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IMPLEMENTATION OF WOLMAN

DAVID YOUNG

Patrick Geary: We have here Mr. David Young, who argued the *Wolman* case before the Supreme Court. Mr. Young has been the counsel for the Ohio State Catholic Conference for the past thirteen years. He is a 1955 graduate of the Ohio State Law School, and his primary practice specialization has been in the conduct of litigation. We also have with us Mr. Edward Leadem, who is the executive director of the New Jersey Catholic Conference. Mr. Leadem is a graduate of Rutgers University Law School and has been the executive director of the New Jersey Catholic Conference for the past nine years. We are also happy to have with us Mr. Leon Hebert, a 1937 graduate of Louisiana State University. He is diocesan attorney for the Diocese of Baton Rouge, Louisiana and is, in fact, the only diocesan attorney that Baton Rouge has ever had, that diocese being formed in 1961. Mr. Young is going to lead off our panel this morning, and he is going to be discussing the background of the *Wolman* decision, including the development of the rationale which led to the Supreme Court decision. Without further ado, I give you Mr. Young.

David Young: Thank you, Pat. I would be remiss if I did not start out by acknowledging that it is an honor to appear on the panel with representatives from Louisiana and New Jersey, states that have fought in the trenches of the battle for nonpublic school aid for so many years. My copanelists have provided outstanding contributions, not only in their own states of Louisiana and New Jersey, but to the entire nation. Mr. Hebert and I were just talking about the fact that it was Louisiana's *Cochran* case that started the ball rolling. I think it was in 1936 that the first textbook legislation was sustained. That came out of the state of Louisiana. And, of course, Ed Leadem has been fighting in the battle for so many years and done so many great things, and it is really an honor to be here with him.

I should also start out by thanking George Reed for inviting me to appear here today to talk about *Wolman v. Walter*. I have lived with this case for so long, and it has been so much a part of me, that all someone has to say is, "Hey, come talk about *Wolman*," and I am on the run. It is a little bit like approaching someone who just got out of the hospital and saying, "Let's talk about your operation."

I shall respond to this subject by first talking about the Ohio statute itself, its legislative history, some of the constitutional strategy in its formation. Then I shall move on to the Supreme Court decision itself; how did the Supreme Court treat the statute and why. I shall analyze the long-range impacts of the *Wolman* decision as I see them and close by looking

into the crystal ball a bit and see what lies ahead in terms of future legislative proposals and future litigation before the Supreme Court of the United States.

The Catholic Conference of Ohio did prepare, but I think that we can pass out at the end, rather than now, a complete set of materials about the Ohio legislation. These materials break down the expenditures: we are spending 88.8 million dollars a biennium in the implementation of this legislation. They break it down, showing how much for textbooks, how much for diagnostic and health services, how much for therapeutic, remedial, and guidance services, how much for testing. Then we go into the elementary and secondary school and say, okay, let us break it down further. How much for kids of this age, how much for the kids of that age. I think this will be of some real assistance in implementing this kind of legislation back home: what kind of money you will need and how you can justify your request when you go to the legislature and say you want 88.8 million dollars for this type of service.

In terms of reviewing the history, I will try not to get into detail. I find myself in a rather unusual situation with respect to *Wolman*. I was just counting before I came up here, I have had occasion to draft four different versions of this legislation, to lobby four different versions of it through the Ohio General Assembly over the past ten years, to try the case before the courts three times, twice in the federal courts and once in the state court. So, as I say, I have lived with it for a very long period of time.

In order to put the decision in better perspective and to give you a better appreciation of what impact it might have in your own state, let us talk a little bit about where we have been in Ohio. I hope that it will give you some guidance as to why we have done certain things and how you might do it. Incidentally, in looking at the schedule, I said how honored I was to be here with my good friends, Mr. Hebert and Mr. Leadem. Just before we got started, I said we have an hour and a half so we will divide this into a half hour apiece. But each of them said, "I have got five minutes, and Dave, you take the rest." Well, needless to say I am not going to bore you for that long a period of time, we are going to save some of that amount of time for questioning.

The history of *Wolman v. Walter* started out in 1967. It was at that time that we drafted the first auxiliary services and materials legislation. In 1965, Ohio had fought its first battle; that was the bus law. And of course, we had *Everson* as a guide. But there were arguments at that time that, since Justice Black had changed his view with respect to bus transportation, perhaps the Supreme Court might change its view. I think it was in a Pennsylvania case where the court refused to accept jurisdiction, and we became convinced that bus transportation was here to stay. So, after the bus battle in Ohio, when we got it through, and it was sustained in our lower courts, the next logical progression seemed to be educational materials and equipment, and auxiliary services. This was passed in 1967. At that time it was funded to the tune of about \$5,000,000 per year. It was immedi-

ately challenged in court and in 1978 we had a full, one week trial. This was the only case in Ohio where we tried the case on the basis of live evidence rather than stipulation. The record turned out so well in that case that we have referred to it in subsequent cases to show the merits of nonpublic education in Ohio.

We prevailed in the trial court. In the meantime, after we had enacted our legislation in 1967, there was the *Allen* case in 1968. This was the beautiful decision where the Supreme Court said: "Nonpublic schools perform two basic functions, secular and religious. And they do a fine job for the nation in both, they are separable, and to the extent that you draft legislation that aids the secular aspect of the function in the nonpublic schools, you have satisfied the Establishment Clause test." At that time, we were looking primarily for purpose and effect, the twofold test. We did not get into the third, administrative entanglement between government and religion, test until after the *Walz* case. So at that time we were talking about a twofold test: primary purpose and effect. We were able to pass that test quite readily, separating the materials and services into the secular aspect of our educational process. The favorable decision was affirmed in the Court of Appeals and in the Supreme Court of Ohio in 1971, *Protestants & Other Americans United for Separation of Church & State v. Essex*, 28 Ohio St. 2d 79, 275 N.E.2d 603 (1971).

It was a very sad day for nonpublic education when our opponents, Protestants and Others United for Separation of Church and State were urged by the Civil Liberties Union to drop their appeal to the Supreme Court of the United States. They filed a notice of appeal but never pursued the matter. That was the end of our first round of litigation. We built a fine record and I believe we would have prevailed in the Supreme Court of the United States.

After we won in the Supreme Court of Ohio, we thought the time was ripe to move for tuition grants for pupils in Ohio. We enacted that kind of legislation. It was funded to the tune of \$40,000,000 per year. After its enactment, and while we were challenging it in court, that was in 1973, the *Nyquist-Sloan-Levitt* decisions came out. Of course, they were preceded in 1971 by *Lemon* and *DiCenzo*, which really started the downhill thrust of the Supreme Court decisions. *Cochran* started us out well in 1938. *Everson* was a step forward in 1947. *Allen*, in 1968, was great. Then we come to 1971, the *Lemon* and *DiCenzo* cases, teacher salary supplement, secular educational contracts. Both were declared unconstitutional. Very bad principles were established, and they have remained to haunt us.

In 1973, the Court had occasion to hear the package of fine legislation adopted in New York and in Pennsylvania. But it struck down the constitutionality of tax-relief legislation, parent-grant legislation, maintenance grants, grants for standardized testing, the whole works. Again a disastrous decision.

It was immediately after that decision that it became obvious to us that no Ohio tax relief or tuition grant legislation was going to withstand

challenges. It would be ludicrous to try to push the matter further. This explains why we have 88.8 million dollars to fund auxiliary services in Ohio. After *Nyquist* in 1973, we had 5 million dollars funding auxiliary services and material which had been declared constitutional. We had 80 million dollars left over from our tuition grant program. The legislature was prepared to help us to that tune, and they came back and said, "Dave, find a constitutional avenue, or we will have to take it back." We were not about to forfeit the \$80,000,000. When we looked about and saw the downhill thrust after *Allen*, it seemed wise to pick something safe for expenditure of the \$80,000,000 per biennium. It was at that time, therefore, in 1973, that we shifted the \$80,000,000 from our tuition grant legislation to the legislation whose constitutionality had already been sustained.

And, at the time, we expanded the auxiliary services and materials legislation a bit so that we could use more money. But, it still basically was our auxiliary service and auxiliary material legislation. The new legislation and appropriation was immediately challenged in the federal court because the opponents had lost in the state court. At the three-judge federal court trial level we prevailed two to one. Now, both *Meek* from Pennsylvania and *Wolman* from Ohio had won at the three-judge federal court level. Both of us won by a two to one vote, and our legislation was very similar. Both cases were proceeding to the Supreme Court of the United States. *Meek* got there first. When one considers the attitude of the Court at that time, I do not think it made any difference. Bill Ball did an outstanding job of briefing the case. I was there at the argument. I think he presented a fine argument. He ended up with the most harsh decision, I think, ever rendered by the Supreme Court of the United States with respect to aid to nonpublic school pupils. It seemed to seal every door, close every door and probably subjected itself to one of the most stinging rebukes ever rendered by a Supreme Court Justice, and that was the dissent rendered by Justice Burger. He said it was bad enough if you were just putting schools out of existence or discriminating against religious exercise, but here you are taking kids, with a handicap, and denying them basic and fundamental services that would let them go out and perform a meaningful role in our society. He could not see how that was anything but a blatant violation of the free exercise clause.

Now, in 1975, we again have a piece of legislation funded to the tune of 88.8 million dollars and another Supreme Court decision which would suggest that it was unconstitutional. Rather than try to distinguish our case, we immediately (this is the third time now) went back to the Ohio General Assembly, changed our law in various ways, and then went back to the three-judge federal court. It was sustained by a three to nothing vote this time and went back to the Supreme Court of the United States. The decision of that Court was rendered in July of 1977. Three branches were declared unconstitutional; six were declared constitutional.

Incidentally, after we won in the Supreme Court of the United States, we still had the 88.8 million dollars appropriation to spend on the six

branches that survived. We had an awful lot of money to fund those, so we went back and amended the legislation to authorize the supply of clerks to help administer the program and to take the kids if they had to go off premises for services. Incidentally, when the services are provided off the premises, for example, in mobile units, we still feel it is constitutional if we provide the material and equipment in those mobile units, rather than the school, and are doing so.

Well, that gives just a little bit of background and we can now look at this legislative package which we have been working on for ten years to see the constitutional strategy, the changes made, and how the Supreme Court responded to them. Hopefully, this is going to give you some assistance in your states if you do not have this legislation yet.

Just for a moment, I might comment on a point of irony. You have to be in the state of Ohio to appreciate it. You know when we look at the subject of discussion, we are talking about implementation of *Wolman*. Who is *Wolman*? Benson *Wolman* is state director of the Ohio Civil Liberties Union. He has the lifelong ambition to prevent one dollar of aid going to pupils in Catholic schools. A delightful fellow. But, he is deepseated in his belief and philosophy that this is wrong, and he has not stopped. He has been on television and the radio for fifteen years, every chance he gets, sticking a pin into aid to Catholic education, ridiculing it, ridiculing the cost. He wanted to be the hero that finally put the nail in the coffin. That is why he personally had his name first in the list of plaintiffs in the lawsuit which was filed against us. But it backfired! *Wolman* is now looked upon as the saviour of Catholic education. It was his poorly timed lawsuit that gave us our first major victory since *Allen* in 1968. I am sure he now wishes he had let someone else's name go on the caption.

Let us now take a look at what we did with the Ohio statute after *Meek*, our constitutional strategy, and see how the Court responded to it. First of all, those of you who studied the *Meek* decision will recall that the Court, with respect to diagnostic assistance, said, "Well, this is probably constitutional, but we will not treat it as severable and we will declare the whole piece of legislation unconstitutional."

Up in the introductory chapters of our Ohio Revised Code, we have a lot of statutory sections relating to legislative intent, how you interpret a statute, how you count days, and things of that sort. One of these sections is the severability statute. It says, "We intend every section to be different and severable, etc.," and the thing that surprises me is that the courts do not seem to follow such statutes. Even though there is a general provision with respect to severability, I suggest that you still should stick a severability clause in a piece of legislation to get the court to really look at it properly. Since they did not find the different phases of the *Meek* legislation severable, we put a strong severability clause in our legislation. We started out in the introductory section by saying, "Monies provided shall be used for the following fully severable services," and then we took every kind of assistance that we could split out and separated it: textbooks,

separate speech and hearing diagnostic services, separate psychological diagnostic services, separate therapeutic services, separate remedial services, separate guidance services, separate materials from equipment, separate health services, separate optometric, dental nurse and medical services. In other words, there was no question about legislative intent when we finished. This was a severable piece of legislation. The Court started right out by conceding it was severable and treating it as severable throughout.

The Ohio legislation sustained in *Wolman* was, of course, redrafted with *Meek* in mind. But those of you who try these cases know the problem you have with the opponents when you draft: "Look at all these sophisticated methods that they use to try to circumvent the Constitution. The Courts tell them that one thing is constitutional and they turn around with another scheme and device to try to get around the Constitution. The Court tells them that is unconstitutional and they implement another scheme and device and on and on." Then they use Justice Brennan's language that it is not just simplistic methods to circumvent the Constitution to be set aside, but even the most sophisticated methods are unconstitutional.

I think it is important to try to fly with motherhood in these kinds of cases. We felt it was so important in Ohio in *Wolman v. Walter* to stress the fact that we were attempting to conform to the teachings of the Supreme Court of the United States. We were not circumventing. We were not trying to get around. There is nothing wrong with the legislature looking at a decision and saying, "Hey, here is what they say you cannot do; they must have meant you can do this." So, let us draft a piece of legislation that conforms to the teaching of the Supreme Court of the United States. We have allowed our opponents to say for too many years, "Hey, this is sneaky, this is tricky, they are trying to circumvent or get around." We spent a lot of time really talking about that, and we had to do it in Ohio, because, good Lord, we had taken this pot of money and kept shifting it around from here to there, and whenever we would lose a case, we would not lose any money. The money remained because we kept putting it in different pockets. Thankfully, the Court started out by agreeing that we were making an honest effort to conform to its teachings.

We in Ohio never had textbooks until the post-*Meek* amendments. But since we had this money, and had to spend it, we included textbook aid in our program. Of course, *Meek* had said the textbooks in Pennsylvania were constitutional: they were lent to pupils, they were inherently secular. Thus, there was no violation of the establishment clause. That sounded fine. They really stayed with *Allen* and *Cochran* on that point of view. But the most incomprehensible aspect of the *Meek* decision, and it is still the law today and something we will talk about in a little bit, is the way it did an about-face and treated materials and equipment differently from textbooks. It acknowledged that they were inherently secular and that starting out as secular they would remain that way. The Court

acknowledged that the materials and equipment were self-policing. Therefore, they did not need surveillance. We did not need government officials coming into the schools to police something that was self-policing and inherently secular.

Then how can they serve a religious purpose? What is the difference between a math card that says one and two is three, and a textbook that says one and two is three? There is no logical constitutional distinction. The Supreme Court must know that. It painted itself into a box in *Meek*, but the Court is like a parent with a child. It can paint itself out of a box very quickly. If the Court says it is so, it is so!

Justice Stewart wrote the opinion in *Meek* and said, "The difference between materials and books is that materials are lent to the schools and books are lent to children." Of course, the schools were, in his view, pervasively sectarian institutions. Now, this "religion pervasive institution" talk had been gradually coming from the higher education cases. The Court presumes that elementary and secondary schools are pervasively sectarian institutions. On the other hand, the Court sees institutions of higher education as having terribly ineffective religious programs and is willing to let them have aid. *Allen* told us that elementary and secondary schools had two functions, secular and religious, which could be separated, and that aid could be channeled at the secular functions. Now, from 1968 to 1975, in such a short period of time, the Supreme Court finds the same institution looked at by Justice White, who wrote the majority opinion in *Allen* as pervasively sectarian and anything you do is all gobbled up in religion. Well, the trouble is, you cannot use that basis to distinguish materials and textbooks, because textbooks are also used in pervasively sectarian institutions. This is not a justification for treating textbooks and materials and equipment differently.

Thus, the only remaining difference was that books were lent to the pupil versus the school. In Ohio, well knowing we were on thin ice, we went back and redrafted our legislative program and took the same materials and equipment we had before and called for them to be lent to the pupils, rather than schools. That is how we adjusted to *Meek*.

With respect to various services, diagnostic, therapeutic, remedial, and guidance counseling, the whole ramification of services, *Meek* tells us there is a difference between this and *DiCenzo*. You recall that in *DiCenzo*, the Supreme Court of the United States declared teacher salary supplements unconstitutional. In *DiCenzo*, the local school district paid a portion of the teachers' salaries because they were lay teachers teaching secular subjects. Unconstitutional, says the Court. They are hired by, and controlled by, the Catholic school; they will succumb to sectarianism.

In *Meek*, the Court said that even though these auxiliary services personnel are hired by the public school, controlled by the public school, and are not teaching basic educational courses, they will still succumb to sectarianism when they perform auxiliary services in a pervasively sectarian religious organization. They are saying that the mere fact that they

are sitting there in this pervasively sectarian organization will cause them to succumb to sectarianism. The risk of impermissible aid to religion can be removed only by bringing entangling governmental surveillance on the premises. This would run afoul of the new third test, unconstitutional entanglement between government and religion. This is, of course, the impossible dilemma that we were thrust in from *Lemon* and *DiCenzo* on. They presume aid to religion without controls. If you have control there will be unconstitutional entanglement between church and state. No matter which way you look, they have got you coming and going.

Justice Burger's dissent was so strong that Justice Stewart really felt obliged to respond to it. It was almost like the racist saying, "Hey, I like black people." He did not want to live with the condemnation that the Court was violating free exercise of religion. In footnote 17 of *Meek* it was stated,

The appellants do not challenge, and we do not question the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students in the Commonwealth, including those who attend church-related schools. Contrary to the argument advanced in a separate opinion filed today, therefore, this case presents no question whether the Constitution permits the states to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and at the same time to deny those benefits to other children only because they attend a Lutheran, Catholic or other church sponsored school.

Justice Stewart said they can all get services. Well, what does that mean? Many were fearful that that might have meant, "Send your children to the public school and they could get the services." But that would constitute a blatant violation of free exercise of religion. So, you really have to test this footnote. You have to go back and say, "All right, Court, you said we could get them and you certainly cannot say we have no right to go to a religious school; so where do we get them?" The Ohio response was quite easy. We said, "These services can be provided in mobile units off the edge of the premises, in public centers or in the public schools." Now, we are hiring publicly-hired, publicly-controlled officials performing public services off the premises of this alleged pervasively sectarian institution. If this is to be condemned, how long are you going to make this child wear the badge of inferiority? How far from the premises of a nonpublic school does he have to travel before he can remove the badge of sectarianism? Are you going to penalize this child because his parents have selected church-related education, even when he goes off the religious premises; when he goes to the store; the movie? How long do you deny him services simply because he has selected a church-related school?

The Court has in recent years seemed to ignore the free exercise clause as the counterbalance to the establishment clause. We thought the Ohio plan would provide an ideal vehicle to reassert free exercise rights. The kids now were receiving services off the premises. If they were to be denied, it

could only be because they selected a church-related school.

With respect to diagnostic services, the Court had suggested in footnote 16 of the *Meek* opinion that speech and hearing services may be constitutional, especially to the extent they are diagnostic. They were upheld in that case because the legislation was deemed nonseverable. The Court seemed to be saying that a speech and hearing diagnostician does not succumb to sectarianism even on a religion pervasiveness basis. We took advantage of this in Ohio and drew some fine lines. Some services were allowed on premises because of reduced likelihood of succumbing to sectarianism. Some services were provided only off premises because they were more education related. We permitted physician, dentist, optometric, nurse, paramedical, and diagnostic psychological speech and hearing services to be provided on premises. In so doing, we followed footnote 16. Then we took all the other services—the guidance counselor, all kinds of remedial education services, the therapeutic services, as distinguished from diagnostic—and allowed them to be provided in a mobile unit, in the public centers or in the public school.

We also looked carefully at the *Levitt* decision that came out of New York, the Supreme Court case that was decided at the same time as *Nyquist* and *Sloane* in 1973. We are using more and more standardized achievement testing in Ohio. It is becoming more sophisticated and more expensive, so we added this in our new legislation. The Court in *Levitt* said that these services were unconstitutional because they were internally prepared by nonpublic teachers. There was the alleged threat that the teacher would sneak religion into the test. But our tests are not teacher-prepared. They are standardized tests prepared by commercial testing organizations. We thought this would meet the strictures of the Supreme Court and, indeed, it did.

Let us talk about one other thing we did, and then we will get into the decision in *Wolman*. We thought another way to spend money (we did not even expect a challenge of that) would be for field trip transportation. Our opponents challenged this with tongue in cheek. They told me, "Dave, we are throwing that in to give you a winner." That was declared unconstitutional by the Supreme Court of the United States. The decision on this branch was so bad that I doubt the form of aid can be rehabilitated. The safest thing we put in the Ohio law other than textbooks was field trip transportation. See how predictable the United States Supreme Court is in this field?

Now that we know what we did and what the strategy was to try to get around *Meek*, let us take a look at what the Supreme Court did, and then we will take a look at the crystal ball.

First of all, as to textbooks. There was much argumentation after *Meek* that textbooks were the next shoe to fall. Many constitutional lawyers said, "Dave, you are going up there at a bad time; you are not only going to lose what you have come up with, but you are going to cause us to lose textbooks." We were indeed worried. Our opponents did a very clever job. They split up their argument. The lead plaintiff, the Civil

Liberties Union, pretty well stayed away from textbooks. Then, the *amicus curiae* briefs hit textbooks real hard. We were in a dilemma, because in an effort to get materials and equipment sustained, we had to argue that materials and equipment were the textbooks of the future. Really, they are the same as textbooks in many respects. But we could not go far in that argument without leading ourselves down the path of inviting a Supreme Court decision which would reverse *Allen*. And Dave Young never would have come to Washington again if that had happened in his case. So we kind of tiptoed through that one. The Supreme Court stuck with *Allen*. Textbooks were again upheld. Three judges voted against us, Justices Marshall, Brennan, and Stevens. The Court, in effect, said, "We really cannot distinguish books from materials. Even so, we will stay with textbooks but not extend the holding to its logical conclusion."

Moving on to the testing and scoring services, the Court followed its *Levitt* reasoning. These are not teacher-prepared; there is no risk that they are going to have religion in them. Therefore, there is no need for entanglement. Marshall, Brennan and Stevens voted against testing services.

With regard to diagnostic services, it is important to remember that it was extremely important that they remain on the premises. You are going to test every kid. It takes time and it costs money. If you have to take every one of those children off the premises, even to the edge of the premises to a mobile unit, you experience a major interruption of the administration of your school program. It is awfully important to keep as much as you can on the school premises, and the fact that we were able to keep diagnostic services on the school premises turned out to be a good gamble.

The Court, in effect, said, "These personnel are not likely to succumb to sectarianism. We do not have an impermissible risk. Since we do not have an impermissible risk, there is no need to police them." The Court, in effect, followed footnote 16, which suggested this would be constitutional. We put the Civil Liberties Union in a terrible bind by including doctor, nurse, optometric, and dental services. If you try to draw lines they get pretty thin between these and speech or hearing diagnosis or psychological diagnosis. The Court agreed. Here we obtained the best percentage, eight to one. Our good friend Brennan, our Catholic representative on the Court, was the only one who voted against diagnostic services.

The therapeutic, guidance, remedial, and auxiliary educational services presented a real challenge. Again, we had to draw a thin line. You take a child and give him a speech or hearing therapist. Typically, that is a one-on-one kind of service. You put him in a special room in your school. You have got a publicly-hired and controlled person providing the service. It is unconstitutional. You take the same person, you walk off the edge of the premises to where you have put the mobile unit (maybe it is close, maybe it is far), you take the same service personnel, you put them in a similar unit. It is constitutional. Again, I think it is the free exercise clause that really wins the day on that one. It seems like a simplistic distinction, but you have to remember that if you are going to deny a child secular educa-

tional and health services off the religious premises solely because he has attended church-related schools, you have got a classic violation of free exercise. So, surprisingly enough, we won on this therapeutic, guidance, and remedial services section 7-½ to 1-½, as I figure it out. In our materials we pass out it says 7 to 2. Both Stevens and Marshall would come up with a whole new test. They would get rid of the three-pronged test of purpose, effect, and entanglement. Justice Marshall would have sustained speech and hearing services and psychological services, but not therapeutic and remedial. Justice Brennan would knock them all out. Seven of the Justices went along with the therapeutic, remedial, and guidance services. Quite frankly, that was a bit of a shock to all of us. We thought that was as tough a case as materials and equipment. As far as materials and equipment is concerned, it is really a six to three vote against us, but I call it five to four, because Justice Powell in his concurring opinion says he would have sustained a more tightly drawn materials and equipment lending program. Maybe somebody ought to take a shot at that again. If they have Justice Powell in their camp in addition to Justices Burger, Rehnquist and White, perhaps a tightly drawn statute could pick up a fifth vote.

As I said before, the field trip decision really floored us. The Court reasoned that the Catholic school teacher determined where the children were going. That teacher could discuss the trip before they left and after they got back. Therefore, even if they go to a secular spot it becomes religious. How you can transport children on a public school bus and let them walk through the legislative halls or through an industrial or cultural center and thereby advance religion I will never know. The mere fact that a Catholic school teacher talks to them before they go and after they get back cannot turn a secular trip into a religious enterprise. If it could, that transportation to and from school would likewise fall.

Let us move on to the long-range implications of the *Wolman v. Walter* decision. What are some of the good points and bad points and where does that leave you in your states?

Before *Wolman v. Walter*, all of us were fearful that there was a hidden Supreme Court doctrine that would stop us from our long-range goals of true equity in distribution of education tax dollars. This sub-rosa doctrine suggested that if it is substantial aid, it is going to fall because of political divisiveness. This led many to believe that the only program that would survive was a low budget one. The Supreme Court in *Wolman v. Walter* knowingly sustained an 88.8 million dollar program, substantially larger than programs it had previously designated as being too substantial to withstand constitutional restrictions. That gave me hope. I particularly like Powell's concurring opinion. He concluded that if the Court said no substantial aid, it would be condemning the nonpublic schools. When you look at Brennan's dissent, you see that he objects to the 88.8 million dollars. Brennan's complaints notwithstanding, we can get substantial aid. That is one long-range implication.

I think we have a new coalition. Going into *Wolman* we had three

justices who understood our philosophy: Burger, Rehnquist, and White; three rather clear opponents: Marshall, Brennan, and Stevens; and three swing justices: Powell, Stewart, and Blackmun. When you read Powell's opinion in *Wolman* you find we now have a four-justice favorable coalition: Burger, Rehnquist, White, and Powell. His is a beautiful opinion, and I think that when we win tax credits in the Supreme Court of the United States, we will see Powell write the opinion and Justice Blackmun or Justice Stewart join with the favorable coalition.

The worst doctrine that has been used in striking our aid program in the past has been the political divisiveness doctrine. Any program that gives us aid spawns future requests and leads to battles in the legislature. Battles in the legislature mean religious fighting people in the legislature who are not of a religious persuasion and political divisiveness along religious lines. This is just a terrible theory. I do not want to start on it because I would speak for hours and hours. But, in footnote 11 of *Wolman*, the Court dismissed the political divisiveness objection with a bootstrap argument. This is not religious aid. If it is not aid to religion, it is not politically divisive along religious lines. That is a very important footnote because it can be seen as a backoff from political divisiveness. I am very hopeful that that is going to lead us in the right direction as far as getting rid of that terrible doctrine. The Court in *Wolman* also distinguished between institutions and children. This child benefit approach could win the day for tax credit legislation.

Those are the favorable long-range implications. One of the things that really continues to worry us is the religion-pervasive doctrine. We have got to someday take that head-on in a proper case. I suggested in my brief, "Court, you are going to have to rethink this distinction between elementary and secondary on the one hand and higher on the other. It is not a valid distinction. We did not have to rethink it in our case but we are going to have to. It is a false doctrine." Many Catholic colleges do a better job of teaching religion and creating a Christian atmosphere than Catholic elementary and secondary schools. It varies from institution to institution. In my Law Review article to be published in the Ohio State Law Journal, I say, "The Supreme Court of the United States is, in effect, establishing a new religion. If you want to get aid, you have to be ineffective in teaching religion. If you are ineffective in teaching religion, the program can be constitutional. If you are effective in teaching religion, the program is unconstitutional." What the Supreme Court has done is champion ineffective teaching of religion at the college level. I do not believe that this truly represents the colleges' religious dimension, but it is the standard profile adopted by the Court. The aid received is important; but I am not sure they are not selling their souls by accepting this distinction. In our brief, we said, "We are not going to proclaim that we are irreligious to try to get dollars. Take us as we are. We are a religious institution, we have a religious mission, it is going to stay there, we are not going to try to change it. Uphold our aid program because it does not violate the estab-

ishment clause. We are not aiding religion. But do not give it to us on the grounds that we are not religious."

Now, let us look into the crystal ball and judge the impact of this decision on future programs. First of all, when we look at the different forms of aid we see that textbooks are safe as a bug in a rug. But if you do not have a textbook law and you draft one, do not change the language that was used in *Allen and Meek*. We changed it in one respect, and it worried us all through the case. We stipulated the change out of the case or we would have been in trouble. We have five judges, but since there are some weak votes, let us stay with the exact language. Do not succumb to the temptation to try to get a little more by changing the definition of "textbook." As far as materials and equipment are concerned, I think it is worth another shot. If someone comes up with a limited materials program which is much closer to textbooks than was ours, and if the program is limited to materials lendable to a child rather than to an institution, they immediately get Justice Powell's vote. Hopefully, such carefully drafted legislation could also attract a fifth vote. So I would not give up completely. This type of aid has much educational importance. It has really made a difference in our schools in Ohio. As far as diagnostic services are concerned, you are completely safe to provide those. There is not a state in the country that should not provide extensive diagnostic and health services to every child in every school. There is just no justification for not supplying them. As far as therapeutic services, remedial and guidance services are concerned, my suggestion to you is do not succumb to the temptation to cheat on this. The mobile units have to be off our premises. Do not think we can sell an acre off our grounds to the public, and then place the unit on that acre. Read the opinion carefully, and you will find where the trouble points are on these kind of services. I would hate to see a similar case go back to the Court with record evidence of an attempt to cheat. Our opponents would love to eliminate this form of substantial assistance. Standardized testing is golden. I do not think there is any problem as long as we do not have the test prepared by our teachers. For the time being, although I hate to say it, the safest program we had, field trip transportation, cannot be rehabilitated in the near future.

So, there it is, the legislative history, what the Supreme Court did, and the crystal ball. This is where we are now. Our next victory should be federal tax credits.