The Burger Court Opinion Writing Database

Norwood v. Harrison

413 U.S. 455 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

To: Mr. J[illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]

1st DRAFT

From: [illegible]

SUPREME COURT OF THE UNITED STATES

Circulated: JUN 5 1973

No. 72-77

Recirculated: _____

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]

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. —.

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.

2, 4, 9, 12, 16

To: Mr. Justice Douglas

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Recirculated: JUN 7 19

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.

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9, 10, 12

To: Mr.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-77

Circulated:

Recirculated: JUN 8 1973

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

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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

From: The Chief Justice

Circulated: _____

Recirculated: JUN 19 197

4th 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]

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1973

Re: Case held for No. 72-77 - Norwood v. Harrison

MEMORANDUM TO THE CONFERENCE:

In No. 72-385, Tate Educational Foundation v. McNeal, the Fifth Circuit initially ordered the petitioner private school to reconvey to the Tate County (Mississippi) School District an abandoned school facility acquired by petitioner through sealed competitive bidding. There was no finding that petitioner operated a racially discriminatory school, since in 1970 the petitioner had embraced an open admissions policy. Nevertheless, there are no Negroes among either petitioner's student body of 134 or its faculty. The Fifth Circuit based its holding on its prior decision in Wright v. City of Brighton, 441 F.2d 447 (CA 5 1971), cert. den. 404 U.S. 915, where it enjoined a similar sale of school property to an admittedly segregated academy apparently designed to circumvent constitutional problems involved in leasing the same facility.

On rehearing in the present case, the Court of Appeals panel modified its initial order, allowing the sale but ordering the District Court to enjoin the petitioner from engaging in racially discriminatory

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1/ The District Court found that there was no prior arrangement between the petitioner and the school board to transfer the school property at a "grossly inadequate price," and that respondents had not proved by a preponderance of the evidence that the sale was for a grossly inadequate price, an unlawful donation of public property under Mississippi law.

practices. Petitioner seeks certiorari claiming a deprivation of property without due process as a result of the restriction imposed by the Court of Appeals.

On the surface, this case is not directly controlled by Norwood, since the sale here was not specifically found to be for less than adequate consideration and therefore does not seem a form of "tangible financial aid" to the private academy. On closer examination, however, it emerges that petitioner's bid on the school property was the only one received, and that petitioner acquired a complete school site for only $4,001.00. Thus, while strictly speaking there is no finding of inadequate consideration and financial aid, in many smaller communities, the market for surplus school property -- being one purpose property -- may be so restricted as to negate any chance of determining accurately whether a sale is or is not a form of state financial aid for purposes of the 14th Amendment and in contravention of Norwood. 2/ The Fifth Circuit was therefore fully justified, in my view, in imposing a requirement of nondiscrimination in the circumstances in this case, and I will vote to deny certiorari.

Regards,

WEB

2/ Thus, in addition to its finding that the consideration was not grossly inadequate in violation of Mississippi law, the District Court also noted: "If there had existed a competitive market for the property for school usage, the bidding would have been more spirited and the property would probably have brought a substantially larger price. However, such a competitive market did not exist. . ."

WEB

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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 5, 1973

Dear Chief:

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

WOD

William O. Douglas

The Chief Justic

cc: The Conference

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

72-269
72-77

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 19, 1973

Dear Chief:

In Levitt and in Norwood are statements or indications that a sectarian school may be reimbursed for its services as respects secular activities by the State.

This is new ground in which I have serious doubts. We have never so held and I would prefer to keep our holdings as narrow as possible. If, however, you keep the opinions in their present form, please note at the end of each:

> Mr. Justice Douglas concurs in the result.

W. O. D.

The Chief Justice

cc: Conference

(3)

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

5-011

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."

Sincerely,

Bill

The Chief Justice

cc: The Conference

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.

The Chief Justice

Copies to 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

June 18, 1973

MEMORANDUM FOR THE CHIEF JUSTICE

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

I would like to join your opinion in this case. I'm afraid, however, that as drafted, your Part V might be read by some to mean that once a school has been certified by the State as nondiscriminatory, this finding could not be challenged in Court. While I am sure that you did not intend this result, I wonder if the opinion might not be clarified by adding the following language to the end of the first full paragraph on page 15: "It will then, of course, be open to appellants to challenge the certification of any school on the ground that the school pursues a racially discriminatory policy."

With something like this added I would rest easier.

T.M.

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
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

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

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 referenees 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

B

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1973

No. 72-77 Norwood v. Harrison

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 7, 1973

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

Dear Chief:

I am concerned lest some of what seems to me rather broad language in parts of your opinion may be claimed in later cases to be dispositive of such issues as the availability of income tax exemption, property tax exemption, and the like for private schools which do in fact discriminate. I assume that you do not want to foreclose those issues here. I therefore offer the following suggestions for what seem to me to be relatively minor changes in language:

Page 9, after the word State in line 6 (2nd draft) insert: ",in giving direct financial aid in the form of tuition grants or textbooks",

Page 9, after the word "tool" in the third line from the bottom, insert: "like tuition grants, they are provided only to schools, and are in that respect unlike more indirect or generalized assistance that a State might provide to schools as well as other institutions. Moreover . . ."

Page 10, for the sentence beginning "Where there is financial aid" at the twelfth line from the bottom, substitute the following:

"A State may not grant the type of direct financial aid here involved if it has a significant

tendency to facilitate, reinforce, and support private discrimination."

Page 12, line 1: Substitute for the word "facilitates" the words "directly aids".

Page 12, line 7, after the word "giving" insert the word "such".

I realize that the author of an opinion has generally devoted a great deal more thought to it than those who do not write, but it did seem to me that a few of the expressions used were perhaps broader than you had intended. Should you see your way clear to make these changes, I will certainly join the opinion, although I voted the other way at Conference.

Sincerely,

JWW

The Chief Justice

bcc: Mr. Justice Powell

Dear Lewis:

In view of our telephone conversation this morning, I thought I would send you a copy of what I wrote the Chief after talking with him on the telephone.

Sincerely,

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