10-1972

Norwood v. Harrison

Lewis F. Powell, Jr.

Probably a Note

9/23/72--LAH

Involves Miss. long settled policy (law) of providing free text books to all children — in public, private & [redacted] religious schools.

DC sustained law, relying on Bd of Ed v Allen

appellants rely on tuition grant & tax exemption cases.

No. 72-77 OT 1972
Norwood v. Harrison
Appeal from the USDC ND Mississippi (3-j ct: Coleman, Kaedy, Smith)

Close & difficult case. U

DISCUSS

EQUAL PROTECTION--FREE TEXTBOOKS

This suit was instituted on behalf of black children attending public schools in Mississippi (and is supported by the Inc. Fund). The suit is against the state officials charged with management of the State's school textbook loan program. The suit charges that the State is supporting efforts to withstand integration of Mississippi schools by making textbooks available on a free basis to the more than 100 private, racially-discriminatory, schools in the State, which were established in the mid and late '60s to provide an alternative for families who did not wish to send their children to recently integrated public schools. The three-judge ct held that the provision for making textbooks available to students in these schools does not

violate the equal protection clause.

The State of Mississippi adopted a program of free textbook provision for every child in the State in 1940. Since then books have been provided for children in public and private schools alike. When Mississippi schools were ordered integrated in 1964-65, it is undisputed that many localities responded by opening new private racially-discriminating schools. The appellees concede that there are over 100 schools in the state that were opened as an answer to integration. Indeed, an order by the Exec Sec of the Textbook Purchasing Bd to all school superintendents states that "we have many disturbed parents since the court decisions. Many of them are going to organize private schools, and they are going to need books." The order instructs public school officials to allow students leaving the public schools to take their textbooks with them to the newly established private schools.

The arguments on the question of the constitutionality of this provision, primarily, are as follows.

(1) The federal courts have struck down the two primary previous means of assisting private schools established to avoid the effects of integration. Both tuition grants and tax exemptions have been struck down as violative of the 14th Amendment because they constitute state support for programs seeking to perpetuate a dual system of public-assisted education. Appellants argue that the reasoning of these cases controls the instant case since it is another form of integration-avoidance assistance. The three-judge ct distinguishes these cases on the ground

that the effect of providing textbooks is so small as not to make any difference in terms of whether children remain in or leave the public school system, i.e., the aid program does not significantly encourage [redacted] discrimination.

(2) The three-judge ct also argued that it was significant that the state law establishing a program of free textbooks was not inspired by any racially discriminatory motive but by a benevolent motive to provide better education for every student in the State. The program was in existence long before the days of massive resistance. It was then, and is now, applied across the board to religious, private, and public schools. Appellants counter that motive is not crucial when determining whether conduct by the state violates the 14th Amendment. They cite the Ct's language last Term in Wright v. City of Emporia in which the Ct said that "motivation is irrelevant" and that the Ct's focus must be on the effect.

(3) The ct below also placed heavy reliance on Bd of Education v. Allen, 392 U.S. 236 (1968), in which this Ct upheld the NY textbook statute. NY loaned books free to children attending parochial schools. The Ct said that such a policy did not constitute an "establishment of religion" in violation of the First Amendment. Appellants argue that Allen is inapplicable since in that case the Ct looked to whether the aid was given to children or whether it was given to the churches. In the case of deciding whether a state program constitutes state support for anti-integration policies, appellants argue that it makes no

difference whether the state aids the schools or the students because in either event it is state assistance to maintain segregation.

(4) Appellants focus considerable attention on the numerous cases from this Ct which have emphasized that it is the affirmative obligation of the state to seek to establish a unitary system. A passive program of textbook aid arguably contributes to the maintenance of a dual system.

(5) The three-judge ct also points out that there would be considerable difficulty in deciding which schools would be barred from receiving aid if it had decided the case the other way. Appellants do not contend that parochial schools must stop receiving aid. Nor do they attempt to bar private schools that are open to Blacks. It focuses instead only on the schools opened after the major ct decisions requiring immediate integration which are all white and positively exclude blacks (of which there are 100+ presently receiving free books).

(6) The three-judge ct also intimates that in its view there might be an argument that the whites in private racially discriminatory schools are being denied equal protection if they are not permitted to receive the same benefits as other students.

RECOMMENDATION

I think the Ct should note probable jurisdiction. The issues raised are difficult and serious. Frankly, I have no solid idea at this point how I would decide the case. But I am not persuaded by the existing three-judge ct opinion. There are several serious questions about the applicability of

Allen, about the applicability of the tuition-grant cases and the tax exemption cases, and about the general language from other cases about the State's affirmative duties to achieve the dismantling of a dual school system in the context of "white flight" out of the "public" school system.

NOTE LAH

Fine Memo - Make Copy for my Memo File on "Desegregation - What Constitutes Impermissible State Aid"

LAH 2/20/73

Fill

BENCH NOTE

No. 72-77
Norwood v. Harrison
Appeal from USDC ND Mississippi (Coleman, Keady, Smith)

I can recall few cases that have come before the Court in my brief tenure here that have come so heavily ladened with precedents--not all of them entirely consistent--from several different areas of constitutional adjudication. In endeavoring to analyze this case I have identified four lines of cases that bear with some degree of importance on this case. Those four lines are (1) the school desegregation decision from Brown I to Emporia with emphasis on the duty of school boards and state officials to dismantle dual school systems, (2) the state-aid-to-"private"-schools cases, including the cases running from the transferral of physical facilities to "private" schools through the cases striking down tuition grants and tax credits, all of which are three-judge court decisions affirmed summarily by this

Court, (3) the state action cases involving state "encouragement"of private discrimination, primarily Wilmington Parking Authority and Reitman v. Mulkey, and (4) the establishment of religion/ free exercise cases, primarily Everson and Allen. Although I would like to write you a book on this case, I have concluded that it will be most expeditious at this time if I merely outline the primary analysis that I find controlling. I can address myself in a supplemental memo to any particular points of concern to you.

I

What we are trying to decide in this case is really the extent of a state agency's obligations with respect to the abolition of dual systems of public education. The State's duty is clear, the only question is whether the State's action in this case violated the letter or spirit of that duty. Green v. New Kent County, 391 U.S. 430, 437-38 (1968) is the source of the language repeatedly reaffirmed since then that the State is "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated." The same proposition was stated negatively in Cooper v. Aaron, 358 U.S. 1 (1958) when it said that "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person equal protection of the laws."

While Cooper and Green establish the groundrules,

neither case involves the factual pattern involved in this case in which, concedely, a unitary system is implemented for the public schools and the State is confronted with the response of massive white flight to private segregated academies in those districts having a substantial black student population. Having established the unitary public school system, how much farther does the State have to go? The answer lies in the spirit of Cooper, Green, Emporia, and Scotland Neck. The obligation on the State is to make desegregation work. And, realistically, desegregation cannot work if integration simply means a "black" public school system and a "white" "private" school system. That is, if the goal of integration--genuine educational opportunity in a mixed environment--is to be realized, the State cannot support or encourage the establishment of segregated counterparts to the public schools.

Your experiences on school boards, I know from our many conversations about Rodriguez, demonstrate one reason. When a struggling school district in a transitional period loses a significant percentage of its student population to private schools it also loses teachers, financial support, and the sustaining interest of parents with the wherewithall to make public education work. No school board committed to making integration work would willingly do anything to encourage or promote rejection of the public school system. This practical problem--loss of the influential and interested families--was one of the reasons why in Emporia and Scotland Neck refused to acquiesce in the creation of new city school districts in

the face of a court-ordered integration order. (You joined in the CJ's opinion concurring in Scotland Neck in which he agreed that the proof demonstrated that the proposed plan to create a separate school system for the City of Scotland Neck "would tend to undermine desegregation efforts.")

The second reason why the State may not encourage or assist the creation of seg academies is that in so doing, unavoidably, it places its approval on a program that must have an adverse psychological impact on the Negro "beneficiaries" of the new unitary system. Brown launched a battle for a single public school environment which would not allow disparate treatment and would not tolerate the historical stigma attached to the black. A school board dedicated to making integration work cannot at the same time undertake to facilitate the sort of mass exodus that occurred in some Mississippi districts. Many of these schools, it should be remembered, were set up inthe wake of Green and Alexander, decisions requiring only that mere freedom-of-choice was not enough. They were not massive busing orders. People were pulling their kids out of the schools entirely because they would be going to school with black children, not because they would be riding a bus. This same argument was approved by the majority in Emporia (407 U.S. at 466). The dissent, in which you joined, did not denigrate the problem but simply concluded where the before-and-after percentages of blacks in the schools were so close it was "speculative" and "unsupported by common experience" to believe that the addition of one or two Negroes or whites per class would make any

psychological difference. In the present case, though, we have a wholly different situation. Here we have some districts that have become 100% black as a consequence of the establshment of seg academies. If there is any bite left to the psychological argument, and it is what Brown was premised on, it must apply under these facts.

The State's argument is that this is a policy which began in 1940 and 1942 and is one that has been consistently adherred to and is a benevolent, neutral policy. That argument was surely right prior to the mid and late-60's. But the change of circumstances in the fae of court-ordered integration makes a critical differences in the propriety of the State's policy. Before the days of integration the State had no constitutional duty to endeavor to promote a unitary system of public education. The mere existence of a neutral policy cannot override the greater constitutional obligation. There is no need to look into the State's purposes or its motives. All we need see is its effects. We don't know, and really have no way of knowing, whether white flight would have been as pervasive if the State had taken a strong affirmative stand for public schools. But we do know that the State went out of its way, to the extent of issuing an order that the usual regulations with respect to textbooks be abrogated, to assure that the children abandoning the public educational system had their books. Again, the "neutral and benevolent" policy argument was made and rejected in Emporia and the dissent's quarrel was only with the evidence in that case, not with the idea

expressed therein.

The State argues, too, that the contribution it made to racially discriminatory education was so slight as to have had no impact on the course of events in Mississippi. The DC said that the plaintiffs had failed to prove a but-for relationship. The State points out that books cost only about $6.00 per pupil per year. First of all, this rationale is flatly inconsistent with the findings in two other recent Mississippi seg academy cases. In Coffey and again in Green (the tuition grant and tax exemption cases) the three-judge courts commented that the academies were run on the "thinnest financial bases." Second, it seems plain to me that books are an integral and pretty much indespensible aspect of public school education today. Schools are esentially "textbook oriented." Without the books the schools are really hamstrung.

Again, the State's response is, if books are so important why did the Ct hold in Allen that statewide provision for school books to private--even religious--schools did not constitute the "establishment" of religion. I think there are two reasons. First, there has always been a tension in religion cases between the establishment and the free exercise clause. While the State can't promote or protect any particular religion, it can neither intefere with the uninhibited exercise thereof. To provide books for all but the religious schools might be viewed as singling out religious entites for disfavored treatment, a practice violative of the exercise clause.

This also explains the result in an obviously analagous situation. This Court has held that tax exemptions are proper for charitable contributions to religious institutions. Walz v. Tax Comm'r, 397 U.S. 644. At the same time it has held that tax exemptions may not be allowed to pesons who make "charitable" contributions to Mississippi's segregated academies. Green v. Connally, 330 F. Supp 1150 (DCDC 1971), aff'd, 404 U.S. 997 (1971). Second, the religion cases have been caught up with the problem of excessive entanglements. See Lemon v. Kurtzman. The redeeming thing about bus transportation and school books is that a program can be administered providing those benefits which does not require the State's involvement in the day-to-day policy decisions of the church. There are no entanglement interests in the school cases. I do not think that Allen can be read as holding that it is OK to give textbooks because such a gift is somehow de minimus. It is simply a neutral, benevolent, and relatively easily administered system for providing a service to all the children.

The State makes one other argument that deserves brief comment. It suggests that textbooks are just like providing police and fire protection, and sewarage and other municipal facilities to a private school. None of those services though has really anything to do with education. They are services provided to all in the municipality. Moreover they are not services that the State can afford to discontinue. It is in everyone's interest to have police protection and to have adequate sewarage facilities. The

provision of such services is hardly regarded as an endorcement of the school's programs. Textbooks, thought, are an integral entity in the educational process. It seems to me that when the State provides books it places its impramatur on the school. At the least it materially assists the seg academies in the difficult process of creating a new school almost overnight.

Apart from the school desegregation cases, a word should be added about the state action precedents. Cases have made clear that the State may not "encourage" private discrimination. In Reitman v. Mulkey the Court held unconstitution a State constitutional amendment which repealed legislation prohibiting racial discrimination with respect to housing. The Ct found it impermissible because it "authorized" and "encourages" private discrimination by making permissible what was previously impermissible. The Ct was careful to say that the question of state involvement in private discrimination is not one susceptible to any "infallible test" or per se rule. Instead it requires a careful "sifting of the facts and circumstances" to determine the quality of the State's involvement. In Reitman the Ct took a carefult look at the history of housing legislation in California (especially the Unruh bill) and considered the impact of the State's action on that basis. This is also the course dictated by Wilmington Parking Authority, 365 U.S. 715. There the Ct held that when a Public Parking Authority leases space to a private restaurant, the private entity may not discriminate on the basis of race. By leasing to

a discriminatory cafe the state had "elected to place its power, property and prestige behind admitted discrimination." Moose Lodge reiterates that evry case must be reviewed on its own facts but does indicate that something more than "such necessities of life as electricity, water, and police and fire protection" must be involved before private action may become imbued with public involvement. 407 U.S. at 173. Although the question is open to question, I would argue that the provision of textbooks at a time when a private school is turning its back on public education in order to retain the right to discriminate against blacks creates a "symbiotic" relationship between state and school that the Constitution prohibits.

II

If I were authoring the Ct's opinion I would not mention Reitman, Wilmington or Moose Lodge. Instead I would rely in the desegregation cases and the obligation they impose on the State to stand behind public education, an obligation that is not fulfilled by a program that encourages--even in a small way--abandoment of that system.

LAH

No. 72-77 NORWOOD V. HARRISON (Miss. Text Book Com) Argued 2/20/73

Close case. See Larry's memo.

Await Conference discussion

Parents have a Const. right to send children to private schools. If any state involvement, however neutral, is invalid - what about issuance of charters, building licenses, providing of municipal services (police, fire, utilities, etc)?

No showing that $6 per pupil sustains segregation.

Leventhal

Aid amounts to $6 per pupil per year & about $5000 per school per year. (This is the only financial aid now provided by State for the segregated schools.).

No other state aid

Draws distinction between free text books to parochial schools & books to segregated schools. Religion is worthy - segregation is not. The standard here is not 1st amend - but 14th.

Absence of any purpose to discriminate (this law passed before Brown) immaterial. The result is that state has aligned itself with segregated schools. Effect - not purpose - is controlling.

Leventhal (cont)

Tax exemption - held invalid by a 3 J/Ct & affirmed here - in indirect benefit. Here benefit is direct.

~~Proper standard~~

Under Green, state has affirmative duty to promote integregation.

Record in this case included depositions of so many of these schools.

(But certainly some private schools are not segregated - e.g. Va Church Schools).

Allain (ast A G of Miss).

How far does "affirmative duty" doctine go? Could a state charter a private school? Bldg license? municipl services?

NO. 72-77 Norwood v. Harrison Conf. 2/26/73

DOUGLAS, J. Reverse
This is state assistance to a segregated schools & is invalid.

MARSHALL, J. Reverse
Has looked at record.
In Little Rock case, tried to close schools. Sees no difference between providing buildings & books — amt. of money or value of aid is immaterial.

BRENNAN, J. Reverse
Bills read from brief of appellants to effect that parents were advised of Ct. order & said books would be available.

BLACKMUN, J. Will probably vote to Reverse
Allen is starting point.

STEWART, J. Reverse
Effect is to aid seg. schools. Inconsistent with affirmative duty to desegregate.
There may be some integrated private schools

POWELL, J. Passed
Q is whether or matter of const. law this aid is invalid.
No ev. that this "aid" contributed to segregation.

WHITE, J. Reverse
State can furnish no aid to a segregated school.
Agrees with Potter.

REHNQUIST, J. Affirm

MEMO: C.J. Reverse (tentative - if opinion is narrowly written)
No ev. that this aid contributes to establishment + maintenance of segregated schools.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1973

Re: No. 72-77, Norwood v. Harrison

Dear Chief,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.
1.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 5, 1973

Dear Chief:

Please join me in your Court opinion in 72-77, Norwood v. Harrison.

WOD

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

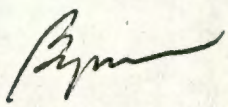
June 7, 1973

Re: No. 72-77 - Norwood v. Harrison

Dear Chief:

I join your circulation of June 7, 1973.

Sincerely,



The Chief Justice

Copies to Conference

9,10,12

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated:

Recirculated: JUN 8 1973

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72–77

Delores Norwood et al., Appellants, v. D. L. Harrison, Sr., et al.	On Appeal from the United States District Court for the Northern District of Mississippi.

[June —, 1973]

Reviewed
Join
if my
suggested
changes
are made

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

A three-judge District Court sustained the validity of a Mississippi statutory program under which textbooks are purchased by the State and lent to students in both public and private schools, without reference to whether any participating private school has racially discriminatory policies. *Norwood* v. *Harrison*, 340 F. Supp. 1003 (ND Miss. 1972). We noted probable jurisdiction 410 U. S. —.

I

Appellants, who are parents of four school children in Tunica County, Mississippi, filed a class action on behalf of students throughout Mississippi to enjoin in part the enforcement of the Mississippi textbook lending program. The complaint alleged that certain of the private schools excluded students on the basis of race and that, by supplying textbooks to students attending such private schools, appellees acting for the State, have provided direct state aid to racially segregated education. It was also alleged that the textbook aid program thereby impeded the process of fully desegregating public schools, in violation of appellants' constitutional rights,

Private schools in Mississippi have experienced a marked growth in recent years. As recently as the 1963–1964 school year, there were only 17 private schools other than Catholic schools; the total enrollment was 2,362 students. Nine hundred sixteen students in these nonpublic schools were Negro, and 192 of these were enrolled in special schools for retarded, orphaned, or abandoned children.[1] By September of 1970, the number of private non-Catholic schools had increased to 155 with a student population estimated at 42,000, virtually all white. Appellees do not challenge the statement, which is fully documented in appellants' brief, that "the creation and enlargement of these [private] academies occurred simultaneously with major events in the desegregation of public schools . . . ."[2]

This case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion or of the authority of a State to allow such schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). The narrow issue before us, rather, is a particular form of tangible assistance the State provides to students in private schools in common with all other students by lending textbooks under the State's 33-year-old program for providing free textbooks to all the children of the State. The program dates back to a 1940 appeal for improved education facilities by the Governor of Mississippi to the state legislature. The legislature then established a state textbook purchasing board and authorized it to select, purchase, and distribute free textbooks for all school children through the first eight grades.[3] In 1942, the program was extended to

[1] Joint Appendix, at 40–41.

[2] Appellants' Brief, at 8–9.

[3] See *Norwood* v. *Harrison*, *supra*, 340 F. Supp., at 1007.

cover all high school students, and, as codified, the statutory authorization remains substantially unchanged. § 6634 *et seq.*, Miss. Code of 1942.

Administration of the textbook program is vested in the Mississippi Textbook Purchasing Board, whose members include the Governor, the State Superintendent of Education, and three experienced educators appointed by the Governor for four-year terms. §§ 6634, 6641. The Board employs a full-time administrator as its Executive Secretary. Textbooks may be purchased only "for use in those courses set up in the state course of study adopted by the State Board of Education, or courses established by special acts of the legislature." § 6646. For each course of study, there is a "rating committee" composed of appointed members, § 6641 (d), and only those books approved by the relevant rating committee may be purchased from publishers at a price "not higher than the lowest prices at which the same books are sold elsewhere in the United States." § 6646 (*l*).

The books are kept at a central book repository in Jackson. § 6641 (f). Appellees send to each school district, and, in recent years, to each private school [*] requisi-

[*] The regulation for distribution of state-owned textbooks from 1940 through 1970 provided as follows:

"For the distribution of free textbooks the local control will be placed in the hands of the County Superintendent of Education. All requisitions for books shall be made through him and all shipments of books shall be invoiced through him. At his discretion he may set up certain regulations governing the distribution of books within the county, such regulations not to conflict with the regulations adopted by the State Textbooks Board or provisions of the Free Textbook Act."

The above regulation was revised on October 14, 1970, to read as follows:

"*Public Schools.* The administration of the textbook program in the public schools shall be the responsibility of the administrative heads of the county units, consolidated districts, and municipal sep-

tion forms listing approved textbooks available from the State for free distribution to students. The local school district or the private school sends a requisition form to the Purchasing Board for approval by the Executive Secretary, who in turn forwards the approval form to the Jackson book repository where the order is routinely filled and the requested books shipped directly to the school district or the private school.

The District Court found that "34,000 students are presently receiving state-owned textbooks while attending 107 all-white, nonsectarian private schools which have been formed throughout the state since the inception of public school desegregation." 340 F. Supp., at 1005. The variation in the figures as to schools and students is accounted for by the District Court's omission of particular kinds of schools in making the findings. The earlier and higher figures are found in the briefs and are not disputed. During the 1970–1971 school year these schools held 173,424 books for which Mississippi paid $490,239. The annual expenditure for replacement or new texts is approximately $6 per pupil or a total of approximately $207,000 for the students enrolled in the participating private segregated academies, exclusive of mailing costs which are borne by the State as well.

In dismissing the complaint the District Court stressed, first, that the statutory scheme was not motivated by a

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arate districts set up by the Legislature. All textbooks transactions between the public schools and the State shall be carried on through them. It shall be the duty of these local custodians to render all reports required by the State; to place orders for textbooks for the pupils in their schools, . . .

"*Private Schools.* Private and parochial school programs shall be the responsibility of the State Textbook Board. All textbook transactions will be carried out between the Board and the administrative heads of these schools. Their duties shall be the same as outlined above for public schools."

desire to further racial segregation in the public schools, having been enacted first in 1940, long before this Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and consequently, long before there was any occasion to have a policy or reason to foster the development of racially segregated private academies. Second, the District Court took note that providing textbooks to private *sectarian* schools had been approved by this Court in *Board of Education* v. *Allen*, 393 U. S. 236 (1968), and that "the essential inquiry, therefore, is whether we should apply a more stringent standard for determining what constitutes state aid to a school in the context of the Fourteenth Amendment's ban against denial of equal protection that the Supreme Court has applied in the First Amendment cases." The District Court held no more stringent standard should apply on the facts of this case, since, as in *Allen*, the books were provided to the students and not to the schools. Finally, the District Court concluded that the textbook loans did not interfere with or impede the State's acknowledged duty to establish a unitary school system under this Court's holding in *Green* v. *County School Board*, 391 U. S. 431, 437 (1968), since

> "Depriving any segment of school children of state-owned textbooks at this point in time is not necessary for the establishment of maintenance of state-wide unitary schools. Indeed, the public schools which plaintiffs acknowledge were fully established as unitary schools no later than 1970–71 continue to attract 90% of the state's educable children. There is no showing that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools."

II

In *Pierce* v. *Society of Sisters, supra,* the Court held that a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice. In the 1971 Term we reaffirmed the vitality of *Pierce, Wisconsin* v. *Yoder,* 406 U. S. 205, 213 (1972), and there has been no suggestion in the present case that we alter our view of *Pierce.* Yet the Court's holding in *Pierce* is not without limits. As MR. JUSTICE WHITE observed in his concurring opinion in *Yoder, Pierce* "held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools." 406 U. S., at 239

Appellees fail to recognize the limited scope of *Pierce* when they urge that the right of parents to send their children to private schools under that holding is at stake in this case. The suggestion is made that the rights of parents under *Pierce* would be undermined were the lending of free textbooks denied to those who attend private schools—in other words, that school children who attend private schools might be deprived of the equal protection of the laws were they invidiously classified under the state textbook loan program simply because their parents had exercised the constitutionally protected choice to send the children to private schools.

We do not see the issue in appellees' terms. In *Pierce,* the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of

the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

The appellees intimate that the State *must* provide assistance to private schools equivalent to that it provides to public schools without regard to whether the private schools discriminate on racial grounds. Clearly, the State need not. Even as to church-sponsored schools whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon* v. *Kurtzman*, 403 U. S. — (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even asuming, therefore, that the Equal Protection Clause requires state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance. See *San Antonio Independent School District* v. *Rodriguez*, — U. S. — (1973). In the same way, a State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination. That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.

III

The District Court's holding therefore raises the question whether and on what terms a State may—as a matter of legislative policy—provide tangible assistance to students attending private schools. Appellants assert not

only that the private schools are in fact racially discriminatory, but also that aid to them in any form is in derogation of the State's obligation not to support discrimination in education.

This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools.[5] A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves.[6] An inescap-

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[5] *Brown* v. *South Carolina Board of Education*, 296 F. Supp. 199 (SC 1968), aff'd *per curiam*, 393 U. S. 222 (1968); *Poindexter* v. *Louisiana Finance Commission*, 275 F. Supp. 833 (ED La. 1967), aff'd *per curiam*, 389 U. S. 571 (1968). See *Wallace* v. *United States*, 389 U. S. 215 (1967), aff'g *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 475 (MD Ala. 1967). Mississippi's tuition grant programs were invalidated in *Coffey and United States* v. *State Educational Finance Commission*, 296 F. Supp. 1380 (SD Miss.); *Coffey and United States* v. *State Educational Finance Commission*, SD Miss., CA No. 2906, decided Sept. 2, 1970 (unreported). *Coffey II* involved a statute which provided for tuition loans rather than tuition grants.

See *Green* v. *Connally*, 303 F. Supp. 1150, aff'd *sub nom. Coit* v. *Green*, 404 U. S. 602.

[6] Appellees misperceive the "child benefit" theory of our cases decided under the Religion Clauses of the First Amendment. See, *e. g.*, *Cochran* v. *Louisiana State Board of Education*, *supra*, and *Board of Education* v. *Allen*, 392 U. S. 236 (1968). In those cases the Court observed that the direct financial benefit of textbooks loans to students is "to parents and children, not to schools," *Allen*, *supra*, at 244, in the sense that parents and children—not schools—would in most instances be required to procure their textbooks if the State did not. But the Court has never denied that "free books make it more likely that some children choose to attend a sectarian school," *ibid.*, just as in other cases involving aid to sectarian schools we have acknowledged that the various forms of state assistance "surely aid those [religious] institutions . . . in the sense that religious bodies would otherwise have been forced to find other sources from which

able educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee* v. *Macon County,* 267 F. Supp. 458, 475 (MD Ala. 1967).

We do not suggest that a State violates its constitutional duty merely because it has provided *any* form of state service that benefits private schools said to be racially discriminatory. Textbooks are a basic educational tool and, like tuition grants, they are provided only in connection with schools; they are to be distinguished from generalized services government might provide to schools in common with others. Moreover, the textbooks provided to private school students by the State

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to finance these services." *Tilton* v. *Richardson,* 403 U. S. 672, 679. "That religion may indirectly benefit from governmental aid to the secular activities of the churches does not convert that aid into an impermissible establishment of religion." *Lemon* v. *Kurtzman,* 403 U. S. 602, 664 (1971) (opinion of WHITE, J.).

The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools. "State support of segregated schools through any arrangement, management, funds or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper* v. *Aaron,* 358 U. S. 1, 19. Thus MR. JUSTICE WHITE, the author of the Court's opinion in *Allen, supra,* and a dissenter in *Lemon* v. *Kurtzman,* noted there that in his view, legislation providing assistance to any sectarian school which restricted entry on racial or religious grounds would to that extent be unconstitutional. 403 U. S., at 671, n. 2. See Part IV, *infra.*

in this case are a form of assistance readily available from sources entirely independent of the State—unlike, for example, "such necessities of life as electricity, water, and police and fire protection." *Moose Lodge No. 107* v. *Irvis*, 403 U. S. 163, 173 (1972). The State has neither an absolute nor operating monopoly on the procurement of school textbooks; anyone can purchase them on the open market.

The District Court laid great stress on the absence of showing by appellants that "any child enrolled in private school if deprived of free textbooks would withdraw from private schools and subsequently enroll in the public schools." We can accept this factual assertion; we cannot and do not know, on this record at least, whether state textbook assistance is the determinative factor in the enrollment of any students in any of the private schools in Mississippi. We do not agree with the District Court in its analysis of the legal consequences of this uncertainty, for the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination. "[D]ecisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 per cent or adds up to only 49 per cent of the support of the segregated institution." *Poindexter* v. *Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833, 854 (1967).[7]

The recurring theme of appellees' argument is a sympathetic one—that the State's textbook loan program is

[7] Accord, *Griffin* v. *State Board of Education*, 296 F. Supp. 1178, 1181 (ED Va. 1969); *Brown* v. *South Carolina Board of Education*, 296 F. Supp. 203 (SC 1968). Contra, *Griffin* v. *State Board of Education*, 239 F. Supp. 560 (ED Va. 1965) (superseded).

extended to students who attend racially segregated private schools only because the State sincerely wishes to foster quality education for all Mississippi children, and, to that end, has taken steps to insure that no sub-group of school children will be deprived of an important educational tool merely because their parents have chosen to enroll them in segregated private schools. We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 462 (1972). The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal.

The District Court offered as further support for its holding the finding that Mississippi's public schools "were fully established as unitary schools throughout the state no later than 1970–71 [and] continue to attract 90% of the state's educable children." 340 F. Supp., at 1013. We note, however, that overall statewide attendance figures do not fully and accurately reflect the impact of private schools in particular school districts.[8] In any event, the constitutional infirmity of

[8] In Tunica County, for example, where appellants reside, in response to *Green* and *Alexander*, all white children were withdrawn from public schools and placed in a private academy housed in local church facilities and staffed by the principal and 17 high school teachers of the county system, who resigned in mid-year to accept jobs at the new academy. See *United States* v *Tunica County Bd. of Ed.*, 327 F Supp 1019 (ND Miss. 1970), aff'd, 440 F 2d 337 (CA5 1971). As of the time of the filing of this lawsuit, the successor Tunica Institute of Learning enrolled 495 students,

the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which, under the District Court holding, may discriminate if they so desire. A State's constitutional obligation requires it to steer clear not only of the old dual system of racially segregated schools but also of giving such aid to institutions that practice racial or other invidious discrimination. That the State's public schools are now fully unitary, as the District Court found, is irrelevant.

IV

Appellees and the District Court also placed great reliance on our decisions in *Everson* v. *Board of Education*, 330 U. S. 1, and *Board of Education* v. *Allen*, 392 U. S. 236. In *Everson*, we held that the Establishment Clause of the First Amendment did not prohibit New Jersey from "spending tax-raised funds to pay the bus fares of parochial school pupils as part of a general program under which it pays the fares of pupils attending public and other schools." 330 U. S., at 17. *Allen*, following *Everson*, sustained a New York law requiring school textbooks to be lent free of charge to all students, including those in attendance at parochial schools, in specified grades.

Neither *Allen* nor *Everson* is dispositive of the issue before us in this case. Religious schools "pursue two goals, religious instruction and secular education." *Board of Education* v. *Allen*, *supra*, 392 U. S., at 245. Barring entanglement, States may "provide church-related schools with secular, neutral or nonideological services, facilities

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all white, and would not attest to an open enrollment policy. Similar histories of Holmes County, Canton Municipal Separate School District, Jackson Municipal Separate School District, Amite County, Indianola Municipal Separate School District, and Grenada Municipal Separate School District are recited, without challenge by appellees, in Appellants' Brief, at pp. 14–19.

or materials," *Lemon* v. *Kurtzman, supra,* 403 U. S. 602, 616, not only because the States have a substantial interest in the quality of education being provided by private schools, see *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370, 375, but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.

Like a sectarian school, a private school—even one that discriminates—fulfills an important educational function; however, the difference is that in the context of this case the legitimate educational function cannot be isolated from discriminatory practices—if such in fact exist—since under *Brown, supra,* discriminatory treatment exerts a pervasive influence on the entire educational process. The religious teaching in a sectarian school, on the other hand, can be identified and isolated from purely neutral secular subjects for purposes of channelling state aid. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted. Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State.

Our decisions under the Establishment Clause reflect the "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause,"

Tilton v. *Richardson*, 403 U. S. 672, 677. This does not mean, as we have already suggested, that a State is constitutionally obligated to provide even "neutral" services to sectarian schools. But the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors.

Thus, while the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts.[9] Totally apart, then, from considerations relating to the separable religious functions of sectarian schools the Constitution permits a far greater degree of state assistance to sectarian schools than it allows to be channelled in support of private schools if they engage in discriminatory practices unlawful in a public school system.

V

At oral argument, appellees expressed concern over the process of determining the scope of relief to be granted

[9] See, *e. g.*, *Griffin* v. *Breckinridge*, 403 U. S. 88; *Jones* v. *Alfred H. Mayer Co.*, 293 U. S. 409; 42 U. S. C. § 2000a *et seq.* (barring discrimination in public accommodations); 42 U. S. C. § 2000e *et seq.* (barring discrimination in private employment); 42 U S. C. § 3601 *et seq.* (barring discrimination in private housing transactions).

should appellants prevail on the merits. That aspect of the case presents problems but the procedural details need not be fully resolved here. The District Court assumption that textbook loans were permissible, even to racially discriminating private schools, obviated any necessity for that court to determine whether some of the private schools could properly be classified as "racially discriminatory" and how that determination might best be made. We construe the complaint as contemplating an individual determination as to each private school in Mississippi whose students now receive textbooks under the State's textbook loan program; relief on an assumption that all private schools were discriminating thus foreclosing individualized consideration would not be appropriate.

The proper injunctive relief can be granted without implying a finding that all the private schools alleged to be receiving textbooks aid are in fact practicing restrictive admission policies. Private schools are not fungible and the fact that some or even most may practice discrimination does not warrant blanket condemnation. The District Court can appropriately direct the respondents to submit for approval a certification procedure under which any school seeking textbooks for its pupils may apply for participation on behalf of pupils. The certification by the school to the Mississippi Textbook Purchasing Board should, among other factors, affirmatively declare its admission policies and practices, state the number of its racially and religiously identifiable minority students and such other relevant data as is consistent with this opinion.

This school by school determination may be cumbersome but no more so than the State's process of ascertaining compliance with educational standards. No presumptions flow from mere allegations; no one can be

required, consistent with due proces, to prove the absence of violation of law.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

So ordered.

June 8, 1973

No. 72-77 Norwood v. Harrison

Dear Chief:

Following a discussion with Bill Rehnquist, he sent me a copy of his letter of June 7 to you.

Although I expect to join you, I think Bill's suggestions are excellent.

Sincerely,

The Chief Justice

lfp/ss

MEMORANDUM

To: Lawrence A. Hammond Date: June 11, 1973

From: Lewis F. Powell, Jr.

No. 72-77 Norwood v. Harrison

I understand that you will follow up with the Chief Justice's Clerk (Jack Weiss) on the changes being made in this case.

I would like to be able to join the Chief promptly after the opinion is recirculated. Possibly Jack could let you see a copy of what he has sent to the printer.

Incidentally, some of the language on page 9 of the Chief Justice's opinion lends support to what we have said in our religion cases.

L.F.P., Jr.

LFP/gg

June 13, 1973

No. 72-77 Norwood v. Harrison

Dear Chief:

In accord with the discussion at the Conference this morning, I have tried to identify for you the precise references in your opinion which appear somewhat inharmonious with the Religion Cases which may well come down on the same day as this case.

Attached is a copy of your third draft upon which I have suggested three changes for your consideration. The general thrust of these minor alterations is merely to effect a shift of emphasis in Part IV.

As presently written the section may be read as indicating that there is a considerable area in which the State may aid church-related schools and that the area in which the State may aid private, discriminatory schools is much narrower. In view of Nyquist and Levitt, it would be more consistent to indicate that however narrow the area of permissible state aid to religious, private schools, the area of aid to discriminatory schools is even smaller. While this comment is relevant to each of the three suggested changes, I add the following brief explanatory statements.

(1) Page 12. This suggested change performs two functions. First, it provides a good spot at which to cite both the Court's

opinion in Nyquist (the portion of that opinion dealing with maintenance and repair which you have joined) and your opinion in Levitt, which I understand will reach a similar conclusion. Also, I think it advisable to avoid citation of the sentence from your opinion in Lemon since it is that sentence upon which New York relied in promulgating its laws in both Nyquist and Levitt. While in my view the language you have cited is still good law, it cannot be read as expansively as New York would have had the Court read it.

(2) Page 13. I would delete the sentence in the middle of the page. As I read your opinion in Lemon, its thrust is that -- because of the dual prohibitions of effect and entanglement -- the State may not be able to isolate the parochial school's secular courses from its nonsecular ones. The sentence does not appear to be essential to your analysis here.

(3). Page 14. The suggested alteration here is directed only at the general concern I mentioned above. It emphasizes the narrowness, rather than the breadth, of State aid to religious schools.

I think you have written a fine opinion in a very delicate area, and I am hopeful that, on so important an issue, it will command a unanimous Court. With these changes I am glad to join, and perhaps Bill Brennan will also join - though I have not discussed these suggestions with him.

Sincerely,

The Chief Justice

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 13, 1973

Re: No. 72-77 - Norwood v. Harrison

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 15, 1973

Re: No. 72-77 - Norwood v. Harrison

Dear Chief:

Please join me.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

12, 13, 14

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: The Chief Justice

Circulated: _____

Recirculated: ~~JUN 19 1973~~

SUPREME COURT OF THE UNITED STATES

No. 72–77

Delores Norwood et al., Appellants v. D. L. Harrison, Sr., et al. | On Appeal from the United States District Court for the Northern District of Mississippi.

[June —, 1973]

Reviewed 6/19

My Suggestions have been adopted. Join.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

A three-judge District Court sustained the validity of a Mississippi statutory program under which textbooks are purchased by the State and lent to students in both public and private schools, without reference to whether any participating private school has racially discriminatory policies. *Norwood* v. *Harrison*, 340 F. Supp. 1003 (ND Miss. 1972). We noted probable jurisdiction, 410 U. S. —.

I

Appellants, who are parents of four school children in Tunica County, Mississippi, filed a class action on behalf of students throughout Mississippi to enjoin in part the enforcement of the Mississippi textbook lending program. The complaint alleged that certain of the private schools excluded students on the basis of race and that, by supplying textbooks to students attending such private schools, appellees acting for the State, have provided direct state aid to racially segregated education. It was also alleged that the textbook aid program thereby impeded the process of fully desegregating public schools, in violation of appellants' constitutional rights.

Private schools in Mississippi have experienced a marked growth in recent years. As recently as the 1963–1964 school year, there were only 17 private schools other than Catholic schools; the total enrollment was 2,362 students. Nine hundred sixteen students in these nonpublic schools were Negro, and 192 of these were enrolled in special schools for retarded, orphaned, or abandoned children.[1] By September of 1970, the number of private non-Catholic schools had increased to 155 with a student population estimated at 42,000, virtually all white. Appellees do not challenge the statement, which is fully documented in appellants' brief, that "the creation and enlargement of these [private] academies occurred simultaneously with major events in the desegregation of public schools . . . ."[2]

This case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion or of the authority of a State to allow such schools. *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). The narrow issue before us, rather, is a particular form of tangible assistance the State provides to students in private schools in common with all other students by lending textbooks under the State's 33-year-old program for providing free textbooks to all the children of the State. The program dates back to a 1940 appeal for improved education facilities by the Governor of Mississippi to the state legislature. The legislature then established a state textbook purchasing board and authorized it to select, purchase, and distribute free textbooks for all school children through the first eight grades.[3] In 1942, the program was extended to

[1] Joint Appendix, at 40–41.

[2] Appellants' Brief, at 8–9.

[3] See *Norwood* v. *Harrison, supra,* 340 F. Supp., at 1007.

cover all high school students, and, as codified, the statutory authorization remains substantially unchanged. § 6634 *et seq.*, Miss. Code of 1942.

Administration of the textbook program is vested in the Mississippi Textbook Purchasing Board, whose members include the Governor, the State Superintendent of Education, and three experienced educators appointed by the Governor for four-year terms. §§ 6634, 6641. The Board employs a full-time administrator as its Executive Secretary. Textbooks may be purchased only "for use in those courses set up in the state course of study adopted by the State Board of Education, or courses established by special acts of the legislature." § 6646. For each course of study, there is a "rating committee" composed of appointed members, § 6641 (d), and only those books approved by the relevant rating committee may be purchased from publishers at a price "not higher than the lowest prices at which the same books are sold elsewhere in the United States." § 6646 (*l*).

The books are kept at a central book repository in Jackson. § 6641 (f). Appellees send to each school district, and, in recent years, to each private school [4] requisi-

[4] The regulation for distribution of state-owned textbooks from 1940 through 1970 provided as follows:

"For the distribution of free textbooks the local control will be placed in the hands of the County Superintendent of Education. All requisitions for books shall be made through him and all shipments of books shall be invoiced through him. At his discretion he may set up certain regulations governing the distribution of books within the county, such regulations not to conflict with the regulations adopted by the State Textbooks Board or provisions of the Free Textbook Act."

The above regulation was revised on October 14, 1970, to read as follows:

"*Public Schools.* The administration of the textbook program in the public schools shall be the responsibility of the administrative heads of the county units, consolidated districts, and municipal sep-

tion forms listing approved textbooks available from the State for free distribution to students. The local school district or the private school sends a requisition form to the Purchasing Board for approval by the Executive Secretary, who in turn forwards the approval form to the Jackson book repository where the order is routinely filled and the requested books shipped directly to the school district or the private school.

The District Court found that "34,000 students are presently receiving state-owned textbooks while attending 107 all-white, nonsectarian private schools which have been formed throughout the state since the inception of public school desegregation." 340 F. Supp., at 1005. The variation in the figures as to schools and students is accounted for by the District Court's omission of particular kinds of schools in making the findings. The earlier and higher figures are found in the briefs and are not disputed. During the 1970–1971 school year, these schools held 173,424 books for which Mississippi paid $490,239. The annual expenditure for replacement or new texts is approximately $6 per pupil or a total of approximately $207,000 for the students enrolled in the participating private segregated academies, exclusive of mailing costs which are borne by the State as well.

In dismissing the complaint the District Court stressed, first, that the statutory scheme was not motivated by a

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arate districts set up by the Legislature. All textbooks transactions between the public schools and the State shall be carried on through them. It shall be the duty of these local custodians to render all reports required by the State; to place orders for textbooks for the pupils in their schools, . . .

"*Private Schools.* Private and parochial school programs shall be the responsibility of the State Textbook Board. All textbook transactions will be carried out between the Board and the administrative heads of these schools. Their duties shall be the same as outlined above for public schools."

desire to further racial segregation in the public schools, having been enacted first in 1940, long before this Court's decision in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), and consequently, long before there was any occasion to have a policy or reason to foster the development of racially segregated private academies. Second, the District Court took note that providing textbooks to private *sectarian* schools had been approved by this Court in *Board of Education* v. *Allen,* 393 U. S. 236 (1968), and that "the essential inquiry, therefore, is whether we should apply a more stringent standard for determining what constitutes state aid to a school in the context of the Fourteenth Amendment's ban against denial of equal protection that the Supreme Court has applied in the First Amendment cases." The District Court held no more stringent standard should apply on the facts of this case, since, as in *Allen,* the books were provided to the students and not to the schools. Finally, the District Court concluded that the textbook loans did not interfere with or impede the State's acknowledged duty to establish a unitary school system under this Court's holding in *Green* v. *County School Board,* 391 U. S. 431, 437 (1968), since

> "Depriving any segment of school children of state-owned textbooks at this point in time is not necessary for the establishment of maintenance of state-wide unitary schools. Indeed, the public schools which plaintiffs acknowledge were fully established as unitary schools no later than 1970–71 continue to attract 90% of the state's educable children. There is no showing that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools.

II

In *Pierce* v. *Society of Sisters, supra,* the Court held that a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice. In the 1971 Term we reaffirmed the vitality of *Pierce, Wisconsin* v. *Yoder,* 406 U. S. 205, 213 (1972), and there has been no suggestion in the present case that we alter our view of *Pierce.* Yet the Court's holding in *Pierce* is not without limits. As MR. JUSTICE WHITE observed in his concurring opinion in *Yoder, Pierce* "held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools." 406 U. S., at 239.

Appellees fail to recognize the limited scope of *Pierce* when they urge that the right of parents to send their children to private schools under that holding is at stake in this case. The suggestion is made that the rights of parents under *Pierce* would be undermined were the lending of free textbooks denied to those who attend private schools—in other words, that school children who attend private schools might be deprived of the equal protection of the laws were they invidiously classified under the state textbook loan program simply because their parents had exercised the constitutionally protected choice to send the children to private schools.

We do not see the issue in appellees' terms. In *Pierce,* the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of

the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

The appellees intimate that the State *must* provide assistance to private schools equivalent to that it provides to public schools without regard to whether the private schools discriminate on racial grounds. Clearly, the State need not. Even as to church-sponsored schools whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon* v. *Kurtzman,* 403 U. S. —— (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even asuming, therefore, that the Equal Protection Clause requires state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance. See *San Antonio Independent School District* v. *Rodriguez,* —— U. S. —— (1973). In the same way, a State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination. That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.

III

The District Court's holding therefore raises the question whether and on what terms a State may—as a matter of legislative policy—provide tangible assistance to students attending private schools. Appellants assert not

only that the private schools are in fact racially discriminatory, but also that aid to them in any form is in derogation of the State's obligation not to support discrimination in education.

This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools.[5] A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves.[6] An inescap-

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See *Green* v. *Connally,* 303 F. Supp. 1150, aff'd *sub nom. Coit* v. *Green,* 404 U. S. 602.

[6] Appellees misperceive the "child benefit" theory of our cases decided under the Religion Clauses of the First Amendment. See, *e. g., Cochran* v. *Louisiana State Board of Education, supra,* and *Board of Education* v. *Allen,* 392 U. S. 236 (1968). In those cases the Court observed that the direct financial benefit of textbooks loans to students is "to parents and children, not to schools," *Allen, supra,* at 244, in the sense that parents and children—not schools—would in most instances be required to procure their textbooks if the State did not. But the Court has never denied that "free books make it more likely that some children choose to attend a sectarian school," *ibid.,* just as in other cases involving aid to sectarian schools we have acknowledged that the various forms of state assistance "surely aid those [religious] institutions . . . in the sense that religious bodies would otherwise have been forced to find other sources from which

able educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee* v. *Macon County,* 267 F. Supp. 458, 475 (MD Ala. 1967).

We do not suggest that a State violates its constitutional duty merely because it has provided *any* form of state service that benefits private schools said to be racially discriminatory. Textbooks are a basic educational tool and, like tuition grants, they are provided only in connection with schools; they are to be distinguished from generalized services government might provide to schools in common with others. Moreover, the textbooks provided to private school students by the State

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to finance these services." *Tilton* v. *Richardson,* 403 U. S. 672, 679. "That religion may indirectly benefit from governmental aid to the secular activities of the churches does not convert that aid into an impermissible establishment of religion." *Lemon* v. *Kurtzman,* 403 U. S. 602, 664 (1971) (opinion of WHITE, J.).

The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools. "State support of segregated schools through any arrangement, management, funds or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper* v. *Aaron,* 358 U. S. 1, 19. Thus MR. JUSTICE WHITE, the author of the Court's opinion in *Allen, supra,* and a dissenter in *Lemon* v. *Kurtzman,* noted there that in his view, legislation providing assistance to any sectarian school which restricted entry on racial or religious grounds would to that extent be unconstitutional. 403 U. S., at 671, n. 2. See Part IV, *infra.*

in this case are a form of assistance readily available from sources entirely independent of the State—unlike, for example, "such necessities of life as electricity, water, and police and fire protection." *Moose Lodge No. 107* v. *Irvis,* 403 U. S. 163, 173 (1972). The State has neither an absolute nor operating monopoly on the procurement of school textbooks; anyone can purchase them on the open market.

The District Court laid great stress on the absence of showing by appellants that "any child enrolled in private school if deprived of free textbooks would withdraw from private schools and subsequently enroll in the public schools." We can accept this factual assertion; we cannot and do not know, on this record at least, whether state textbook assistance is the determinative factor in the enrollment of any students in any of the private schools in Mississippi. We do not agree with the District Court in its analysis of the legal consequences of this uncertainty, for the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination. "[D]ecisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 per cent or adds up to only 49 per cent of the support of the segregated institution." *Poindexter* v. *Louisiana Financial Assistance Comm'n,* 275 F. Supp. 833, 854 (1967).[7]

The recurring theme of appellees' argument is a sympathetic one—that the State's textbook loan program is

[7] Accord, *Griffin* v. *State Board of Education,* 296 F. Supp. 1178, 1181 (ED Va. 1969); *Brown* v. *South Carolina Board of Education,* 296 F. Supp. 203 (SC 1968). Contra, *Griffin* v. *State Board of Education,* 239 F. Supp. 560 (ED Va. 1965) (superseded).

extended to students who attend racially segregated private schools only because the State sincerely wishes to foster quality education for all Mississippi children, and, to that end, has taken steps to insure that no sub-group of school children will be deprived of an important educational tool merely because their parents have chosen to enroll them in segregated private schools. We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Wright* v. *Council of City of Emporia,* 407 U. S. 451, 462 (1972). The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal.

The District Court offered as further support for its holding the finding that Mississippi's public schools "were fully established as unitary schools throughout the state no later than 1970–71 [and] continue to attract 90% of the state's educable children." 340 F. Supp., at 1013. We note, however, that overall statewide attendance figures do not fully and accurately reflect the impact of private schools in particular school districts.[8] In any event, the constitutional infirmity of

[8] In Tunica County, for example, where appellants reside, in response to *Green* and *Alexander,* all white children were withdrawn from public schools and placed in a private academy housed in local church facilities and staffed by the principal and 17 high school teachers of the county system, who resigned in mid-year to accept jobs at the new academy. See *United States* v. *Tunica County Bd. of Ed.,* 327 F. Supp. 1019 (ND Miss. 1970), aff'd, 440 F. 2d 337 (CA5 1971). As of the time of the filing of this lawsuit, the successor Tunica Institute of Learning enrolled 495 students,

the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which, under the District Court holding, may discriminate if they so desire. A State's constitutional obligation requires it to steer clear not only of the old dual system of racially segregated schools but also of giving such aid to institutions that practice racial or other invidious discrimination. That the State's public schools are now fully unitary, as the District Court found, is irrelevant.

IV

Appellees and the District Court also placed great reliance on our decisions in *Everson* v. *Board of Education,* 330 U. S. 1, and *Board of Education* v. *Allen,* 392 U. S. 236. In *Everson,* we held that the Establishment Clause of the First Amendment did not prohibit New Jersey from "spending tax-raised funds to pay the bus fares of parochial school pupils as part of a general program under which it pays the fares of pupils attending public and other schools." 330 U. S., at 17. *Allen,* following *Everson,* sustained a New York law requiring school textbooks to be lent free of charge to all students, including those in attendance at parochial schools, in specified grades.

Neither *Allen* nor *Everson* is dispositive of the issue before us in this case. Religious schools "pursue two goals, religious instruction and secular education." *Board of Education* v. *Allen, supra,* 392 U. S., at 245. And, where carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests, States may

all white, and would not attest to an open enrollment policy. Similar histories of Holmes County, Canton Municipal Separate School District, Jackson Municipal Separate School District, Amite County, Indianola Municipal Separate School District, and Grenada Municipal Separate School District are recited, without challenge by appellees, in Appellants' Brief, at pp. 14–19.

assist church-related schools in performing their secular functions, *Committee for Public Education* v. *Nyquist, post,* at 16–17; *Levitt* v. *Committee for Public Education, post,* at ——,not only because the States have a substantial interest in the quality of education being provided by private schools, see *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370, 375, but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.

Like a sectarian school, a private school—even one that discriminates—fulfills an important educational function; however, the difference is that in the context of this case the legitimate educational function cannot be isolated from discriminatory practices—if such in fact exist—since under *Brown, supra,* discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted. Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State.

Our decisions under the Establishment Clause reflect the "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause," *Tilton* v. *Richardson,* 403 U. S. 672, 677. This does not

mean, as we have already suggested, that a State is constitutionally obligated to provide even "neutral" services to sectarian schools. But the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors.

Thus, while the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts.[9] However narrow may be the channel of permissible state aid to sectarian schools, *Nyquist, supra; Levitt, supra,* it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system.

V

At oral argument, appellees expressed concern over the process of determining the scope of relief to be granted

[9] See, *e. g., Griffin* v. *Breckinridge,* 403 U. S. 88; *Jones* v. *Alfred H. Mayer Co.,* 293 U. S. 409; 42 U. S. C. § 2000a *et seq.* (barring discrimination in public accommodations); 42 U. S. C. § 2000e *et seq.* (barring discrimination in private employment); 42 U S. C. § 3601 *et seq.* (barring discrimination in private housing transactions).

should appellants prevail on the merits. That aspect of the case presents problems but the procedural details need not be fully resolved here. The District Court assumption that textbook loans were permissible, even to racially discriminating private schools, obviated any necessity for that court to determine whether some of the private schools could properly be classified as "racially discriminatory" and how that determination might best be made. We construe the complaint as contemplating an individual determination as to each private school in Mississippi whose students now receive textbooks under the State's textbook loan program; relief on an assumption that all private schools were discriminating thus foreclosing individualized consideration would not be appropriate.

The proper injunctive relief can be granted without implying a finding that all the private schools alleged to be receiving textbooks aid are in fact practicing restrictive admission policies. Private schools are not fungible and the fact that some or even most may practice discrimination does not warrant blanket condemnation. The District Court can appropriately direct the respondents to submit for approval a certification procedure under which any school seeking textbooks for its pupils may apply for participation on behalf of pupils. The certification by the school to the Mississippi Textbook Purchasing Board should, among other factors, affirmatively declare its admission policies and practices, state the number of its racially and religiously identifiable minority students and such other relevant data as is consistent with this opinion.

This school by school determination may be cumbersome but no more so than the State's process of ascertaining compliance with educational standards. No presumptions flow from mere allegations; no one can be

required, consistent with due proces, to prove the absence of violation of law.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 19, 1973

RE: No. 72-77 Norwood v. Harrison

Dear Chief:

I have somewhat the same reservations about your opinion in the above as I expressed in my memorandum to you in Levitt. I repeat that I don't believe that the Court has ever specifically held that a sectarian school may itself be reimbursed by a State for its services - secular or otherwise. It seems to me that your suggestion at pages 12 and 13 that "where carefully limited so as to avoid the prohibitions of the 'effect' and 'entanglement' tests, States may assist church-related schools in performing their secular functions" suggests the contrary. Therefore, would you mind please noting at the foot of the opinion that "Mr. Justice Brennan concurs in result."

This does not go beyond prior expressions. Also is very general.*

Sincerely,

Bill

The Chief Justice

cc: The Conference

* I discussed with Potter & told him I was satisfied generally with changes.

June 19, 1973

No. 72-77 Norwood v. Harrison

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 20, 1973

Re: No. 72-77 - Norwood v. Harrison

Dear Chief:

Please join me in your opinion.

Sincerely,

T.M.

The Chief Justice

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1973

Re: No. 72-77 - Norwood v. Harrison

MEMORANDUM TO THE CONFERENCE:

To make explicit what was implicit, I am adding a sentence at the end of the last complete paragraph on page 15 as follows:

> "The State's determination [of eligibility] would, of course, be subject to judicial review."

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 20, 1973

Dear Chief:

In 72-77, Norwood v. Harrison

would you note I concur in the result?

William O. Douglas

The Chief Justice

cc: The Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
3/5/73								
1st draft 6-5-73 2nd draft 6/7/73	join C.J. 6-5-73 concur in result 6/19/73		join C.J. 6-5-73	Join CJ 6/7/73	Join CJ 6/20/73	Join CJ 6/15/73	Join CJ 6/19/73	Join CJ 6/13/73
4th draft 6/19/73								
						Decided June 25, 1973		
					No. 72-77 Borwood v. Harrison			