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10-1976

Wolman v. Walters

Lewis F. Powell Jr.

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Discuss

In this Establishment Clause case the 3J/Ct sustained Ohio statute tailored to meet our decision in Meek v Pittenger. [Meek sustained the text book aid, following Allen. But Meek invalidated the loan of equipment to the schools. Here, Ohio tried to provide for equipment loans to pupils — on a somewhat dubious distinguishing of Meek. Diagnostic service provided by State, not in private schools, seems OK. Testing also is OK to enable State to accredit schools.

PRELIMINARY MEMORANDUM

January 7, 1976, Conference
List 3, Sheet 1

No. 76-496

WOLMAN, taxpayer

v.

ESSEX, Superintendent of Public Instruction

Appeal from 3-Judge DC (S. D. Ohio) (Peck, C.J.: Kinneary & Duncan, DJ's)

Federal/Civil

Timely

Back page.

1. Summary: This establishment-of-religion case involves an Ohio aid-to-private-education statute which was obviously tailored to meet the criteria of Meek v. Pittenger, 421 U.S. 349 (1975).

2. FACTS & HOLDING BELOW: On July 1, 1975, the 3-J DC upheld the constitutionality of Ohio Rev. Code § 3317.062 which provided for state aid to private schools in the state. This Court subsequently decided Meek v. Pittenger, supra striking down the greatest portion of a Pennsylvania statute similar to the Ohio statute. The Court then vacated and remanded this case in light of Meek. Wollman v. Essex, 421 U.S. 982 (1975).

The Ohio General Assembly then enacted the current statute. Ohio Rev. Code 3317.06. It provides five separate types of aid to private school pupils. Appellants challenge each of these in whole or in part as violating the Establishment of Religion clause of the Constitution. 1/ The statute provides (1) Loans of textbooks, instructional materials and instructional equipment to private school pupils or their parents; 2/ (2) on-campus physician, nursing, and optometric care, as well as speech, hearing and psychological diagnostic services; (3) off-campus therapeutic psychological speech and hearing services, as well as remedial programs for deaf, blind, crippled, and emotionally disturbed pupils; 3/ (4) standardized testing; and (5) transportation for field trips. This aid is to be implemented by each school district in Ohio, and is to be provided only to private schools which do not discriminate on the basis of race, religion or national origin in their hiring and admission policies. The 3-Judge DC unanimously upheld the constitutionality of the statute.

3. CONTENTIONS & DISCUSSION: Appellants raise somewhat different objections with respect to each of the programs outlined above, so I will discuss them separately.

(1) Loans of textbooks, materials and equipment: Appellants concede the constitutionality of the loans of textbooks to pupils and

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1/ It is stipulated that 86 percent of Ohio's private schools are operated by the Catholic church, and an additional ten percent are operated by other religious denominations.

2/ The statute limits distribution of such materials and equipment as not capable of diversion to religious use.

3/ Therapeutic and remedial series are to be provided in public schools, public centers (e.g. fire houses) or in mobile units parked off the private school premises.

their parents under the authority of Meek v. Pittenger, supra, 421 U.S. at 359 and Board of Education v. Allen, 392 U.S. 236 (1968). However, they challenge the loans of equipment and materials. They argue that materials and equipment, unlike textbooks, cannot meaningfully be used by individual pupils, but must be lent to the group as whole. They suggest that any purported loans of e.g. laboratories, gymnastic equipment and sewing machines to pupils must be a subterfuge, especially in light of the fact that such materials may be stored on the premises of the private school.

Although, the line between a loan to the pupils and a loan to the private school is admittedly thin, this Court's decisions in Meek and Allen seem to indicate that such line should nonetheless not be ignored. Textbooks, as well as materials and equipment, are used during group school activities, and must be ordered for the group as a whole to be useful. The Court in Meek and Allen sanctioned procedures whereby student requests for the books were filed initially with the private school, which then, in turn, submitted summaries for these requests with public officials. 421 U.S. at 361. While, no doubt, here also, the school will be involved in directing and coordinating the requests of students, the equipment will be under the supervision of state employees, and pupils and their parents will deal directly with them in obtaining use of the materials and equipment.

There does not appear to be such an essential difference between textbooks and equipment that one is compelled to accept appellants' argument that a loan of the latter to the pupils must be deemed a sham per se. The Court in Meek certainly did not intimate such a distinction. While the Court struck down the Penn. program providing loans of materials and equipment, it did so, apparently, wholly on the basis that the loans were made directly to the sectarian schools. The Court's concern appeared to be that by lending these materials directly to the

school, the school's sectarian religious purposes would be furthered:

> Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion.

421 U.S. at 365-66 (citation omitted). While lending materials to the pupils of these schools also provides some advantage to the school, such collateral benefit is also derived if the state loans textbooks to the pupils. However, the Court upheld the textbook lending scheme, id. at 362-65. It therefore appears that the Court considered loans made directly to the school by the state to stand on substantially different footing from loans made to the pupils, but from which the school also derives a benefit.[4]

(2) Diagnostic Services: Appellants concede that provision of on-campus physician, optometric and nursing services by the state does not violate the Establishment Clause. They do argue however that the provision of similar services for disabilities relating to speech, hearing and psychological disorders does constitute such a violation. Appellants differentiate the latter types of services from the former on the basis that speech, hearing and psychological diagnoses require substantially more communication between the professional and the pupil than do diagnoses for other types of disorders. They suggest that this added communication would constitute an opportunity for the state-employed diagnostician to inculcate religious values. With respect to psychological services in particular, appellants make the somewhat incredible claim that students might be diagnosed as psychologically disturbed if they show signs of religious heresy.

what?

I am at a loss to understand how state-employed professionals are likely to participate in the dissemination of religious education while

---

4/ The fact that the materials may be stored at the private school does not seem to have substantial bearing. The schemes upheld in Meek and Allen involved storage of the textbooks lent to the pupils on the premises of the private schools. 421 U.S. at 361 n.9.

they test pupils for reading, hearing and psychological disabilities. While, indeed, these types of diagnoses may involve more communication between diagnostician and pupil than diagnosis of other disturbances or defects, it appears to me that in the relatively short time which the pupil spends with the professional, the chance of religious indoctrination is miniscule.[5/] In any case, appellants' argument, at least with respect to reading and hearing diagnostic services seems to be foreclosed by this Court's statement in Meek to the effect that "'speech and hearing services,' at least to the extent such services are diagnostic, seems to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools." 421 U.S. at 371, n.21. While the footnote goes on to strike down that portion of the statue which provided for such services, this was done on the basis that the provision could not be deemed severable from other portions of the statue which had been struck down by the Court.

(3) Therapeutic Services: Appellants do not challenge the constitutionality of this range of services insofar as they are provided in public schools, as part of the public schools' general programs. What they do contend is that the setting up of therapeutic centers on public non-school premises or in curb-side mobile units, for the exclusive benefit of private school students constitutes unconstitutional aid to religion. While they concede that the State has an important interest in providing children who have speech or hearing deficiencies, or who are crippled, handicapped or emotionally disturbed, the types of therapeutic services which will enable them to participate in educationa programs, they argue that centers designed to serve only private schools

5/ Diagnosis only is performed on school premises. Therapeutic programs take place outside the school, in public centers. See discussion in the next subsection.

constitute a direct aid to religion and that these centers will eventually become involved in fostering religious values.

I again fail to appreciate appellants' argument. If the State has an important interest in providing therapeutic services to pupils to alleviate educational handicaps, there does not appear to be any problem with providing centers, on public school premises, designed to service private schools. Such services are already being provided to public school students on public school premises, so public school pupils are not being deprived of an equivalent opportunity.[6/] For efficiency of administration, the State is simply allocating use of the new centers to pupils attending specific private schools. Nor do I see any problem with the positioning of mobile therapeutic units outside the gates of private schools. Such centers would be conveniently close so that private school pupils need to be exposed to danger and loss of time, yet the administration and operation of the centers would be kept separate from the administration and operation of the private schools.

This seems consistent with the analysis in Meek where the Court struck down Pennsylvania's remedial services program, which was provided within the private schools, stating the following:

> To be sure, auxiliary services personnel, because not employed by the non-public schools, are not directly subject to the discipline of a religious authority. [Citation] But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. [Citation.] The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that these restrictions were being followed. 22/
>
> ---
>
> 22/ The presence of auxiliary teachers in church related schools, moreover, has the potential for provoking controversy between the Commonwealth and religious authorities

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6/ In fact, the statute limits all aid to private school pupils to the type the school district provides in its public schools.

> over the extent of the teachers' responsibilities and the meaning of the legislative restrictions on the content of their instruction. [Citation].

421 U.S. at 317-72 (emphasis added). The problems enumerated in this passage seem to be avoided where the remedial services are provided off the private school premises.

There does remain the problem, mentioned by the Court in Meek, that provision of such services, where funding is appropriate on a periodic basis, will provide "successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect." Id. at 372. It is unclear, however, whether the Court viewed this as an independent basis for striking down the auxiliary services provision in Meek, or whether it merely considered this as one element in showing an Establishment Clause violation. The following passage seems to indicate that the latter analysis is the correct one:

> This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that [the statute] violated the constitutional prohibition against laws "respecting an establishment of religion."

Id. (emphasis added). Here, while there does appear to exist some danger of political controversies, it seems to be far less than that in Meek where the auxiliary services were provided directly to the parochial schools. As discussed above, moreover, administrative entanglement is eliminated by the Ohio scheme. Under the circumstances, I think the DC correctly held these programs unobjectionable.

(4) Standardized Testing. Appellant's argument that the administration of standardized tests to pupils of private schools constitutes an Establishment Clause violation is based on Levitt v. Committee for Public Education, 413 U.S. 472 (1973) where the Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for

expenses of examination and testing of pupils. The tests in Levitt, however, were prepared and graded by the personnel of the private school, and in that context were held, by the Court, to be an "integral part of the teaching process." Id. at 481. The tests in this case, by contrast, are prepared and graded by the State. They are administered to all pupils in both private and public schools, to determine whether the schools are providing an adequate level of education to the pupils. Since the State accredits private schools, it certainly has an interest in ascertaining whether the education they provide is on a par with that provided in public schools. These State-wide tests can thus hardly be claimed to inculcate religious values (as might test which are prepared by parochial school teachers), nor can they be said to be for the benefit of the private schools. Quite the contrary, they are a check upon the private schools, to assure that they comply with State standards.

(5) Field Trip Busing. Appellants contend that providing transportation for field trips constitutes an imperishable enhancement of the educational programs of religious schools. While under the Court's other cases this argument might be persuasive, busing seems to have been placed in a category sui generis by Everson v. Board of Education, 330 U.S. 1 (1947). In that case the Court held that bus transportation of children to and from private schools was not unconstitutional, even though an incidental benefit was provided to private religious schools. The 3-Judge DC concluded that it could not "distinguish in a significant manner the constitutional provision to nonpublic school children of bus transportation on a daily basis [in Everson] from the provision of transportation on an occasional basis." Juris Statement at A 31.

Everson aside, it would appear to me that transportation of large numbers of children involves such fundamental safety considerations that the State may well have an important interest in providing busing

to all school children through state operated facilities, rather than permitting individual schools to provide their own transportation facilities. Moreover, busing is not the type of service which is likely to be diverted to a religious use.

CONCLUSION: The State of Ohio appears to have made a bona fide, conscientious effort to tailor its aid to private education to comply with this Court's opinions, particularly Meek v. Pittenger. Appellants' broadside attack on virtually every aspect of the statute appears to be based less upon a reasoned concern with a possible violation of the Establishment Clause, than on an unspoken hostility to private schools in general and parochial schools in particular. If appellants' arguments are upheld, this would make it virtually impossible for the State to provide any auxiliary assistance to private school pupils. I do not think that this is required by the Constitution or this Court's decisions. The judgment below should be summarily affirmed.

There are motions to affirm or dismiss.

12/13/76 Kozinski Opn in Juris Statement
TAP

The lines in this area are not very bright, but I am inclined to agree with the memo-writer's analysis. Also, most of these issues have been recently addressed, so that it might be better to wait for some pattern in the lower court decisions in varying factual settings. I would affirm.

DAB

JAN 7 1977

Court USDC, S.D. Ohio
Argued ...., 19...
Submitted ...., 19...

Voted on................, 19...
Assigned ...., 19...
Announced ...., 19...

No. 76-496

BENSON A. WOLMAN, ET AL., Appellants

vs.

MARTIN W. ESSEX, ET AL.

10/7/76 - Appeal

Harry would affirm on merits with some exceptions. Could note on some issues - #1 & 5. But ~~this~~ it is difficult to limit an appeal. ~~to~~ Several of us (John, Harry & I) agree we can affirm everything except 1 & 5

Noted (finally agreed to note ~~acr~~ across board - altho #1 & 5 are only troublesome ones.)

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Stevens, J.				✓ across Board									
Rehnquist, J.							✓						
Powell, J.				✓ as to #1 & 5									
Blackmun, J.				✓ " " #1 & 5									
Marshall, J.				Join Harry									
White, J.							✓						
Stewart, J.										Pass			
Brennan, J.				✓									
Burger, Ch. J.							✓						

LFP/lab 4/25/77

No. 76-496 Wolman v. Essex

This is another "establishment-of-religion" case, in which Ohio tailored it aid to private schools to meet the criteria of Meek v. Pittenger, 421 U.S. 349. The three-judge court sustained the validity of the Ohio statute.

The following categories of aid are involved:

1. Loans of textbooks. Appellants conceded validity on the basis of Meek and Allen.

2. Loans to pupils of materials and equipment. Equipment such as that used in laboratories, gym equipment, sewing machines, etc., are to be lent to pupils rather than directly to the schools, although the equipment will be stored on premises. In Meek, we invalidated loans of equipment directly to the schools. We may have been drawing lines that are too fine, and making unprincipled distinctions. Lending equipment - conceded to be nonsectarian - does aid private schools, whether the loans are to bhe pupils or to the schools. But on the authority of Allen, if equipment is made available to all students in the state on the same terms I see no principled distinction.

3. Diagnostic services. Apparently appellants concede that provision of physician, optometric and nursing services by the state is valid, even though the professionals

rendering this service come to the schools.

But appellants try to draw a distinction with respect to speech, hearing and psychological diagnosis. I see no basis for a distinction.

4. Therapeutic services. These are services to be rendered children with speech or hearing deficiencies, or who are crippled or emotionally disturbed. This State proposes to establish therapeutic centers in curbside mobile units or on nonschool premises. I see no problem. The services are provided all public and private school students in the State.

5. Standardized testing. Standardized tests are given to all school pupils for purposes of accreditation. They have nothing to do with religion.

6. Field trip busing. In Everson v. Board of Education, 330 U.S. 1, the Court held that bus transportation of all children - to public and private schools - was valid. Here, transportation is to be provided for special educational purposes exclusive of religious education.

Comment:

Although the State aid provided by Ohio to private schools is quite extensive, and certainly will contribute to the viability of such schools, as long as Allen, Everson and Meek remain the law it is difficult to find too much fault with the Ohio statute. Some of the foregoing is marginal

(such as lending equipment to individuals on a fictional basis), but I am not yet persuaded that aid of this kind cannot pass the three-part test applied in these cases. It may be that some of our cases have gone too far in drawing artificial lines between aid that is permissible and that which is invalid. I do not find it easy to identify the principled rationale for deciding some of these questions.

I will await arguments and discussion.

L.F.P., Jr.

LFP/lab 4/25/77

No. 76-496 Wolman v. Essex

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I will await arguments and discussion.

L.F.P., Jr.

76-496 <u>WOLMAN v. ESSEX</u> Argued 4/25/77

Ohio's aid to private schools

1. SG says Title I of Ed. act provides billions

Kandelbaum (Rets)

Rets are "taxpayers".

Do not challenge the health services (physically oriented services)

~~Eq~~ Equipment & materials - loans to parents; can't be used for sectarian purposes (in Meek Pa statute had been construed to embody this limitation).

Equipment & materials - maps, science eq., electronic, ~~eq~~ etc are same types of eq. involved in Meek. (No comparable statute for public schools.)

T. M. asked difference bet. map & a geog. book.

Allen & Meek (as to textbooks) should be overruled - tho this not necessary.

Tests - No limitation that only standardized test be given (?).

Refers to Paul Freund's 1969 H.L.R. as to "shared time".

[illegible] (cont.)

Young (appellants) (If I write, refer to transcript.)

Argues that lending of materials & equipment is on individual basis: child checks eq out for a few days. - e.g. a small computer, a map with a casset explaining the map. Rotomatic equipment. Much of this can be taken home.

The custodian of the eq. & materials is a public official (public clerk librarian - a public employee) who checks eq. in & out to pupils.

As to field trips, these are limited to same trips as public school children.

76-496 BENSON v. WOLMAN Cofn. 4/27/77

The Chief Justice Affirm
Meek was wrongly decided

Mr. Justice Brennan Reverse
Everything invalid except what Petrs concede.
Would overrule Allen & Everson

Mr. Justice Stewart

Mr. Justice White Affirm

Across board.
Allen & Everson right

Mr. Justice Marshall Reverse

Agree with WJB.
Overrule Everson

Mr. Justice Blackmun Affirm for most part

Generally Ohio has met Meek
except as to eq. & materials.

Mr. Justice Powell Affirm

On all issues except as to equipment & materials I'd limit to what can be lent to individual students.

Ohio has met our Meek standards.

Allen & Everson apply

Private school kids treated equally with public school kids.

[struck out]

Mr. Justice Rehnquist Affirm

Mr. Justice Stevens Reverse

$88 million is too

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1977

✓

MEMORANDUM TO THE CONFERENCE

Re: No. 76-496 - Wolman v. Walter

A little later today I shall be distributing in xerox copy form a proposed opinion in this case.

Past experience discloses that the votes of the Conference in this area of state-aid-to-sectarian-schools is fractionated. It is thus extraordinarily difficult to put together an opinion that will command votes of a Court. I am not sure, either, that my position, as expressed at conference on April 27 was fully representative. The usual pattern is for two votes to be in favor of constitutionality generally, for two to be in favor of unconstitutionality generally, and for the other five to come to rest at varying points of the spectrum.

Accordingly, I have attempted to segment this opinion. This suggests joinders in part. Hopefully, we shall be able to arrive at some resolution of the case.

Inasmuch as the Ohio statute is an obvious attempt to conform to the holding in Meek v. Pittenger, it may well be, as was suggested at conference, that what we do here will emerge as the pattern for other state aid programs.

H. A. B.

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 8, 1977

76-496, Wolman v. Walter

Dear Harry,

I am glad to join your opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 14, 1977

Re: No. 76-496 - Wolman v. Walter

Dear Harry:

Would you please add at the bottom of your opinion in this case the following:

> "For the reasons stated in Mr. Justice Rehnquist's separate opinion in Meek v. Pittenger, 421 U.S. 349 (1975), and in his own dissenting opinion in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), Mr. Justice White concurs in the judgment with respect to textbooks, testing and scoring, and diagnostic and therapeutic services (Parts III, IV, V and VI of the opinion) and dissents from the judgment with respect to instructional materials and equipment and field trips (Parts VII and VIII of the opinion)."

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 17, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-496 - Wolman v. Walter

My opinion in this case will be rerun by the Print Shop (1) to make stylistic changes, (2) to add the material suggested by Byron in his letter of June 14, (3) to add a new footnote 13 dropped from the 5th line of the paragraph beginning on page 14, and (4) to change the numbering of succeeding footnotes.

A copy of the new footnote is enclosed.

H.A.B.

13/ We believe this concession reflects appellants' understanding that the programs are not intended to influence the classroom activities in the nonpublic schools. Our brother MARSHALL argues that certain stipulations regarding paragraph (H) announce that guidance counseling will include planning and selection of particular courses. Post, p. ____. We agree that such involvement with the day-to-day curriculum of the parochial school would be impermissible. We, however, do not so read the stipulations. Rather, we understand them to recognize that a guidance counselor will engage in broad-scale, long-term planning of a student's career choices and the general areas of study that will further those choices. Our brother MARSHALL also argues that the stipulations reflect an understanding that remedial service teachers under paragraph (I) will plan courses of study for use in the classroom. Post, p. ____. Such a provision would pose grave constitutional questions. The stipulations, however, provide only that the remedial service teacher will keep the classroom teacher informed of the action taken. App. 49. We do not understand the stipulations to approve planning of classroom activities.

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1977

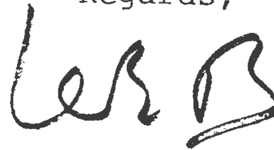
Re: 76-496 - Wolman v. Walter

Dear Harry:

I join Parts I, II, III, IV, V, VI.

Show me as dissenting with respect to Parts VII and IX.

Regards,



Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

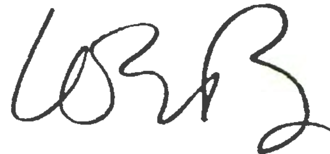
June 21, 1977

RE: 76-496 - Wolman v. Walter

Dear Harry:

My memo of June 20, third line, has a "typo"; the "IX" should have been VIII.

Regards,



Mr. Justice Blackmun

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A B.	L. F. P.	W. H. R.	J. P. S.
					5/3/77			
Join Parts I, II, III, IV, V, VI dissent Parts VII & IX	typed draft concurring & dissenting	Join HAB		typed draft concurring & dissenting	typed draft 6/6/77	concurring in Part & dissenting in part	Join Blkmn statement 6/21/77	concurring in part and dissenting in part
	6/9/77 1st draft 6/20/77			6/16/77 1st draft 6/22/77	1st draft 6/13/77 2nd draft 6/20/77	6/17/77 1st draft 6/21/77		typed draft 6/13/77 1st draft 6/20/77

76-496 Wolman v. Essex

x x x

It must be acknowledged that our decisions in this troubling area draw lines that often seem arbitrary. As the Court noted in *Meek*, "[s]ubstantial aid to the educational function of [sectarian] schools ... necessarily results in aid to the sectarian enterprise as a whole". 421 U.S. at 366. If this strictly pragmatic view were the sole criterion it would be difficult to sustain any state aid to such schools - even if wholly secular in character and whether lent to the pupils or directly to the institutions. ~~The result would~~ *Allen*, *Everson* & *Meek* would have to be overruled, and the persistent desire of a number of states to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would think it desirable in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided a choice for millions of young Americans, they often afford wholesome competition with our public schools, and in some states they relieve substantially the tax burden incident to the operation of public schools. ¶ As against

these positive contributions, the risk of significant religious or denominational influence on our democratic processes at this point in the Twentieth Century seems entirely tolerable. At least this is the repeated judgment of the voters and their representatives in the several states that have long sought valid means of assisting citizens who wish to preserve for their children the option of attending a sectarian school. The decisions of this Court – notably *Lemon v Kurtzman* 403 U.S. 602 (1971), Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), and recently *Meek, supra.* – have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism.

LFP/lab 6/16/77

No. 76-496 Wolman v. ~~Essex~~ Walter.

~~* * *~~

MR. JUSTICE POWELL, concurring in part and dissenting in part.

It must be acknowledged that our decisions in this troubling area draw lines that often seem arbitrary. As the Court noted in Meek v. Pittenger, 421 U.S. 349, 366 (1975), "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." ~~421 U.S. at 366.~~ If this strictly pragmatic ~~view~~ consideration were the sole criterion, it would be difficult to sustain any state aid to such schools - even if wholly secular in character and whether ~~lent~~ supplied to the pupils or directly to the institutions. ~~Allen, Everson &~~ Meek itself would, ~~along with~~ along with Board of Education v. Allen, 392 U.S. 236 (1968), and Everson v. Board of Education, 330 U.S. 1 (1947), have to be overruled, and the persistent desire of a number of states to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would think it desirable in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided ~~a~~ ~~choice~~ an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in

some states they relieve substantially the tax burden incident to the operation of public schools.

As against these positive contributions, the risk at this point in the Twentieth Centry of significant religious or discriminational influence on our democratic processes seems entirely tolerable. At least this is the repeated judgment of the voters and their representatives in the several states that long have sought valid means of assisting citizens who wish to preserve for their children the option of attending a sectarian school. The decisions of this Court -- notably Lemon v. Kurtzman, 403 U.S. 756 (1973), and recently Meek, supra -- have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism.

~~We are~~ It is important to keep the matter in perspective. At this point in the 20th century we are ~~very far~~ quite far removed from the dangers that ~~brought the Establishment~~ led the Framers to include the Establishment Clause in the Bill of Rights. See Walz v. Tax Commission, 397 U.S. 664, 668 (1970). The risk in our day of significant religious or denominational control over our democratic processes is remote, and when ~~balanced~~ viewed against the positive contributions of sectarian schools, ~~any such~~ it seems entirely tolerable. The decisions of this Court, -- notably Lemon v. Kurtzman, 403 U.S. 756 (1973), and recently Meek -- ~~inspired perhaps by the complementary nature of the two religion clauses, see Walz, supra, at ___,~~ have sought to establish principles that preserve the cherished safeguard ~~fo~~ of the Establishment Clause without resort to blind absolutism.

Most of the Court's decision today follows that pattern, ~~is within this spirit,~~ and I ~~am pleased to~~ join parts I throught VI of the Court's opinion. I regret that I cannot join the rest. ~~The rest, however, seems to me an unfortunate departure.~~

No. 76-496 Wolman v. Walter

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I join Parts I through VI of the Court's opinion.

With respect to Part VII , I join only in the judgment. I am not persuaded, nor did the Court hold in Meek v. Pittenger, 421 U.S. 349 (1975), that all loans of secular instructional material and equipment "inescapably [have] the primary effect of providing a direct and substantial advancement of the sectarian enterprise." Ante, at 29-30. If that were the case, then Meek surely would have overruled Board of Education v. Allen, 392 U.S. 236 (1968). Instead the Court reaffirmed Allen, thereby necessarily holding that at least some such loans of items helpful in the educational process are permissible--so long as the items are incapable of diversion to religious uses, and so long as they are lent to the individual students or their parents and not to the sectarian institutions. Here the statute is expressly limited to materials incapable of diversion. Therefore the important question is whether the materials are such that they are "furnished

for the use of individual students and at their request." Allen, supra, at 244, n. 6 (emphasis added).

The Ohio statute unfortunately embraces some materials like wall maps, charts and other classroom paraphernalia for which the concept of a loan to individuals is a transparent fiction. A loan of these items is indistinguishable from forbidden "direct aid" to the sectarian institution itself, whoever the technical bailee. See Meek, supra, at 362-366. Since the provision makes no attempt to distinguish these impermissible instructional materials from others meaningfully lent to individuals, I agree with the Court that it must be held unconstitutional. But I would find no defect in a properly limited provision lending only appropriate instructional materials and equipment to the individuals themselves.

I dissent as to Part VIII, concerning field trip transportation. The Court writes as though the statute funded the salary of the teacher who takes

the students on the outing. In fact only the bus and driver are provided, for the limited purpose of physical movement between the school and the secular destination of the field trip. I find this aid indistinguishable from that upheld in Everson v. Board of Education, 330 U.S. 1 (1947), and I would sustain the District Court's judgment approving this provision of the Ohio statute.

Dave - possibly add something like rough draft on yellow pages attached. Try editing - or rewriting - this carefully in your best Yale prose. If you like it, try it on your co-clerks & come back to me. It may be a useless effort, but if something like this is to be said a little concurrence in a wide ranging case may be the place

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No. 76-496 Wolman v. Walter

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Good. I like the 1st part. HAB

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Concur & Dissent (B)

MARTIN
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No. 76-496 Wolman v. Walter

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Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

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helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some states they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. See _Walz_ v. _Tax Commission_, 397 U.S. 664, 668 (1970). The risk of significant religious or denominational control over our democratic processes--or even of deep political division along religious lines--is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in view of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment

Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable. Most of the Court's decision today follows in this tradition, and I join parts I through VI of its opinion.

With respect to Part VII, I concur in the judgment. I am not persuaded, nor did Meek hold, that all loans of secular instructional material and equipment "inescapably [have] the primary effect of providing a direct and substantial advancement of the sectarian enterprise." Ante, at 18. If that were the case, then Meek surely would have overruled Allen. Instead the Court reaffirmed Allen, thereby necessarily holding that at least some such loans of materials helpful in the educational process are permissible -- so long as the items are incapable of diversion to religious uses, cf. Committee for Public Education v. Nyquist, 413 U.S. 756 1973) and so long as they are lent to the individual students or their parents and not to the sectarian institutions. Here the statute is expressly limited to materials incapable of diversion. Therefore the relevant question is whether the materials are such that they are "furnished for the use of individual students and at their request." Allen, 392 U.S., at 244, n. 6 (emphasis added).

The Ohio statute includes some materials such as wall maps, charts and other classroom paraphernalia for

which the concept of a loan to individuals is a transparent fiction. A loan of these items is indistinguishable from forbidden "direct aid" to the sectarian institution itself, whoever the technical bailee. See _Meek_, 421 U.S., at 362-366. Since the provision makes no attempt to separate these instructional materials from others meaningfully lent to individuals, I agree with the Court that it cannot be sustained under our precedents. But I would find no constitutional defect in a properly limited provision lending to the individuals themselves only appropriate instructional materials and equipment similar to that customarily used in public schools.

I dissent as to Part VIII, concerning field trip transportation. The Court writes as though the statute funded the salary of the teacher who takes the students on the outing. In fact only the bus and driver are provided for the limited purpose of physical movement between the school and the secular destination of the field trip. As I find this aid indistinguishable in principle from that upheld in _Everson_, _supra_, I would sustain the District Court's judgment approving this part of the Ohio statute.

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SUPREME COURT OF THE UNITED STATES

No. 76-496

Benson A. Wolman et al., Appellants, v. Franklin B. Walter et al.	On Appeal from the United States District Court for the Southern District of Ohio.

[June —, 1977]

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