine, with any reasonable finality, what principles might be educationally sound as bases for the development and assurance of equal educational opportunity, is a most difficult determination.⁸

However, at present, there may be less value in developing a satisfactory solution to this problem than to suggesting a method which utilizes cooperation between governmental branches in the maintenance of separation of powers and responsibilities. This writer is suggesting that educators will better serve the interest of students if one of the things that they insist on is the separation of educational and constitutional issues. First, they should insist that they themselves fulfill the constitutional requirements of the spirit as well as the letter of the law. Likewise on educational

⁸It is of interest to note here that in the early planning of this dissertation at the suggestion of Dr. George Johnson, this was one of the primary points to be focused on; i.e. The courage and necessity to determine what is essential in an education in order to assure equal protection educationally. This writer still strongly feels that it is a topic which ought to be developed and affirmed. It would require a statement which affirms the minimums that are imperative for equal educational opportunity. If any one of the minimums were lacking this would serve as prima facie evidence of lack of equal protection educationally. However, this would represent a separate study by itself and is not now the objective of this dissertation.

policies or practices which have constitutional implications and on which professional dialogue has a tendency to be split the courts should tread lightly. Generally if there is closure by educators, in the sense of general agreement, then let the courts utilize this as a basis for a constitutional judgment. But in any event let educators help clarify issues, such as bussing and dress codes. Educators can discuss with some agreement the implications and educational significance of actions taken in relation to such issues even when in philosophical disagreement. At the present time many educators do not seem to be concerned with providing clarity and leadership.

This leads us to the next section in which the attempt to separate the constitutional factors from educational policy is evaluated as a process for overcoming the conflict between the judiciary and education. This discussion includes some reflections on the very complex and puzzling issues facing contemporary educators.

Another difficulty for educational policies and practices resulting from litigation is that in litigation considerable attention is given to legal maneuvering and less attention is focused upon educational principles. This is as it should be, but it does not lend itself to the kind of dialogue which contributes to the development of strong educational policies or remedies. The emphasis of lawyers on either side of the litigation must be concentrated on winning rather than on pursuit of truth or justice. In such a statement, this writer realizes that there is a belief and real possibility that justice

results from winning in an adversary situation. That, after all, is what contributed to the prevailing position being judged as most valid. However, this realization does not mean that the adversary situation of the courtroom does not break down in the pursuit of justice or more specifically in the pursuit of constitutional but educationally sound educational practices. Many other factors enter into the situation when one or the other litigants is out to prove a point rather than to reflectively work out acceptable and valid ends. Such factors include quality of lawyers, judicial bias, interpretation of explanations, presentation of material, knowledge of specialized material, and a sense of what material to withhold or de-emphasize as well as what material to emphasize. Again, the case in point is Hobson, both in the terms of the material utilized by the lawyers as revealed in the original court record and on the question of justice. Hobson serves an example of why the courtroom is not the best location for the forum to solve the problem of educational policy if educators are to attempt to develop the best possible educational situation for students and to help assure equal protection educationally.

Related to the discussion on separation of powers is a need to attempt to separate valid legislative activities by the courts from policy determination in the field of education. It is difficult because we have, in this instance, moved from a fairly precise distinction of separation of powers to stating that it is acceptable to hedge on this separation. However, as indicated earlier even here this

writer is not certain that acts often described as legislative are truly legislative.

It is appropriate here to indicate that the perplexity caused by such puzzlement and lack of resolution causes this writer to be tempted to put forth as firm the original hypothesis that the judiciary ought not legislate. However, instead it is asked whether such examples as Brown and Carr as well as our medical analogy are really legislative or whether they are judicial acts requiring new legislation. If they are not legislative there is little problem. However, if one still desires to believe that such acts are legislative it is still possible to question the appropriateness of such legislative actions by the judiciary.

For instance, as suggested earlier, few persons would argue over the court's ruling that the medical profession must provide its services to all regardless of ability to pay, but they certainly would question judicial determination of specialized paraphernalia and remedies to be used in the practice of medicine. The charge that has been put forth here is that in Brown, the decision was similar to the equal rights in the medical analogy while in the case of Hobson the activities approximated the second part of the analogy. The Brown decision declared a particular school organization plan unconstitutional, a plan which was most difficult to justify. The Hobson decision, as have some decisions since, moved into the determination of policies, boundaries, learning organization, spending patterns and teacher assignment. The issues in terms of school integration, in addition to judicial

legislation, is judicial remedies in education based upon the possible avoidance of the underlying constitutional issues and with incomplete or questionable awareness of the significance of the full impact of these remedies upon the educational process.

Hence one of the first alternatives to be developed is one which is based upon the idea that separation of powers is not an outdated concept and that more careful attention to it would enhance the development of more valid and satisfying processes to assure equal educational opportunity.

Let us turn to the concept of constitutionality for support for the argument that we can provide a more adequate response to the improvement of education than to do so by judicial intervention. This is perhaps one of the more, if not the most, conservative alternatives we will consider in this chapter and yet one of the reasons it appears to be so desirable is that it takes into account the complexities and similarities of the arguments and points of view presented in Chapters Three and Four. In essence, the argument is that the separation of powers is constitutionally required. While there have been significant developments in the scope of judicial involvement in other areas, judicial activity must still be justified in such a way as to maintain separation of powers. This is true even for those who argue for extension of judicial review for the purpose of maintaining constitutional protection. This extension of judicial review to assure fuller constitutional rights to greater numbers of

people does not relieve the court from justifying that activity within the constitutional framework of the separation of powers. What it does, educationally, is to demand the involvement of educators in the grey area of interpreting educational material for the purpose of achieving or fulfilling constitutional ends. This problem of fulfilling constitutional ends is well illustrated in Hobson where the process for developing a viable interpretation of educational material was limited. As illustrated this allowed the court to affirm a position with far more confidence than the facts would warrant. This may well also be the case in Brown if the educational outcome for the student is evaluated.

It is here argued that more attention focused upon the maintenance of separation of powers can result in processes which facilitate that separation and yet at the same time overcome the over cautious judicial response or timidity when significant issues are at stake. Perhaps the courts should take an even more active interest in assuring the constitutional rights of children as they pertain to education. The fact that education is a political right rather than a constitutional right does not, of course, exempt it from constitutional protection --especially from the equal protection clause of the fourteenth amendment. When there is even a hint of constitutional abuse the courts must, with all of their power and weight of authority, insist that the schools not act in such a way as to limit the fulfillment of constitutional rights. Yet even on this insistence it must be recognized

that some of the solutions which might be proposed would create no more protection than does the particular practice or practices under fire.

On the point of constitutional determination, educators will assess only attempts to claim a constitutional right as an educational factor. The courts will judge the merits of any constitutional claim. Likewise, then, when an issue is determined to be educational in nature the courts ought to refuse to interject themselves into the remedy and ought to allow if not insist that educators work out the problem.

It is necessary to consider how educational material will be evaluated or interpreted in the determination of constitutional matters arising from educational institutions. It appears that the court in Hobson was certain that policies such as tracking and pupil transfer worked to prevent constitutional rights. Yet, it appears that many of the practices suggested to compensate for this problem have the same difficulty as did the practices which were ordered out of existence. Another hypothetical illustration of a practice which might be constitutional in nature but whose educational consequences may be so negative as to require a choice between the functional aspects of education and constitutional right is implied in the bussing issue. Also closely related to the problem of bussing is the concept of the neighborhood school. Yet it must be recognized that when a constitutional issue is at stake choices about change must be made and that those choices will bring about changes in educational practices and

policies. For instance, as mentioned before, the Brown decision about what was unconstitutional, required numerous changes in the educational structure, as do bussing orders and court orders which insist upon different school boundary patterns. However, even these changes, it can be argued, are not educational matters in the sense of the teaching/learning process but are educational only in their identification with the organization of educational institutions. Certainly, one cannot deny that there is a significant relationship, but it is a distinction essential to a better understanding of the separation of powers as they pertain to the educational process.

These latter issues become concerns of the educators only when the effect begins to show up in the educational process itself. And even here it may, upon occasion, be necessary to weigh one value against another. For instance on the issue of bussing, regardless of what legislatures might want to say, bussing may be required to protect the educational rights of students because de jure as well as de facto segregation may be unconstitutional.

If then, integration is to be assured by bussing or changing boundaries, some situations will require the public, that is the state, to develop boarding schools so children will not have to be on busses for such periods of time as to negate or negatively influence attempts to carry out the educational process. The courts, it would now appear, should constitutionally require the latter, but in not doing so, are they then sacrificing constitutional principle? At the same time, on this particular issue, it

can be argued that there are some significant values in the neighborhood school and that integration or segregation really has little to do with the educational process.

It can be argued that the courts' willingness to hold education responsible for righting constitutional injustice and to rule out the value of the neighborhood school places the more basic constitutional issue of societal integration in the twilight for the present and increases the necessity for judicial involvement in educational policy. To have required society integration might have allowed the courts to begin to overcome an historical negative, decreased the temptation for judicial involvement in education policy and affirmed one of the basic constitutional principles facing society. In the process, the courts could have argued for reasonable bussing and boundaries until neighborhoods generally became integrated because society has had sufficient time to integrate even without all deliberate speed. The courts could have suggested that as communities integrated they could choose to return to the neighborhood school.

While it is difficult to argue or affirm categorically that neighborhood schools do have an educationally sound advantage, and some educators and educational organizational plans imply that they do not, it is significant to note that parents often believe that there is a particular advantage in neighborhood schools. Even more interesting is that if there is an increase in this belief, public insistence and support of a constitutional amendment declaring bussing

unconstitutional is in the realm of possibility. Also there is a principle in learning and life which suggests that development into the unknown is encouraged when there is security in the known and immediate environment. Hence, it can be asked if this is entrenched firmly enough so as to increase anxiety and prevent the development of a sense of community if a too encompassing geographical community is thrust upon children too early in their lives. It should be noted that there does appear to be less opposition to bussing of older children. While these concerns may be rejected or treated with ambivalence by those not directly affected the beliefs do linger and these beliefs can contribute to the addition of constitutional amendments.

It is certainly not a foregone conclusion that the judiciary would have been any more successful if it insisted that segregated neighborhoods were unconstitutional. But then the question is still whether education ought to be saddled with the burden of greater responsibility for correcting constitutional rights when people are unwilling to deal with the cause for the segregation in the neighborhood schools and other institutions. Segregated neighborhoods are unconstitutional. If the judiciary is unwilling to face the reality of the unconstitutionality of segregated neighborhoods should they then reject appropriate educational planning and processes to deal with the school segregation which is a resulting evil of segregated neighborhoods?

What the writer has suggested to this point is that one alternative to a more comfortable relationship between the courts and educators is to insist upon the maintenance of separation of powers and thus to insist that those in the various branches fulfill the functions of their particular branch. When interpretation of educational material and actions is needed to determine constitutionality it is suggested here that educators be called upon to evaluate and interpret for the court the educational material and exhibits as well as to develop an impact statement of the projected consequences of varied alternatives which develop from a fuller discussion of data. It will be suggested that those involved represent at least a cross section of the academic-judicial community, if not of the total community. As for necessary remedies to overcome constitutional issues it appears to this writer that the courts should remain aloof from prescribing precise remedies. If courts feel that the educational system cannot be trusted to operate according to constitutional principles then the court ought to encourage litigation for holding those in charge in contempt or to charge the professional educators with unprofessional conduct. Both of these points, but especially the latter, will be developed as an appropriate approach for compelling educators to act constitutionally and to avoid excessive judicial interference in educational policy.

The second point is that we must continue to give attention to protecting constitutional rights of students.

Because education is a political issue, and although definitely defined as such by judicial affirmation, the concern for equal protection educationally falls under the First Amendment clause of free speech and freedom of religion and under the equal protection clause of the Fourteenth Amendment. Numerous contemporary conflicts and litigation involving educators are placed in this category. As indicated earlier the problem is adequately interpreting the substantive issues in a conflict so as to determine what is constitutional. For example, issues such as boundary lines, tracking, bussing, curriculum, teacher assignment policies, racial composition of schools and faculties, testing programs for students and for faculties, and hair and dress regulations illustrate this conflict.

In the case of hair and dress regulations, the Federal Courts⁹ have split and the Supreme Court¹⁰ has so far refused to **determine their implications**. As illustrated in these decisions and in continuing litigation the students' rights to extreme dress and hair style has been upheld with the development of precise distinctions. The distinctions simply insist that as long as it does not represent a health or safety problem and if it does rules must be applied only in terms of safety and health and equally to male and female students.¹¹

⁹Ferrell v. Dallas Independent School District et al., 261 F.Supp. 545 (1966) and 392 F.2d. 697; Crews v. Cloncs 303 F.Supp. 1370 (1969) and 432 F.2d. 1259.

¹⁰Ferrell v. Dallas Independent Schools District et al. Certiorari denied (Mr. Justice Douglas dissenting) 89 S.Ct. 98, 393 U.S. 856, (1968).

¹¹Crews v. Cloncs, 303 F.Supp. 1370.

On the other hand, in *Ferrell*, the court was convinced by the school district that the issue was educational and that they ought not interfere with the school authorities in the operation of the school. The general argument is the right of the school authorities to maintain discipline and an atmosphere conducive to learning. Specifically in *Ferrell* the "so-called" educational experts argued that students with long hair received lower grades than did students who conformed to the norm.¹² Now what does one do with an issue such as this? It is this writer's view that before the court accepted this argument they might have considered more closely the implications of this reasoning so they might possibly have been able to grasp the incongruities of this argument. Likewise, a discussion by a large panel (representing many educational positions) of educational experts might have provided an analysis which would have rejected hair and dress codes as educational issues.

While this whole issue will be taken up again later in the Chapter it is worth pointing out here that dress and hair styles seem to concern the administrators and the so-called disciplinarians who are constantly concerned about threat to authority and a conforming student body. To many educators, issues such as hair length and dress are not educational issues. Dress and hair codes may, however, represent constitutional issues in terms of rights of citizens.

¹²*Ferrell v. Dallas Independent School District*, 261 F. Supp. 545.

To illustrate, if we were to follow the court's thinking in Ferrell, we could simply assume that by cutting the hair or changing the dress the grades of the students would be higher. Likewise we could assume that if other students were to begin to deviate on one of these matters their grades would drop significantly. If we develop this reasoning even further it would be possible to assert that there would not be any high achievers with long hair or low achievers with short hair. There are numerous issues related to dress codes which may be educational, but hair length and clothes style are not, except to the extent that they may be related to discipline or conformity. These are examples of the many issues on which educators often disagree.

A third point related to constitutionality and which is an extension of the above concern is that of distinguishing educational issues from constitutional issues so we can insist that the profession act on the educational issues in such a way so they are in conformance with constitutional principles. This writer does not understand how in a democracy educational principles can be of a higher priority order than constitutional principles as some writers reviewed in Chapter Three suggested, unless the constitutional principles are not being applied to the rest of society. And if that happens to be the case, the validity of the reasoning which insists that the schools act in a constitutional manner is questionable. If, as this point suggests, it is necessary to distinguish that particular processes, principles,

practices and issues are educational as distinguished from constitutional, or if not constitutional at least non-educational in nature, it is necessary to develop an alternative which provides the basis for categorizing issues and practices. Implied here is the argument that educators ought to develop the remedies to bring practices in line with the constitutional principles. This alternative, even in situations where courts might still fashion remedies, can still be helpful in that the courts will have some additional input in at least distinguishing an educational principle or practice as such and will not mistake constitutional or non-educational issues for educational issues.

These comments, plus those on Hobson regarding the problem of judicial interpretation of educational material even in judgments about constitutional matters, suggests a degree of rationality to the claim that we need to develop more adequate and valid processes to resolve the uneasy relationship between the judiciary and education. Secondly, a rationale exists for developing alternatives which will reduce the number of inadequate decisions. This rationale is valid when the courts have claimed the right to intervene on constitutional grounds as well as where the courts, such as in the case of Ferrell, have refused to intervene when the issue is constitutional or would appear to be so by some educators.

The numerous cases recently brought before the court and those before the court at the present time, especially in the area of civil rights in educational institutions,

should encourage us, given the problems presented in this dissertation, to develop without an undue lapse of time some alternatives for overcoming or reducing the uneasiness in that relationship. Attention will now be directed to those alternatives.

A Quasi Legal Body

The first alternative has already been suggested earlier in this Chapter. It is an alternative which will allow the courts to draw more satisfactorily upon the expertise in the field of education--even in the determination of constitutional matters. It is suggested that witnesses and briefs do not adequately provide the proper forum for the type of dialogue essential in the determination of these matters.

Hence the following suggestion is made. Whenever the courts are called upon to hear a case in which the institution of education is involved and in which the issue before the court is about the educative process in contrast to the hearing of an issue that has to do with condemnation proceedings or property dispute or boundary dispute, a large panel be established with the mutual cooperation of the court and professional community. The purpose of the panel would be the identification of the issue or issues, evaluation and interpretation of the material as to its educational or non-educational significance.

It is important that this panel be charged with the responsibility of developing a conclusion. It cannot have

the luxury of non-decision because litigants are demanding action. It is also appropriate for this group to file a minority report should it be necessary. When there is general agreement by this panel on an issue it would appear that the court, with more valid authority than now, could base its judgments on those interpretations. To the degree that there is little agreement the court should be more reluctant to prescribe what a particular action or remedy might be. Even if the issue is constitutional and there is little closure on a particular point, the court while acting will do so only after the fullest and most careful consideration and then only to insist that new remedies must be immediately developed. It is essential that the panel represent a cross-section of those educators involved with the particular level of education from which the litigation is emerging. It is even conceivable that all educational levels should always be represented as well as all types of education. This panel will be most helpful in situations where its conclusions are weighted by a substantial plurality.¹³

Because we are discussing aspects of constitutionality, it may be difficult to perceive why the emphasis is on a committee in which there is a large number of educators. As

¹³It is not being suggested that numbers make right or that a plurality of fifty-per-cent plus one determines an absolute standard. What is being affirmed is that a particular point has appeared to withstand the debate and it would appear that the suggestions by the panel have overcome most objections to any particular suggestion.

indicated earlier, issues such as hair and dress style as well as bussing or boundary lines are all too often passed off as educational issues when at the most they may be issues which are neutral or at their worst, affect education. For instance, bussing simply is not an educational issue. It does not improve the educational process nor hinder it in terms of learning processes. When it becomes an excessive requisite for school attendance it can affect the actual learning situation by contributing to the tiredness of the student. Yet, even this needs to be weighed against an evaluation of the process of what might be taking place among children educationally while on the busses and the consequences of non-bussing. Likewise, if the issue is placed in a highly emotional situation, this can be distracting to the teaching-learning situation. But the issue itself simply is not educational. So even here a panel of this type may be appropriate.

The second step of the issue at hand and one which Hobson so adequately allows us to focus upon is the matter of determining constitutionality when the evaluation and interpretation of educational material and processes are required. It will be remembered from Chapter Two that in Hobson the court was attempting to determine whether or not the rights of students were being protected constitutionally under the equal protection clause of the Fourteenth Amendment. This required court evaluation and interpretation of such things

as tracking and teacher assignment policies. Even though there was considerable testimony by various experts and although briefs were filed there did not appear to be an evaluation of the material based upon the varied educational philosophies of the day. As indicated in Chapter Two there **were** a variety of ways to interpret the material and there could have been a much more complete discussion of the problem had more material been presented. It is conceivable that material was withheld for fear of how it might be used by lawyers or fear of how the judge might perceive or construe it. Likewise, little attention was directed to the ramifications of the decision about tracking. Furthermore, as suggested in Chapter Two a fuller discussion possibly would have prevented some of the mistakes made in the evaluation and interpretation of the material. Also, it is possible that less hostility might have been directed to the Superintendent and more energy directed to developing alternatives. It might well have forced Judge Wright to realize that he was asking for a drastic change in processes which were in reality enhancing the type of education he himself was suggesting as appropriate education.

In short, the process would be a matter of determining whether or not there was a constitutional issue involved in the litigation by asking for interpretation and evaluation of the educational claims made either by the plaintiffs or the defendants, from the panel. Through evaluation and dialogue the panel would be able to develop a position on the constitutionality of the issues and the reason for that

position on the constitutionality of the issues and the reason for that position even if panel members disagreed. These findings along with projected impact of projected remedies would then be presented to the judiciary. Again it is hoped that at this point neither the plaintiff's nor the defendant's lawyers would be able to utilize these findings to serve their self interest because the presentations by the panel would be focused upon justice rather than on winning the case or doing someone in. This writer feels that an interesting and significant point to consider here is whether there are not times when it is appropriate, with the exception of clearly defined constitutional issues, to ask litigants to be patient especially when there is not a significant plurality on one side of the issue or another. The reader is reminded of the remarks about tracking in Chapter Two.

It is hoped that the utilization of this panel could better facilitate the affirmation of constitutionality and provide a better basis for that affirmation especially in such grey areas as those just described. If, in the process, the issue is determined to be educational rather than constitutional, the suggestion is that the issue then be passed on to an educational committee for its evaluation and suggested remedy. This avoids the concept of adversary relationships when cooperation will best serve the educational needs of students. This step is discussed more fully later in this Chapter.

There are a number of obvious mechanistic and procedural problems which might develop in employing a group of educators as counsel to the judiciary. The approach might appear to be burdensome, given consideration of time, and the numbers of people that would be involved. However, in this writer's view, this is an arbitrary determination. It is certainly not necessarily any more burdensome than the present procedure; for instance, the procedure in Hobson and similar cases. This writer also argues that this alternative system not only serves as well, but more adequately, the educational needs of the students. If this process also better serves the purpose of justice, then the concept of burdensomeness becomes irrelevant.

The size of the panel, which requires large numbers of people will certainly be open to the criticism that this particular panel approach is impractical or naive. Again this writer thinks that this is an arbitrary criticism and is not valid apart from the framework which requires an evaluation of the consequences of not having such a body. There is certainly something to be said in defense of the panel, especially when dealing with controversial issues or issues upon which reasonable persons of similar intellect disagree. When issues are complicated there is the potential of greater community awareness and sensitivity and tolerance when attempts are made to develop remedies for the problem. Likewise there is not any particular reason to believe that we do a better job of administering justice because we limit the numbers of judges nor even that constitutionality is better served if limited to judgments by a few people in our society. In fact, it might be argued that

the greater number of people involved the greater the chances for benefit to the society. Likewise, to assure that this process achieves its potential it will be necessary to work with the population to overcome the undue emphasis on the impressiveness of power. These panels can best fulfill their function when each person listens, argues and acts, but with little regard to power blocs and to how his/her vote will look. Perhaps this writer has an undue faith in the process but this writer is convinced that it is a process conducive to achieving improved education and increasing justice educationally.

A digressing note in relation to this panel is the fact that even in negligence cases this approach might better serve the process of education and justice than does our present system. Though this writer is much more willing but **not without question**, to accede categorically to the courts on the matter of negligence for numerous reasons stated throughout the dissertation.

Some will argue that the cost, both financially and in person hours required will be prohibitive. To the extent that we accept the proposition that we are ruled best with a small number of persons making the judgments then that criticism holds; however, to the extent we desire increased involvement by a greater number of **peoples as suggested** in a previous paragraph, it can be argued time and monetary expenditures are required of citizens and professionals if we are to function democratically. For paid professionals the time expenditure

will be part of their responsibilities though it is suggested that they will have released time to serve on these panels. Likewise, it may be necessary as part of the process of citizenship that persons regardless of the position they hold, have released time from their positions to serve these functions.¹⁴ Individuals must decide, even if in a collective sense, what type of society they desire to be a part of and the processes for achieving that society. If it is one of active participation; certainly a point implied in community concern over bussing, curriculum, sex education, required and suggested reading lists, and prayer in the schools, then a system such as this will facilitate that process. In the long run the masses must be trusted, but better trusted in involvement and process rather than in mob action. This problem becomes real, certainly when the courts must bear too much of the brunt of actualizing educational principles to fulfill constitutional mandates.

Finally, some may raise as a criticism the question of function and preparation of, or competency, of people to do particular things that service on such a panel will require. This panel does not in any way take away from the judiciary their final determination in matters of constitutionality or of legal technicalities. What it does do though is utilize

¹⁴This whole process could of course be better facilitated by a society in which our wealth were distributed equally. Short of that, paid released time from jobs is essential for this process to work. These obligations and responsibilities should not be the prerogative of the wealthy, the professionals or those on welfare.

the competency of the legal and educational professions in evaluating and interpreting the issues without necessarily an eye to winning a particular case. It also includes the beliefs and attitudes of the populace about the issues at hand and provides for the beginning of a forum on which to deal with those issues in the society as a whole. Participants become the educators in the sense of further community contact and explanations. It also provides the judiciary with a frame of reference which can provide considerable weight in the decision, indicating to the judiciary that it should proceed cautiously or that the court may be going against the best minds of the profession and the populace and that their reasoning will need to be extremely well developed. Here again, for emphasis it can be asked if the competency of the judiciary is any greater than that of other professions in their particular fields or even if on constitutional matters whether the voices of an active populace are not beneficial in the determination of constitutionality?¹⁵

Even if the latter is not valid, is it still not wise to provide a forum which can help remind the judiciary of the problems caused for those they are judging and should not decisions based upon the dialogue of a profession be better a developed decision? The position put forth here is that it is certainly worthy of our consideration.

¹⁵Constitutional determination by popular vote is not being implied here, simply greater input in the deliberations.

Committee for Judging Educational Questions

The suggestion here is similar to the operation of the quasi-legal panel and is an approach similar to one already being attempted in the area of legal decisions in the medical field.¹⁶ It is designed to develop a system which can better utilize the competency of the professions and allow them to pursue justice in non-adversary situations. It is also designed to reduce the burden on the courts in terms of court load.

As suggested this body comes into existence to deal with litigation when it is determined that the issues are not constitutional or, if constitutional, when constitutional principles about the issue are already established. This body would require that its membership include a number of lawyers as well as educators and representatives of the general population.

This body would be large and its decisions and remedies final, or at least on-going. Appeal would be allowed on technical aspects of the law if this panel appeared to be acting capriciously, unreasonably or arbitrarily. Though even here, the judiciary would need to be extremely cautious because the board would be large and would represent a cross-section of educational philosophies and opinions. It is difficult to perceive this board as acting in an unreasonable manner or for the whole board to be arbitrary or capricious; hence unconstitutional, though this writer will not suggest that it is out of the realm of possibility.

¹⁶"Court to test new plan to speed procession of malpractice suits." New York Times, August 13, 1971, 24:6. This panel consists only of three people, the State Supreme Court Judge of New York, a lawyer, and a physician.

The issues which this board would be forced to deal with are: What assures the best possible education? What are the implications of alternative remedies? What action should be taken in regards to litigants' questions? and How can the educational policies and practices best be brought in line with prescribed constitutional principles? Determination of the implications of actions would also be a task for this board when there is a conflict of constitutional and educational principles, such as the case of hair and dress regulations. Among numerous recent cases one might look at for an indication of such conflict are Dunham v. Pulsiter,¹⁷ Freeman v. Flake,¹⁸ Minnich v. Nabuda,¹⁹ Crews v. Cloncs,²⁰ Gfell v. Rickelman,²¹ and Bishop v. Cermenaro.²²

The problems with this body are similar to those of the advisory board. The same answers hold true here. However, there are additional problems with this panel. One, the legislature would have to pass enabling legislation which would allow these judicial bodies to come into existence. Whether or not the composition of the legislatures and the implied self interest of large numbers of legislators would make such legislation possible is debatable. Second, even given the authority by the

¹⁷312 F.Supp. 411 (1970).

¹⁸320 F.Supp. 531 (1970), affirmed 448 F.2d. 258, cert. denied (Douglas dissented) 92 S.Ct. 1292 (1972).

¹⁹336 F.Supp. 769 (1972).

²⁰303 F.Supp. 1370 (1969), reversal 432 F.2d. 1259 (1970).

²¹313 F.Supp. 364 (1970), affirmed 441 F.2d. 444 (1971).

²²355 F.Supp. 1269 (1973).

legislatures to exist and act, what principles might guide the specialized judicial body? Because it is specialized and because that special function is admitted, it would appear that in addition to the constitutional principles prescribed by the higher courts, the principles of justice educationally would be the underlying principle upon which this panel might base its decisions.

A most interesting and significant highlight at this point in the panel process is that in coming into existence any given panel must come to grips with the determination of what constitutes education or how it can be defined at any given point in time. We may not like it, it may be constantly changing and emerging, but at any given point we are saying at least by a vote of one that this is our best judgment of what education is. The more evenly divided the panels are, then, the more the panel must develop a process or series of policies to assure the utmost in flexibility in carrying out the judgments and remedies of the panel.

This lack of agreement about what constitutes education on the part of educators appears to upset some members of the legal profession. While imperfect, this process would force the profession in active ways, yet while allowing for dissent, to affirm and to act upon what they think they mean. Pressure for a decision would make them say, "We have no more time for further knowledge from another study, the time for decision is now, tomorrow we can pursue more knowledge in relation to the decision but for now there is a quasi-absolute."

This process removes that affirmation from the judiciary and places it in the hands of educators and the populace. At the same time it forces the educators in a sense to state yes or no. Yet it also provides for a maybe.

Rather than the panel being uneven in number of members, it is suggested that it be even numbered so that there can be an even split which would force the members to look again, to gain more knowledge about the matter in question or to request more time. They can, in the case of a tie, wait; not an undesirable proposition if we are actively insisting on leadership from the professionals in protecting the constitutional rights that are firmly established by insisting on affirmative action to protect those rights and at the same time making certain that there are no delaying tactics in assuring those rights. The process for enhancing such action by professionals will be developed in the next section of this dissertation.

Another significant value in these panels is that the panel can appropriately deal with speculations about the consequences of various actions and alternatives. In fact, this becomes a significant function, a function supposedly beyond the domain of the courts. The hypothetical "What if?" is part of the dialogue and the panel need not wait for litigation or the wronged party to file suit. This speculation may lead to remedies that must have potential for significant change to alleviate a particular problem rather than judicial presumption of what shall become. In essence this would provide greater influence upon significantly changing the

"is" world rather than untested presumptions of what ought to be. The inappropriateness of judicial activity on such points is that the judiciary ought to avoid policy decision in disciplines or fields other than their own, and especially that the judiciary does not deal with hypothetical matters. The judiciary is not a forum, a forum would better facilitate educational justice, hence the need for panels such as this.

In short, this panel would serve what is now a debatable judicial function. The idea of the panel develops from the recognition that specialized bodies might better carry out what the courts are being called upon to do in relation to educational litigation. Yet, it does not in any way take away or even suggest reduction of judicial obligations and the right of the court to protect the constitutional rights of the citizenry. It also recognizes that equal protection educationally and educational justice might better be served by this process.

Professional Committee

There are some legal minds and certainly some educators, this writer among **them**, who would fault educators for the lack of leadership in educational situations which require that citizens go to court to protect their constitutional rights. There are some of us who would go so far as to suggest that leadership is lacking because educators have not acted affirmatively in such a way as to prevent the necessity for citizens to call upon the courts to protect the rights of students constitutionally. This writer would

again put forth such problems as integration and hair and dress codes as examples where without court orders educators could have and ought to have provided leadership. Instead and while recognizing that some courageous educators do exist, school officials and educators were caught up in acquiescing, in avoidance, and in delaying tactics to prevent students from practicing their constitutional rights. All too often it has been a matter of developing a technique to avoid fulfilling the law of the land rather than developing the most valid, most feasible policy for fulfilling the constitutional requirements which protect the rights of students. Again examples of this are found in integration, school boundaries, bussing, and civil rights of students. It can be stated "too often" on the basis of the reappearance in court of the same case, or the same school district with the same problem.

There are two major questions to be raised here; one is, do educators, by virtue of education, have a greater obligation as citizens to enhance constitutionality? If so, but even if not, it is appropriate to ask whether or not the profession is obligated to develop a process which assumes leadership in the protection of constitutional rights within educational institutions and whether or not it is the professional educators' responsibility to provide the best possible education for their pupils or students? Again, as discussed in the preceding section, this would require the profession to develop a working, active definition of what it means to be a profession. Numerous writers have

attempted this. It would also require that the profession itself develop a continuing, collective process for defining as a concept (though a working one) what education is at any given time.

What this writer would like to affirm here is that educators do have a responsibility to provide leadership and that the profession ought to develop approaches for handling those persons, teachers and administrators alike, who consistently refuse to take this obligation or responsibility seriously.

It is suggested here that one of the best approaches or methods for insisting that educators fulfill their obligations is to develop a process requiring expulsion of members from the profession and censoring school districts or universities much as the American Association of University Professors has done and in turn blacklist educators who insist on contracting their services to those districts. Success of this process, among other factors, will depend upon the co-operation of districts not blacklisted, not to hire educators who have been blacklisted. This process is one that the writer **still has reservations about**, but it still appears to be one of the more viable alternatives available. To protect against undue pressure for conformity to particular ideology, it would again be essential that any board called upon to do the blacklisting or censoring would be large and represent all prevailing educational philosophies.

The consequences of this may not be as dire as first perceived because this writer has seen too many situations

where what he has judged as good administration or good teaching has come under attack. Essentially, these acts are acts which are required by the discipline of education. School boards and the populace can do this because they know they can replace these persons with persons who will more closely reflect their own views or life styles or philosophies of life. In such situations and where blacklisting was a possibility school boards or administrators would have to consider carefully, even in times of educator surplus, before firing educational leaders because it is conceivable that there would not be replacements or the quality of the replacements would be so low that even for the sake of conformity of thought a system might not want to risk the education of its children to these educators.

What the profession would tend to say is that on issues which the court has spoken constitutionally, any educator found to be acquiescing to hinder the law of the land faces expulsion from the profession. Likewise, any system attempting to hinder constitutional rights will also be blacklisted. Here it is admitted that there is a further complication in that this will not be very effective as long as it is a state agency without professional organization approval which does the licensing. To be more effective, it would require that the profession, as in the medical and legal professions, have the responsibility to recommend for certification and for the withdrawal of certification. As it now stands, the action for withdrawal of certification

often comes only from the very boards charged with school operation and which generally are not made up of educators.

On issues constitutional in nature there should be little equivocation. On issues educational in nature the task is more difficult but here again at any given point there is something defined as education. If and when an educator or system refuses to live up to that responsibility then blacklisting should again be considered as a possibility but perhaps as a much later step. This writer is not talking about those grey areas where reasonable persons of good will and similar intellect might reasonably be expected to disagree but of those issues which blatantly counter, with little valid argument, the thinking of the profession about what constitutes education and how one best educates so that all children receive equal protection under the law educationally.

It is necessary before leaving this section to also give attention to the problem mentioned earlier of defining education. There is some possibility that in reality whether or not one like it, education is that which is popularly defined as such. This writer hastens to point out that such reality may not be what ought to be, but that is a reality forced upon us. Also, for consideration is the point that if it is defined more in terms of a commencing, developing, emerging process one might be able to judge as uneducational those activities which prevent that process. That alone might be a significant accomplishment for the educational profession in a democratic society. The point here is that the suggested educational process would require that the

profession constantly face the question of education as a process and the development of the operational process which would achieve a dynamic conceptualization of education and which would take into account community past, present, and future. It might well be the affirmation of Peirce's concept of the community of the intellect²³ in contemporary society.

Operational Aspects of the Alternatives

The issues of bussing and integration and of hair and dress codes have appeared numerous times throughout this dissertation. The writer will consider now how the alternatives mentioned above might contribute to the working out of these issues as well as the problems of judicial involvement in educational policies as presented in Hobson.

A panel might look at the issue of integration as extensively and intensively as did the Civil Rights Commission in 1965 and as the Coleman Report²⁴ did, yet still the panel may conclude that while integration is a matter affecting education it might be identified as a constitutional issue and one in which the law of the land was firmly established. The panel would accede very quickly to the judiciary and would provide some impact statements about various plans to overcome the problem and establish the principle that all plans should work to that end of carrying out the law

²³Charles Hartshorne and Paul Weiss, Collected Papers of Charles Sanders Peirce (Cambridge, Mass.: Harvard University Press) 1931) Volume 5.

²⁴U.S. Civil Rights Commission, Racial isolation in the public schools. Coleman, Equality of educational opportunity.

of the land, as far as possible and with all deliberate speed. With this principle established the school systems and educators would be expected to fulfill this function. If not, citizens could then bring charges against individual educators to the professional panel for evaluation and appropriate action.

Let us look at perhaps the more difficult problem of bussing. More difficult perhaps because it has been identified as much more of an educational issue, yet perhaps so identified simply because of the use of the very word school in the phrase "school bus." However, a close investigation or analysis by a panel might well reveal that this too is a constitutional issue or at least not educational. Bussing interestingly could always have been considered to be constitutional in that bussing has been designed as a process to assure better education for greater numbers of students. The panel would again accede to the courts, but would develop some guidelines to be followed in relation to the very real effect bussing can have on the learning situation for differing children and differing ages. The panel could also suggest that curriculum changes may be necessary and provide the framework for what might be included in the curriculum if integration and learning to live together is to be the end result of the bussing program. Again, once such judgments are established, educators would be required by the profession to follow the law of the land. On this issue it would seem that the dialogue would make the court

more cognizant of the real constitutional issue behind bussing and pose the more complex and difficult question of whether or not they should ask the schools, given the present definition of education, to carry a greater burden than the rest of society. What should be the hierarchy of values on such an issue? The courts must grapple with this one in its finality because only in a very rare instance can bussing be considered a matter of learning or teaching.

Consideration of hair and dress regulations is a bit more complex because there is a general acceptance of the right and obligation of school authorities to maintain discipline and an atmosphere conducive to learning. All that can be said here is that the panel acting on this one would at least provide for the court some of the insights on hair and discipline of the larger educational community. However, this writer fails to see how it can be determined that hair and dress are educational issues. For years institutions such as Antioch College and Goddard College have put that argument to rest. This position is also affirmed by James D. Moore when he stated, "While this writer would urge that hair regulations bear no rational relationship to the object of education, he has read over fifty cases in which someone thought they did."²⁵ If nothing else this approach could make these issues, which are non-educational

²⁵James D. Moore, "In-hair-ent rights and tonsorial tutelage." 32 Montana Law Review 294 (1971).

and perhaps even non-constitutional matters, issues in which the schools in a democratic society would provide more flexibility and variety of choice for students. While there might not be any authority to prevent school authorities from establishing certain rules, statutory in nature, neither would the profession or the courts give them the weight and pronouncements of the judiciary or educational community. This approach could provide a far greater forum within the profession of what constitutes education or issues warranting the attention of educators.

Judicial remedies and judgments on issues of hair and dress and freedom of speech have too often been resolved by appeal to community standards or the belief that the deviant individual was being protected against physical harm which might be imposed by the community. While there appears to be a definite trend away from this thinking it is pointed out here, to illustrate that the panels suggested above, might have prevented the fall into such a trap. It, of course, must also be mentioned that the concept of community standards is not dead as long as some judges do not see these issues as constitutional and as evidenced by the 1973 Supreme Court decision on obscenity.

Turning to Hobson, it will be remembered that it was affirmed that while constitutional questions were raised the issues of concern and conflict were over educational policies. Hence, the panel would have investigated these, evaluated and suggested alternatives which in a sense is

what the Superintendent and other educators were doing at the time of the decision. The process would be little different from those discussed earlier except that it would move directly to the educational issues and to remedies, thereby placing pressure on educators to act according to the standards of leadership of the profession or to face the possibility of loss of certification. The issues which this writer feels would have emerged in this process were mentioned in Chapter Two. Some examples of such issues were pupil assignments, teacher assignments and track determination.

One more aspect of these panels is that they would be large, representative of prevailing philosophies and thinking and while heavily local would include many outsiders on an exchange basis. No one would have a monopoly nor would they be permanent, but would be rotating though the rotation staggered and according to some established guidelines pertaining to quotas.

In closing, it is clear that the present alliance between education and the judiciary is an uneasy one. The uneasiness is of the nature and intensity to warrant investigation of possible alternatives for changes. Some changes have been suggested here, which this writer asserts, might improve the situation while maintaining the necessary rights of individual citizens for litigation and of the courts on constitutional matters. The process may contribute to a more successful separation on educational policy from constitutional issues and will utilize more fully the competency

of a specialized field. It also demands leadership from the profession at the cost of loss of livelihood and of communities with loss of educators if they refuse to carry out the law of the land.

Also, this process includes more intimately a far greater number of people in their roles as citizens and professionals in the determination of constitutionality. Related to this is the fact that this involvement provides the basis for greater leadership and educational process as well as tolerance in attempting to work out those controversial issues. It is part of the process of the never ending search for the objective reality identified as learning or education. The process puts more emphasis on educational justice and less on winning and the use and manipulation of power. A process compatible, it seems, with any definition of education.

In the light of the present situation, this writer suggests that the judiciary and educators consider some of these alternatives for enhancing the search for justice and the development of equal protection under the law educationally.

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