

The Burger Court Opinion Writing Database

Meek v. Pittenger

421 U.S. 349 (1975)

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



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: MAY 13 1975

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 73-1765

Sylvia Meek et al.,
Appellants,
v.
John C. Pittenger, Etc., et al. } On Appeal from the United
States District Court for
the Eastern District of
Pennsylvania.

[May —, 1975]

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I agree with the opinion of the Court only insofar as it affirms the judgment of the District Court. My limited agreement with the Court as to this action leads me, however, to agree generally with the views expressed by MR. JUSTICE REHNQUIST and MR. JUSTICE WHITE in regard to the other programs under review. I especially find it difficult to accept the Court's extravagant suggestion of potential entanglement which it finds in the "auxiliary services" program of Pa. Stat. 194. Here, the Court's holding, it seems to me, goes beyond any prior holdings of this Court and, indeed, conflicts with our holdings in *Board of Education v. Allen*, 392 U. S. 236 (1968), and *Lemon v. Kurtzman*, 403 U. S. 602 (1971). There is absolutely no support in this record or, for that matter, in ordinary human experience, to support the concern some see with respect to the "dangers" lurking in extending common, nonsectarian tools of the education process—especially remedial tools—to students in private schools. As I noted in my dissent in *Committee for Public Education v. Nyquist*, 413 U. S. 756 (1973), the "fundamental principle which I see running through our prior decisions in this difficult and sensitive field of law . . . is premised more on experience and history

1,2

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:

2nd DRAFT

Recirculated: MAY 15 1975

SUPREME COURT OF THE UNITED STATES

No. 73-1765

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[May —, 1975]

MR. CHIEF JUSTICE BURGER, concurring in the judgment in part and dissenting in part.

I agree with the Court only insofar as it affirms the judgment of the District Court. My limited agreement with the Court as to this action leads me, however, to agree generally with the views expressed by MR. JUSTICE REHNQUIST and MR. JUSTICE WHITE in regard to the other programs under review. I especially find it difficult to accept the Court's extravagant suggestion of potential entanglement which it finds in the "auxiliary services" program of Pa. Stat. 194. Here, the Court's holding, it seems to me, goes beyond any prior holdings of this Court and, indeed, conflicts with our holdings in *Board of Education v. Allen*, 392 U. S. 236 (1968), and *Lemon v. Kurtzman*, 403 U. S. 602 (1971). There is absolutely no support in this record or, for that matter, in ordinary human experience to support the concern some see with respect to the "dangers" lurking in extending common, nonsectarian tools of the education process—especially remedial tools—to students in private schools. As I noted in my separate opinion in *Committee for Public Education v. Nyquist*, 413 U. S. 756 (1973), the "fundamental principle which I see running through our prior decisions in this difficult and sensitive field of law... is premised more on experience and history

Supreme Court of the United States
Washington, D. C. 20542CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 24, 1975

RE: No. 73-1765 Meek v. Pittinger

Dear Chief:

I've decided that I should not assign the opinion in the above. I'm alone in my conference vote that the text books statute should fall with the statutes on services, etc. Thus on text books, the conference vote is 6 - 1; however Thurgood votes (if he does participate) there remains a majority against my view.

Thurgood's vote on services, etc. could make a difference I agree. If he agrees with Potter, Lewis, Harry and me, the majority will be 5 - 3 on that question. If he votes with you, Byron and Bill Rehnquist, there would be an affirmance by a 4 - 4 vote. Either result suggests that I ought not assign the opinion.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 20, 1975

RE: No. 73-1765 Meek v. Pittenger, et al.

Dear Potter:

I shall in due course circulate an opinion dissenting in part and concurring in part in the above.

Sincerely,



Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackman
Mr. Justice Powell
Mr. Justice Rehnquist

Exhibit C—Continued

Case No. 4-10-7.

Background

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1765

Sylvia Meek et al.,
Appellants,
v.
John C. Pittenger, Etc.,
et al. } On Appeal from the United
States District Court for the
Eastern District of Pennsylvania.

[April —, 1975]

MR. JUSTICE BRENNAN, concurring and dissenting.

I join in the reversal of the District Court's judgment insofar as that judgment upheld the constitutionality of Act 194 and the provisions of Act 195 respecting instructional materials and equipment, but dissent from Part III and the affirmance of the judgment upholding the constitutionality of the textbook provisions of Act 195.

A three-factor test by which to determine the compatibility with the Establishment Clause of state subsidies of sectarian educational institutions has evolved over 50 years of this Court's stewardship in the field. The law in question must, first, reflect a clearly secular legislative purpose, second, have a primary effect¹ that neither

¹ The Court emphasized in *Committee for Public Education v. Nyquist*, 413 U. S. 756, 783-784, n. 39 (1973), that "primary effect" did not connote a requirement that the Court render an ultimate judgment on the effect of the statute in question. The Court stated:

"Appellees, focusing on the term 'principal or primary effect' which this Court has utilized in expressing the second prong of the three-part test, . . . have argued that the Court must decide in these cases whether the 'primary' effect of New York's tuition grant program is to subsidize religion or to promote these legitimate secular objectives. . . . We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do

stylistic
changes - 5, 6, 7, 9, 10, 11
only

2nd DRAFT

Received April 14, 1975

SUPREME COURT OF THE UNITED STATES

No. 73-1765

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Appellants,
v.
John C. Pittenger, Etc.,
et al. } On Appeal from the United
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[April —, 1975]

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 21, 1975

73-1765

Dear Chief:

Bill Douglas called me at home Saturday night to ask that I add him to my dissent in No. 73-1765, Meek v. Pittenger, and that Lewis join him in his opinion for the Court in No. 74-13 - Mullaney v. Wilbur. He also stated that he would be here for the Fowler argument today.

Sincerely,

Bul

The Chief Justice

cc: The Conference

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

cc: Stewart, J.

Circulated: MAR 19 1975

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1765

Sylvia Meek et al.,
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v.
John C. Pittenger, Etc., et al. } On Appeal from the United
States District Court for
the Eastern District of
Pennsylvania.

[April —, 1975]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case requires us to determine once again whether a state law providing assistance to nonpublic, church-related, elementary and secondary schools is constitutional under the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. *Murdock v. Pennsylvania*, 319 U. S. 105, 109; *Cantwell v. Connecticut*, 310 U. S. 296, 303.

I

With the stated purpose of assuring that every school-child in the Commonwealth will equitably share in the benefits of auxiliary services, textbooks, and instructional material provided free of charge to children attending public schools,¹ the Pennsylvania General Assembly in 1972 added Acts 194 and 195, July 12, 1972, Pa. Stat. Tit. 24, § 9-972, to the Pennsylvania Public School Code of 1949, Pa. Stat. Tit. 24, §§ 1-101 to 27-2702.

¹ See Act 194, § 1 (a), Pa. Stat. Tit. 24, § 9-972 (a); Act 195, § 1 (a), Pa. Stat. Tit. 24, § 9-972 (a).

P. 14

To: The Chief Justice
Mr. Justice Douglass
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: _____

Recirculated: APR 11 1975

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1765

Sylvia Meek et al.,
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v.
John C. Pittenger, Etc.,
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¹ See Act 194, § 1 (a), Pa. Stat. Tit. 24, § 9-972 (a); Act 195, § 1 (a), Pa. Stat. Tit. 24, § 9-972 (a).

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
~~Mr.~~ Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: _____

Recirculated:

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1765

Sylvia Meek et al.,
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et al. } On Appeal from the United
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[April —, 1975]

MR. JUSTICE STEWART announced the judgment of the Court and delivered the opinion of the Court (Parts I, II, IV, and V), together with an opinion (Part III), in which MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL, joined.

This case requires us to determine once again whether a state law providing assistance to nonpublic, church-related, elementary and secondary schools is constitutional under the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. *Murdock v. Pennsylvania*, 319 U. S. 105, 109; *Cantwell v. Connecticut*, 310 U. S. 296, 303.

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¹ See Act 194, § 1 (a), Pa. Stat. Tit. 24, § 9-972 (a); Act 195, § 1 (a), Pa. Stat. Tit. 24, § 9-972 (a).

✓ J. J. Brennan
✓ Justice White
✓ Justice Marshall
✓ Justice Blackmun
✓ Justice Powell
✓ Justice Rehnquist

P 18

✓ Justice Stewart, J.

circulated: _____

circulated: 14 1975

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1765

Sylvia Meek et al.,
Appellants,
v.
John C. Pittenger, Etc., et al. } On Appeal from the United
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Pennsylvania.

[April —, 1975]

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This case requires us to determine once again whether a state law providing assistance to nonpublic, church-related, elementary and secondary schools is constitutional under the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. *Murdock v. Pennsylvania*, 319 U. S. 105, 108; *Cantwell v. Connecticut*, 310 U. S. 296, 303.

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¹ See Act 194, § 1 (a), Pa. Stat. Tit. 24, § 9-972 (a); Act 195, § 1 (a), Pa. Stat. Tit. 24, § 9-972 (a).

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

LC

CHAMBERS OF
JUSTICE POTTER STEWART

May 21, 1975

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Meek v. Pittenger, No. 73-1765

No. 74-339, Wolman v. Essex

This case is here on direct appeal from the judgment of a three-judge district court upholding the constitutionality of an Ohio statute providing two forms of assistance to nonpublic elementary and secondary schools in the State. The appellants brought this class action on behalf of all similarly situated citizens and taxpayers of Ohio, alleging that § 3317.062 of the Ohio Revised Code violates the constitutional prohibition against laws "respecting an establishment of religion," and requesting injunctive and other relief.

Section 3317.062 authorizes local school districts to use state appropriated funds "to provide . . . services and materials to pupils attending nonpublic schools within the school district for: guidance, testing, and counseling programs; programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children; audio-visual aids; speech and hearing services; remedial reading programs; educational services; programs for the improvement of the educational and cultural status of disadvantaged pupils." The statute prohibits use of the educational services and materials in sectarian religious courses or devotional exercises. In addition, the statute restricts the materials and services that can be provided to those that are available for pupils in the public schools of each particular school district.

06/14
you Dwyer

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 10, 1975

Re: No. 73-1765 - Meek v. Pittenger

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

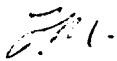
April 16, 1975

Re: No. 73-1765 -- Sylvia Meek v. John C. Pittenger

Dear Bill:

Please join me.

Sincerely,



T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 24, 1975

Re: No. 73-1765 - Meek v. Pittinger

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

cc: The Conference

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION
LIBRARY OF THE CONFERENCE

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

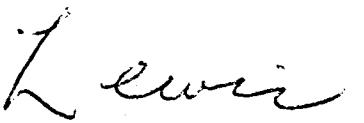
March 21, 1975

No. 73-1765 Meek v. Pittenger

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

1fp/ss

cc: The Conference

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

From: Rehnquist, J.
APR 9 1975
Circulated:

1st DRAFT

Recirculation:

— 1 —

SUPREME COURT OF THE UNITED STATES

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[April —, 1975]

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

Substantially for the reasons set forth in my dissent and those of THE CHIEF JUSTICE and MR. JUSTICE WHITE in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U. S. 756 (1973), and *Sloan v. Lemon*, 413 U. S. 825 (1973), I would affirm the judgment of the District Court.

Two Acts of the Pennsylvania Legislature are under attack in this case. Act 195 includes a program that provides for the loan of textbooks free of charge to elementary and secondary students attending nonpublic schools, just as other provisions of Pennsylvania law provide similar benefits to children attending public schools, Pa. Stat. Tit. 24, § 8-801. I agree with the Court that this program is constitutionally indistinguishable from the New York textbook loan program upheld in *Board of Education v. Allen*, 392 U. S. 236 (1968), and on the authority of that case I join the judgment of the Court insofar as it upholds the textbook loan program.

The Court strikes down other provisions of Act 195 dealing with instructional materials and equipment¹

¹ The District Court upheld these sections of Act 195 except insofar as

Cite checking corrections

& 1,2,3,5,6,7

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

From: Rehnquist, J.

Circulated:

Recirculated: 4/10/75

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1765

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Appellants,
v.
John C. Pittenger, Etc., et al. } On Appeal from the United
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[April —, 1975]

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Two Acts of the Pennsylvania Legislature are under attack in this case. Act 195 includes a program that provides for the loan of textbooks free of charge to elementary and secondary school students attending non-public schools, just as other provisions of Pennsylvania law provide similar benefits to children attending public schools, Pa. Stat. Tit. 24, § 8-801. I agree with the Court that this program is constitutionally indistinguishable from the New York textbook loan program upheld in *Board of Education v. Allen*, 392 U. S. 236 (1968), and on the authority of that case I join the judgment of the Court insofar as it upholds the textbook loan program.

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3rd DRAFT

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