The Burger Court Opinion Writing Database

Wolman v. Walter
433 U.S. 229 (1977)

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

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

76-496

CHAMBERS OF
THE CHIEF JUSTICE

May 5, 1977

PERSONAL

Dear Harry:

I am "out of circulation" today and perhaps the rest of the week, but your memo on Wolman v. Essex, No. 76-496, was read to me. I have talked with Lewis about the matter and he is willing to undertake Wolman v. Essex if you would be willing to switch with Morris v. Gressette, No. 75-1583.

If this is satisfactory, I will then send a memorandum amending the assignments.

Regards,

WEB

Mr. Justice Blackmun

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

-L. 496

CHAMBERS OF
THE CHIEF JUSTICE

May 5, 1977

Dear Harry:

I have your note, and on balance it seems to me the best thing to do is let the assignments stand as they are. Lewis, you and I, at least, have grave reservations about the constitutionality of the Voting Rights Act and, therefore, even though we cannot bury it, our inclination is not to praise it. Nevertheless, we have all written opinions, the results of which we do not like, on the basis of stare decisis. Barrett Prettyman often told me this was good discipline for the soul of a judge. The opinion in Gressette can be written on the premise that the Court has, at least for the moment, settled the underlying question.

This little exercise illustrates the trials and tribulations of assignments and the chain reaction that follows, particularly at this time of the year.

Many thanks to both you and Lewis.

Regards,

WEB

Mr. Justice Blackmun

cc: Mr. Justice Powell

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~~ VIII.

Regards,

WEB

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

Dear Harry:

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

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 6/9/77

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 76-496 O.T. 1976

Benson A. Wolman, et al., Appellants, v. Martin W. Essex, et al.

On Appeal from the United States District Court for the Southern District of Ohio.

[June ____ 1977]

MR. JUSTICE BRENNAN, concurring and dissenting.

I join Parts I, VII and VIII of the Court's opinion, and the reversal of the District Court's judgment insofar as that judgment upheld the constitutionality of §§3317.06(B),(C), and (L).

I dissent however from Parts II, III, IV, V and VI of the opinion and the affirmance of the District Court's judgment insofar as it sustained the constitutionality of §§3317.06 (A),(D), (F), (G), (H), (I), (J) and (K). The Court holds that Ohio has managed in these respects to fashion a statute that avoids an effect or entanglement condemned by the Establishment Clause. But "The [First] Amendment nullifies sophisticated as well as simple-minded . . ." attempts to avoid its prohibitions, Lane v. Wilson, 307 U.S. 268, 275 (1939), and, in any event, ingenuity

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 6/20/77

Recirculated: _____

1st DRAFT

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]

MR. JUSTICE BRENNAN, concurring and dissenting.

I join Parts I, VII, and VIII of the Court's opinion, and the reversal of the District Court's judgment insofar as that judgment upheld the constitutionality of §§ 3317.06 (B), (C), and (L).

I dissent however from Parts II, III, IV, V, and VI of the opinion and the affirmance of the District Court's judgment insofar as it sustained the constitutionality of §§ 3317.06 (A), (D), (F), (G), (H), (I), (J), and (K). The Court holds that Ohio has managed in these respects to fashion a statute that avoids an effect or entanglement condemned by the Establishment Clause. But "The [First] Amendment nullifies sophisticated as well as simple-minded . . ." attempts to avoid its prohibitions, *Lane* v. *Wilson,* 307 U. S. 268, 275 (1939), and, in any event, ingenuity in draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to $88,800,000 (less now the sums appropriated to finance §§ 3317.06 (B) and (C) which are invalidated today) just for the initial biennium. The Court nowhere evaluates this factor in determining the compatibility of the statute with the Establishment Clause, as that Clause requires, *Everson* v. *Board of Education,* 330 U. S. 1, 16 (1947). Its evaluation, even after deduction of the amount appropriated to finance §§ 3317.06 (B) and (C), compels in my view the conclusion that a divisive political potential of unusual magnitude

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

JUN 16 1977

No. 76-496, Wolman v. Walter

Mr. Justice Marshall, concurring and dissenting.

I join parts I, V, VII, and VIII of the Court's opinion. For the reasons stated below, however, I am unable to join the remainder of the Court's opinion or its judgment upholding the constitutionality of §§ 3317.06 (A), (G), (H), (I), (J), and (K).

The Court upholds the textbook loan provision, § 3317.06(A), on the precedent of Board of Education v. Allen, 392 U.S. 236 (1968). Ante, at 5-7. It also recognizes, however, that there is "a tension" between Allen and the reasoning of the Court in Meek v. Pittenger, 421 U.S. 349 (1975). I would resolve that tension by overruling Allen. I am now convinced that Allen is largely responsible for reducing the "high and impregnable" wall between church and state erected by the First Amendment, Everson v. Board of Education, 330 U.S. 1, 18 (1947), to "a blurred, indistinct, and variable barrier," Lemon v. Kurtzman, 403 U.S. 602, 614, incapable of performing the vital functions of protecting both church and state for which it was designed.

In Allen, we upheld a textbook loan program on the assumption

2-6

JUN 22 1977

1st PRINTED DRAFT

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]

MR. JUSTICE MARSHALL, concurring and dissenting.

I join Parts I, V, VII, and VIII of the Court's opinion. For the reasons stated below, however, I am unable to join the remainder of the Court's opinion or its judgment upholding the constitutionality of §§ 3317.06 (A), (G), (H), (I), (J), and (K).

The Court upholds the textbook loan provision, § 3317.06 (A), on the precedent of *Board of Education* v. *Allen*, 392 U. S. 236 (1968). *Ante*, at 5–7. It also recognizes, however, that there is "a tension" between *Allen* and the reasoning of the Court in *Meek* v. *Pittenger*, 421 U. S. 349 (1975). I would resolve that tension by overruling *Allen*. I am now convinced that *Allen* is largely responsible for reducing the "high and impregnable" wall between church and state erected by the First Amendment, *Everson* v. *Board of Education*, 330 U. S. 1, 18 (1947), to "a blurred, indistinct, and variable barrier," *Lemon* v. *Kurtzman*, 403 U. S. 602, 614, incapable of performing its vital functions of protecting both church and state.

In *Allen*, we upheld a textbook loan program on the assumption that the sectarian school's twin functions of religious instruction and secular education were separable. 392 U. S., at 245–248. In *Meek*, we flatly rejected that assumption as a basis for allowing a State to loan secular teaching materials and equipment to such schools:

"The very purpose of many of those schools is to provide

HAB

76-496

May 5, 1977

Dear Chief:

In the assignments of May 3 I was given No. 76-496, Wolman v. Essex. My notes indicate that while I was generally with the majority, my views on the one issue of loans of equipment and materials were not shared by others.

I am willing to take this case on provided that my views on that issue remain open. It may be that I shall join the majority view. It may be, on the other hand, that I shall not. The opinion could be put in segmented form and, in the latter case, I could indicate that I did not join on that particular issue. I suppose this is rarely, if ever, done here, but, as you know, it is not uncommon at the court of appeals level. On this understanding I am willing to go ahead. If this is not acceptable to the Conference, the case should be reassigned.

Sincerely,

HAB

The Chief Justice

HAB

76-496

May 5, 1977

Dear Chief:

This is in response to your note about a change in the assignments. I am in the minority in No. 75-1583, Morris v. Gressette, and thus could not possibly take that one on.

On the other hand, Lewis and I are on the same side in No. 76-5187, Lee v. United States. That possibly could be exchanged for Wolman v. Essex. (76-496)

I say again that I am quite content to take on Wolman with the slight reservation I mentioned this morning. It really is not a very serious one. I have discussed this with Lewis. He tells me that he is content to leave the assignment as it is or to make the suggested change. My preference, for what it is worth, is to leave it as it is, but you have the assigning power and we shall be content to abide by your judgment.

Sincerely,

HAB

The Chief Justice

cc: Mr. Justice Powell

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.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

No. 76-496 - Wolman, et al. v. Walter

Circulated: JUN 6 1977

Recirculated: _____

MR. JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which Mr. Justice _____ joined.

This is still another case presenting the recurrent issue of the limitation imposed by the Establishment Clause of the First Amendment on state aid to pupils in church-related elementary and secondary schools. Appellants are citizens and taxpayers of Ohio. They challenge all but one of the of the provisions of Ohio Rev. Code § 3317.06 (Supp. 1976) which authorize various forms of aid. The appellees are the State Superintendent of Public Instruction, the State Treasurer, the State Auditor, the Board of Education of the City School District of Columbus, Ohio, and, at their request, certain representative potential beneficiaries of the statutory program. A three-judge court was convened. It held the statute constitutional in all respects. 417 F. Supp. 1113 (ND Ohio 1976). We noted probable jurisdiction. ____ U.S. ____ (1977).

p. 16

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 13 1977

1st DRAFT

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]

MR. JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE joined.

This is still another case presenting the recurrent issue of the limitation imposed by the Establishment Clause of the First Amendment made applicable to the States by the Fourteenth Amendment, *Meek* v. *Pittenger*, 421 U. S. 349, 351 (1975), on state aid to pupils in church-related elementary and secondary schools. Appellants are citizens and taxpayers of Ohio. They challenge all but one of the provisions of Ohio Rev. Code § 3317.06 (Supp. 1976) which authorize various forms of aid. The appellees are the State Superintendent of Public Instruction, the State Treasurer, the State Auditor, the Board of Education of the City School District of Columbus, Ohio, and, at their request, certain representative potential beneficiaries of the statutory program. A three-judge court was convened. It held the statute constitutional in all respects. 417 F. Supp. 1113 (ND Ohio 1976). We noted probable jurisdiction. — U. S. — (1977).

I

Section 3317.06 was enacted after this Court's May 1975 decision in *Meek* v. *Pittenger, supra,* and obviously is an

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.

1

fn. 1, 14-15, 20, 24

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 20 1977

2nd DRAFT

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]

MR. JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE STEWART joined.

This is still another case presenting the recurrent issue of the limitations imposed by the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, *Meek* v. *Pittenger*, 421 U. S. 349, 351 (1975), on state aid to pupils in church-related elementary and secondary schools. Appellants are citizens and taxpayers of Ohio. They challenge all but one of the provisions of Ohio Rev. Code § 3317.06 (Supp. 1976) which authorize various forms of aid. The appellees are the State Superintendent of Public Instruction, the State Treasurer, the State Auditor, the Board of Education of the City School District of Columbus, Ohio, and, at their request, certain representative potential beneficiaries of the statutory program. A three-judge court was convened. It held the statute constitutional in all respects. 417 F. Supp. 1113 (ND Ohio 1976). We noted probable jurisdiction. — U. S. — (1977).

I

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HAB

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 21, 1977

MEMORANDUM TO THE CONFERENCE

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

No. 76-713, LaSalle Academy v. Committee for Public Education

No. 76-595, Levitt v. Committee for Public Education

These cases involve the statute passed by New York to replace the provisions struck down in Levitt v. Committee for Public Education, 413 U.S. 472. The statute provides reimbursement to nonpublic schools for the costs of administering various examinations and reporting procedures required by the State. Among the tests and reports are the regents examinations, the statewide evaluation plan, the basic educational data system, the State's pupil evaluation system, and the uniform procedure for pupil attendance reporting. The definition of "costs" is not set out, but the statute has been construed to authorize reimbursement for teacher salaries, fringe benefits, supplies, and other contractual expenditures such as data processing services. The amount of reimbursement due for teacher salaries and fringe benefits is computed by determining the percentage of total work time spent performing reimbursable services and multiplying gross wages and fringe benefits by that percentage. The state funds merely replace funds that would be spent by the schools in any event. It appears that the amount paid to any given school for salaries and fringe benefits will depend on the wage scale set up by that school and will differ between schools. The schools must keep separate books and vouchers covering their claims, and they are subject to audit.

The District Court held that this system violates the Establishment Clause because it constitutes direct aid to sectarian education. The court also mentions that the aid provided is "substantial" but does not rely on that fact.

LFP/lab 6/17/77

To: The Chief Justice
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

Circulated: JUN 17 1977

Recirculated: _____

No. 76-496 Wolman v. Walter

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

Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in Meek v. Pittenger, 421 U.S. 349, 366 (1975), that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind--even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. Meek itself would have to be overruled, along with Board of Education v. Allen, 392 U.S. 236 (1968), and even perhaps Everson v. Board of Education, 330 U.S. 1 (1947). The persistent desire of a number of states to find proper means of

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

From: Mr. Justice Powell

Circulated: _____

1st PRINTED DRAFT

Recirculated: JUN 2 1 1977

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]

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

Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in *Meek* v. *Pittenger*, 421 U. S. 349, 366 (1975), that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind—even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. *Meek* itself would have to be overruled, along with *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and even perhaps *Everson* v. *Board of Education*, 330 U. S. 1 (1947). 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 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

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 21, 1977

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

Dear Harry:

After considerable agonizing, I have decided to ask you to include me as well as Byron in the statement which Byron asked you to append to your opinion in this case in his letter of June 14th.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

DRAFT # 2

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

76-496 Wolman v. Essex

From: Mr. Justice Stevens

Circulated: 6/13/77

Recirculated: _____

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

The distinction between the religious and secular is a fundamental one. To quote from Clarence Darrow's argument in the Scopes case:

> "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve." 1/

The line drawn by the Establishment Clause of the First Amendment must also have a fundamental character. It should not differentiate between direct and indirect subsidies, or between instructional materials like globes and maps on the one hand and instructional materials like textbooks on the other. For that reason, rather than the three-part test described in Part II of the Court's opinion, I would adhere to the test enunciated for the Court by Mr. Justice Black:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Everson v. Board of Education, 330 U.S. 1, 16.

Under that test, a State subsidy of sectarian schools is invalid regardless of the form it takes. The financing of buildings, field trips, instructional materials, educational tests, and school books are all equally invalid. 2/ For all give aid to the school's educational mission, which at heart is

1/Tr. of Oral Arg., at 7, Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) [Clarence Darrow Papers, Library of Congress,

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

From: Mr. Justice Stevens

Circulated: _____

1st DRAFT

Recirculated: JUN 20 1977

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]

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

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> "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has armed both the public and the religion that it would pretend to serve." [1]

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> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, what-

[1] Tr. of Oral Arg., at 7, *Scopes* v. *State*, 154 Tenn. 105, 289 S. W. 363 (1927) [Clarence Darrow Papers, Library of Congress, Box 5] [punctuation corrected].