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ESTABLISHMENT CLAUSE: State Aid to Non-Public School Children Upheld in Part—*Wolman v. Walter,* 433 U.S. 229 (1977).

I. INTRODUCTION

On June 24, 1977, the Supreme Court of the United States in *Wolman v. Walter*[1] affirmed in part and reversed in part a lower court ruling[2] which upheld the constitutionality of an Ohio statute providing certain services to private school students at public expense. With this decision the Court further delineated the permissible limits to which a state may go in providing support for private secondary and primary education. But in doing so the Court revealed a house divided on the method of analyzing "establishment clause" cases and a basic conflict within the Court as to the permissible limits of state aid.

Wolman represents the farthest limits that the Supreme Court has allowed a state to go in aiding nonpublic education. Beginning in 1947 with *Everson v. Board of Education*[3] the Supreme Court upheld the reimbursement of parents for the cost of transportation to private, non-profit schools. In 1968 the Court, in *Board of Education v. Allen,*[4] approved the loan of textbooks to all children, including those in private schools. In 1971 the Court struck down Rhode Island and Pennsylvania statutes which provided a subsidy for private school teachers in *Lemon v. Kurtzman.*[5] Two 1973 New York cases, *Levitt v. Committee for Public Education*[6] and *Committee for Public Education v. Nyquist,*[7] declared invalid statutes providing reimbursement for testing and scoring along with maintenance and repair subsidies and tuition rebates. Finally, in 1975 the forerunner of the *Wolman* case, *Meek v. Pittenger,*[8] struck down all but the textbook provisions of a Pennsylvania statute which provided counseling, testing, psychological, speech, hearing, and related diagnostic and therapeutic services to nonpublic school children. The Ohio legislature, aware of this chain of decisions and its own ten year conflict in finding a constitutional method of aiding private

1. Wolman v. Walter, 433 U.S. 229 (1977).
2. Wolman v. Essex, 417 F. Supp. 1113 (S.D. Ohio 1976) *modified, sub nom.* Wolman v. Walter, 433 U.S. 229 (1977).
3. 330 U.S. 1 (1947).
4. 392 U.S. 236 (1968).
5. 403 U.S. 602 (1971).
6. 413 U.S. 472 (1973).
7. 413 U.S. 756 (1973).
8. 421 U.S. 349 (1975).

education, responded with legislation building upon these prior cases.

II. FACTS

The appellants were citizens and taxpayers of the state of Ohio. They brought suit in the District Court for the Southern District of Ohio seeking to have the section of the Ohio Revised Code dealing with state aid to private education declared unconstitutional.[9] The state legislature of Ohio had enacted four statutory schemes for the financing of aid to private education at the primary and secondary levels between the years 1967 and 1976. The previous three had been declared invalid by the federal courts.[10] In response to these difficulties and the near certainty of future litigation, the legislature sought to draft a bill which would conform to the recent Supreme Court decision in *Meek v. Pittenger*.[11] The result was Ohio Revised Code section 3317.06 which provided twelve categories of aid to private school pupils. These were: 1) textbooks; 2) instructional materials; 3) instructional equipment; 4) speech and hearing diagnostic services; 5) medical and dental services; 6) diagnostic psychological services; 7) therapeutic psychological, speech and hearing services; 8) guidance and counseling services; 9) remedial services; 10) standardized tests and scoring services; 11) programs for handicapped children; and 12) bus transportation for field trips.[12] Appellants challenged all categories except the medical and dental services as being violative of the first amendment. A three-judge panel on the district court level found the statute to be wholly constitutional.[13] The Supreme Court granted *certiorari*.

III. DECISION OF THE COURT

Justice Blackmun, writing for the majority, structured his opinion into eight major parts. Part one of the opinion was essentially a discussion of the factual background, including the stipulation that, of the 720 schools privately chartered in Ohio, all but twenty-nine were sectarian and 92% were run by the Catholic Church.

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9. OHIO REV. CODE ANN. § 3317.06 (A)-(D), (F)-(L) (Page Supp. 1976).

10. Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972), *aff'd*, 409 U.S. 808 (1972); Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd sub nom.* Grit v. Wolman, 413 U.S. 901 (1973); Wolman v. Essex, 421 U.S. 982 (1975).

11. 421 U.S. 349 (1975).

12. OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976).

13. Wolman v. Essex, 417 F. Supp. 1113 (S.D. Ohio 1976), *modified sub nom.* Wolman v. Walter, 433 U.S. 229 (1977).

Part two of the opinion sets forth the mode of analysis used by the Court. The Court adopts the three-pronged test first utilized in *Lemon v. Kurtzman*[14] to analyze "establishment clause" cases. *Lemon* held unconstitutional a Pennsylvania statute authorizing part payment by the state of teachers' salaries in parochial schools. The test in the *Wolman* Court's words requires that, "In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion."[15] The majority found upon application of this three-pronged test that the difficulty lies not with the requirement that the legislation have a secular purpose, but with the latter two requirements of effect and entanglement.

The third part of the opinion deals with part (A) of the statute[16] which authorizes secular textbooks for loan to nonpublic school students. The Court refers to the factual similarity between Ohio's textbook loan program and that found in *Board of Education v. Allen*[17] and in *Meek v. Pittenger*.[18] The Court states that: "As read, the statute provides the same protection against abuse as were provided in the textbook programs under consideration in Allen and Meek."[19] Therefore relying on past decisions the Court upheld this provision of the statute.

Part four of the opinion deals with section (J) of the statute[20] providing standardized tests and scoring services for nonpublic schools. The Court contrasts the Ohio provision with that discussed in *Levitt v. Committee for Public Education*[21] where a New York

14. 403 U.S. 602 (1971).

15. 433 U.S. 229, 236 (1977).

16. OHIO REV. CODE ANN. § 3317.06(A) (Page Supp. 1976) provides:

To purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. Such loans shall be based upon individual requests submitted by such non-public school pupils or parents. Such requests shall be submitted to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district. As used in this section, "textbook" means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends.

17. 392 U.S. 236 (1968).

18. 421 U.S. 349 (1975).

19. 433 U.S. 229, 238 (1977).

20. OHIO REV. CODE ANN. § 3317.06(J) (Page Supp. 1976) provides: "To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state."

21. 413 U.S. 472 (1973).

statute provided for the reimbursement of church sponsored schools for the cost of teacher-prepared testings. The majority found that, unlike the situation in *Levitt,* the Ohio nonpublic schools would not control the content of the tests and as such they could not be converted to religious teaching. This avoids the "direct aid to religion found present in Levitt. Similarly, the inability of the school to control the test eliminates the need for supervision that gives rise to excessive entanglement."[22] Therefore the Court upheld this provision.

Part five of the opinion deals with sections (D) and (F) of the statute which provides for psychological, speech and hearing diagnostic services for nonpublic school pupils.[23] The Court cited the fact that the appellants did not even challenge section (E) of the statute which provided for medical and dental services and drew attention to the close similarity between the two types of services. The Court went on to find that previous decisions have "a common thread to the effect that the provision of health services to all school children, public and nonpublic, does not have the primary effect of aiding religion."[24] Citing greater safeguards than in *Meek,* which struck down speech and hearing diagnostic services, the Court concluded that there was no need for excessive surveillance, no extreme risk of fostering ideological views and therefore no excessive entanglement. Consequently, the Court upheld this provision.

Part six of the opinion deals with sections (G), (H), (I), and (K) of the statute which provide funding for certain therapeutic, guidance and remedial services for students who have been identified as needing specialized treatment.[25] The statute further required that

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22. 433 U.S. 229, 240 (1977).

23. OHIO REV. CODE ANN. § 3317.06(D, F) (Page Supp. 1976) provides:

(D). To provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service.

. . . .

(F). To provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil receiving the service.

24. 433 U.S. 229, 242 (1977).

25. OHIO REV. CODE ANN. § 3317.06 (G,H,I,K) (Page Supp. 1976) provides:

(G). To provide therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(H). To provide guidance and counseling services to pupils attending nonpublic

this treatment could not be given on the nonpublic school premises. The Court singled out the appellant's contention that because these services might be provided apart from public school students, those personnel providing the services might be drawn into an ideological approach by the mere fact of this separation. The Court rejected this argument stating, "So long as these types of services are offered at truly religiously neutral locations, the danger perceived need not arise."[26] The Court saw no excessive entanglement arising from supervision of the personnel, as supervision of public employees on public property is hardly an entanglement between church and state. The neutral site ensured that religion would not be advanced by these services.

Part seven of the opinion deals with sections (B) and (C) of the statute, which provide instructional materials and equipment for loan to nonpublic school pupils.[27] As the Court in *Meek* had found a similar provision to be unconstitutional, the appellees attempted to distinguish the Ohio program by pointing to the requirement that the equipment go directly to the student, unlike the direct loan to

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schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public center, transportation to and from such facilities shall be provided by the public school district in which the nonpublic is located.

(I). To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

. . . .

(K). To provide programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school, or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

26. 433 U.S. 229, 247 (1977).

27. OHIO REV. CODE ANN. § 3317.06(B & C) (Page Supp. 1976) provides:

(B). To purchase and to loan to pupils attending nonpublic schools within the district or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

(C). To purchase and to loan to pupils attending nonpublic schools within the district or to their parents, upon individual request, such secular, neutral and nonideological instructional equipment as is in use in the public school within the district and which is incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

the private schools found in *Meek*. The Court rejected this distinction, stating that the providing of instructional equipment to nonpublic schools "inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise."[28] Therefore, as in *Meek*, the providing of such aid was held unconsitutional.

The final section of the opinion, part eight, deals with section (L) of the statute which authorized the funding of transportation of nonpublic school field trips.[29] The Court found that because the nonpublic school controls the timing, frequency, and, subject to some limitations, the destinations of these trips, it was the beneficial recipient and not the pupils. This, in the Court's view, amounts to "impermissible direct aid to sectarian education."[30] Further, to ensure secular use of field trip funds and transportation would require such a high degree of supervision as would create excessive entanglement. For this reason, the Court found that section (E) was unconstitutional.

The eight points of the opinion were marked by a large number of dissenting votes. Of the sixty-four votes cast, some eighteen were dissents, with the remaining forty-six comprising the majority.[31] As a result, separate opinions were written by Justices Brennan, Marshall, Powell and Stevens.[32]

Justice Brennan in his separate opinion stated that "ingenuity in draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to $88,800,888."[33] Because of this, he concluded

28. 433 U.S. 229, 250 (1977).

29. OHIO REV. CODE ANN. § 3317.06(L) (Page Supp. 1976) provides: "To provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district. School districts may contract with commercial transportation companies for such transportation service if school district busses are unavailable."

30. 433 U.S. 229, 254 (1977).

31. The concurrence and dissent breakdown for the eight points was as follows: part 1, Justices Blackmun, Stewart, Burger, Brennan, Marshall, Powell and Stevens concurring; part 2, Justices Burger, Stewart and Powell concurring, Justices Brennan and Stevens dissenting; part 3, Justices Burger, Stewart, Powell, White and Rehnquist concurring, Justices Brennan, Marshall and Stevens dissenting; part 4, Justices Burger, Stewart, Powell, White and Rehnquist concurring, Justices Brennan, Marshall and Stevens dissenting; part 5, Justices Blackmun, Stewart, Burger, Marshall, Powell, Stevens, White and Rehnquist concurring, Justice Brennan dissenting; part 6, Justices Blackmun, Stewart, Burger, Powell, Stevens, White and Rehnquist concurring, Justices Brennan and Marshall dissenting; part 7, Justices Blackmun, Stewart, Brennan, Marshall, Stevens and Powell (with reservations) concurring, Justices Burger, White and Rehnquist dissenting; part 8, Justices Blackmun, Stewart, Brennan, Marshall and Stevens concurring, Justices Burger, White, Rehnquist and Powell dissenting.

32. Chief Justice Burger dissented from parts VII and VIII of the opinion. Justices White and Rehnquist concur in parts III, IV, V, and VI and dissent in parts VII and VIII.

33. 433 U.S. 229, 256 (1977) (Brennan, J. concurring and dissenting).

that "[t]his suffices without more to require the conclusion that the Ohio statute in its entirety offends the First Amendment's prohibition against laws respecting an 'establishment of religion'."[34]

Justice Marshall's approach would be to overrule *Board of Education v. Allen*[35] because he believes "that Allen is largely responsible for reducing the 'high and impregnable' wall between church and state".[36] He suggests this would draw the line at allowing general welfare programs for children while prohibiting programs of educational assistance.

Justice Powell in his opinion finds fault only with points seven and eight. He believes that while the Ohio statute provides for an unconstitutional method of loaning instructional materials and equipment, he is unwilling to adopt the majority conclusion that all schemes of loaning such equipment are by their nature improper. He dissents from part eight, finding that the Ohio field trip provision is indistinguishable from that approved in *Everson v. Board of Education.*[37] Of the separate opinions it is Justice Powell who is most supportive of the aims of the Ohio legislature.

The opinion by Justice Stevens advocated the abandonment of the three-pronged *Lemon* test, for a much stricter test patterned after Justice Black's opinion in *Everson v. Board of Education,* which found that, "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions."[38] Under this test any state subsidy with the possible exception of those directly relating to public health services would be invalid. Justices Burger, White and Rehnquist recorded their dissents without comment.

IV. ANALYSIS

Wolman found constitutional most of the very same services struck down in *Meek v. Pittenger.*[39] With the Court utilizing the same three-pronged test in both cases the result seems remarkable.[40] The answer lies in the careful draftsmanship by the Ohio legislature. One of the prime objections in *Meek,* was that the state-provided services were on the private school premises and were sub-

34. 433 U.S. 229, 256 (1977) (Brennan, J. concurring and dissenting).

35. 392 U.S. 236 (1968).

36. 433 U.S. 229, 257 (1977) (Marshall, J. concurring and dissenting).

37. 330 U.S. 1 (1947).

38. 433 U.S. 229, 265 (1977), *citing* Everson v. Board of Educ. 330 U.S. 1 at 16 (1947) (Stevens, J. concurring and dissenting).

39. 421 U.S. 349 (1975).

40. While the Court had lost Justice Douglas and gained Justice Stevens, their votes would not have affected the outcome as the position taken was similar.

ject to some limited control by the private school administrators. The Ohio statute, by contrast, was directed at providing those same services at off-campus sites, which ranged from mobile centers to public buildings. Further, the loan of textbooks and the unsuccessful attempt at the loan of materials were subject to strict limitations. The field trip transportation, while subject to some limitations, appears to have fallen short of the standard set by the Court. The reason for this failure may have been that unlike the other types of aid, field trip transportation was an area not yet dealt with by the Court.

At first glance *Wolman* appears to have strengthened the *Lemon* three-pronged test. But a close examination of the voting breakdown on point two, which adopts the test, reveals that this method was supported by only Justices Burger, Stewart, and Powell, while Justices Brennan and Stevens dissented. A majority of three may well indicate that the search for a better mode of analysis might be underway. Of the two dissenters, Justice Stevens offered an alternate test and Justice Marshall, who did not dissent completely, expressed his displeasure with the continuance of the present test. The ultimate question may well be what effect the abandonment of the three-pronged *Lemon* test would have on situations such as presented in *Wolman* and in *Meek*. An examination of two of the opinion points, which did not deal with the public health question,[41] points three and four dealing with textbooks and testing, show that the support generated for these services resulted in a five to three for vote. This indicates limited support for textbooks and testing even though a favorable textbook ruling extends back almost ten years.[42]

The national significance of *Wolman* may well be that, through careful drafting in conformance with the Court's opinion, states may expand their realm of state aid to private school pupils without fear of a successful court challenge. The negative effect brought home by an examinatination of the voting breakdown is that the permissible limits under the *Lemon* three-pronged analysis may have been reached. Any future Court action, may prove that only a limited expansion beyond *Wolman* is possible.

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41. Public health issues are considered to be an exception, while those services not of a health related nature are viewed with a more rigorous eye. In this case OHIO REV. CODE ANN. § 3317.06(E) (Page Supp. 1976) was not even challenged. Section E reads as follows: "To provide physician, nursing, dental, and optometric services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the nonpublic school pupil receiving the service." For further clarification see Justice Stevens' dissent.

42. Board of Educ. v. Allen, 392 U.S. 236 (1968).

Five Ohio statutes which had provided state aid to nonpublic school children and schools have undergone court tests since 1969.[43] As a result the Ohio legislature has four times revised or rewritten statutes which were held unconstitutional.[44] The most recent legislative enactment was contested here.[45] This persistence appears to have provided a "suit safe method of private school pupil aid appropriation, thus ending a ten year legislative search.[46]

V. CONCLUSION

Wolman provides the legislator and his draftsman with the clearest and most expansive delineation of what aid to private secondary and primary schools is permissible under the "establishment clause" of the First Amendment. It reinforces a chain of cases that have gradually revealed the amount and method of aid possible under the Constitution. With the reaffirmation of the *Lemon* three-pronged test, it provides those courts, confronted with cases of this type, a mode of analysis that is backed by adequate precedent.

At the same time, *Wolman* can be viewed as a limiting factor because, due to the nature of the test it utilizes and the multiple cases that the Court has examined, it should have provided enough of a base that the issue will not come before the Supreme Court for some time. However, some possibility for change can be envisioned because of the disparate voting patterns found in *Wolman.* These patterns indicate that there is a basic disagreement, not just as to the limits of aid, but also as to the mode of analysis itself. It would appear that any significant change in this area will only occur with a change in the make-up of the Court. Until that time, *Wolman* should stand as the guide in delineating permissible public aid to private schools.

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43. Wolman v. Essex, 421 U.S. 982 (1975); Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd sub nom.* Grit v. Wolman, 413 U.S. 901 (1973); Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972), *aff'd* 409 U.S. 808 (1972); Protestants & Other Ams. United for Separation of Church & State v. Essex, 28 Ohio St. 2d 79, 275 N.E.2d 603 (1971).

44. OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1969) (act in effect 1967 to 1969); OHIO REV. CODE ANN. § 3317.062 (Page 1972) (act in effect 1971); OHIO REV. CODE ANN. §§ 5703.052, 5747.05, 5747.111 (Page 1973) (act in effect 1972); OHIO REV. CODE ANN. § 3317.062 (Page 1972) (act in effect 1973, repealed 1975); OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976) (act in effect 1976).

45. S. 170, Ohio Gen. Ass., 112th Sess. (1975).

46. OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1969) (passed in 1967).