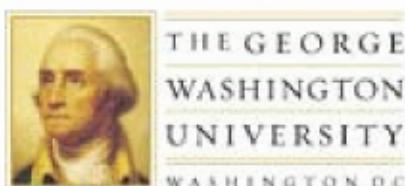


The Burger Court Opinion Writing Database

Committee for Public Education and Religious Liberty v. Regan

444 U.S. 646 (1980)

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

CHAMBERS OF
THE CHIEF JUSTICE

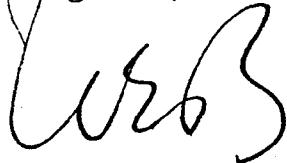
January 31, 1980

Re: 78-1369 - Committee for Public Education and
Religious Liberty v. Regan

Dear Byron:

I join.

Regards,



Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 10, 1979

RE: No. 78-1369 Committee for Public Education and
Religious Liberty v. Regan

Dear Harry:

I joined your Per Curiam in the above last year
and am still with you. Now that we are in dissent I
assume you'll convert it into a dissent.

Sincerely,



Mr. Justice Blackmun

cc: Mr. Justice Marshall
Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 29, 1980

Re: No. 78-1369
Committee for Public Education and Religious Liberty v. Edward V. Regan

Dear Harry:

Please join me.

Sincerely,



cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 14, 1980

Re: No. 78-1369, Committee for Pub. Ed.
& Rel. Lib. v. Regan

Dear Byron,

I am glad to join your opinion for
the Court in this case.

Sincerely yours,

P. S.

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 10, 1979

Dear Bill:

Re: No. 78-1369 - Committee for Public Education and
Religious Liberty v. Regan

I shall be glad to try a dissent in this case in due course. I shall probably wait for the proposed majority opinion to be circulated.

Sincerely,



Mr. Justice Brennan

cc: Mr. Justice Marshall
Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 8, 1980

Re: No. 78-1369 - Committee for Public Education v. Regan

Dear Byron:

In due course, I shall prepare a dissenting opinion in this case.

Sincerely,

HAB

Mr. Justice White

cc: The Conference

To: Mr. Justice Blackmun
 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

2nd DRAFT

Circulated: —

Received: FEB 7 1980

SUPREME COURT OF THE UNITED STATES

No. 78-1369

Committee for Public Education
 and Religious Liberty et al.,
 Appellants,
 v.
 Edward V. Regan, etc., et al.

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

[February —, 1980]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN
 and MR. JUSTICE MARSHALL join, dissenting.

The Court in this case, I fear, takes a long step backwards in the inevitable controversy that emerges when a state legislature continues to insist on providing public aid to parochial schools.

I thought that the Court's judgments in *Meek v. Pittenger*, 421 U. S. 349 (1975), and in *Wolman v. Walter*, 433 U. S. 229 (1977) (which the Court concedes, *ante*, at 7, is the controlling authority here), at last had fixed the line between that which is constitutionally appropriate public aid and that which is not. The line necessarily was not a straight one. It could not be, when this Court, on the one hand, in *Everson v. Board of Education*, 330 U. S. 1 (1947), by a 5-4 vote, decided that there was no barrier under the First and Fourteenth Amendments to parental reimbursement of the cost of fares for the transportation of children attending parochial schools, and in *Board of Education v. Allen*, 392 U. S. 236 (1968), by a 6-3 vote, ruled that New York's lending of approved textbooks to students in private secondary schools was not violative of those Amendments, and yet, on the other hand, in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), struck down, as violative of the Religion Clauses, statutes that, respectively, would have supplemented nonpublic school teachers' salaries and would have authorized the "purchase" of certain "secular

January 10, 1980

No. 78-1369 Comm. for Public Education v. Regan

Dear Byron:

I think your opinion in this case is excellent, and have written you a separate join note.

As you may have observed, my thinking about Establishment Clause cases has "mellowed" a bit over the years, and in a broad sense my current thinking is reflected in my concurring and dissenting opinion in Wolman. I do not think that the separation of church and state intended to be ensured by the Clause is threatened in the slightest by the type of state aid involved in this case. On the other hand, I think we restrict liberty in general when we prevent a state from taking this kind of action to help preserve some freedom of choice as to where - and by whom - young people are educated.

You comment on one aspect of this in your footnote 8 where you express the sound view that political divisiveness along religious lines will not result from this type of state aid. I would welcome the addition to footnote 8 of the thought that the Establishment Clause should not be construed so restrictively as to proscribe narrowly drawn legislation that furthers the public interest in preserving some diversity in educational opportunities, and in helping to assure that parochial and other private schools meet minimum state educational requirements. I touched on these thoughts briefly in Wolman.

Sincerely,

Mr. Justice White

LFP/lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 10, 1980

No. 78-1369 Comm. for Public Education v. Regan

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

Copies to the Conference

LFP/lab

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 10, 1980

Re: No. 78-1369 - Committee for Public Education
and Religious Liberty et al. v. Regan

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 9, 1980

Re: 78-1369 - Committee for Public Education
v. Regan

Dear Byron:

I shall wait for Harry's dissent.

Respectfully,



Mr. Justice White

Copies to the Conference

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: FEB 6 80

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-1369

Committee for Public Education
 and Religious Liberty et al.,
 Appellants,
 v.
 Edward V. Regan, etc., et al. } On Appeal from the United
 States District Court for
 the Southern District of
 New York.

[February —, 1980]

MR. JUSTICE STEVENS, dissenting.

Although I agree with MR. JUSTICE BLACKMUN's demonstration of why today's holding is not compelled by precedent, my vote also rests on a more fundamental disagreement with the Court. The Court's approval of a direct subsidy to sectarian schools to reimburse them for staff time spent in taking attendance and grading standardized tests is but another in a long line of cases making largely ad hoc decisions about what payments may or may not be constitutionally made to nonpublic schools. In groping for a rationale to support today's decision, the Court has taken a position that could equally be used to support a subsidy to pay for staff time attributable to conducting fire drills or even for constructing and maintaining fire-proof premises in which to conduct classes. Though such subsidies might represent expedient fiscal policy, I firmly believe they would violate the Establishment Clause of the First Amendment.

The Court's adoption of such a position confirms my view, expressed in *Wolman v. Walter*, 433 U. S. 229, 264 (STEVENS, J., dissenting), and *Roemer v. Board of Public Works*, 426 U. S. 736, 775 (STEVENS, J., dissenting), that the entire enterprise of trying to justify various types of subsidies to non-public schools should be abandoned. Rather than continuing with the sisyphean task of trying to patch together the