

The Burger Court Opinion Writing Database

Earley v. DiCenso

403 U.S. 602 (1971)

Paul J. Wahlbeck, George Washington University

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Mr. Justice Black
Mr. Justice Douglas
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

Circulated: 6-10-71

Nos. 569 AND 570.—OCTOBER TERM, 1970*

Recirculated: _____

John R. Earley et al.,
Appellants,
569 v.
Joan DiCenso et al.
William P. Robinson, Jr.,
Commissioner of Educa-
tion of the State of
Rhode Island, et al.,
Appellants,
570 v.
Joan DiCenso et al.

On Appeal From the United
States District Court for
the District of Rhode
Island.

[June —, 1971]

MR. JUSTICE BRENNAN, concurring in result.

I agree that the judgment in Nos. 569 and 570 must be affirmed and that the judgment in No. 89 must be reversed. I agree also that No. 153 should be remanded but for reconsideration different from that directed by the Court.

I continue to adhere to the view that to give concrete meaning to the Establishment Clause

“the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the framers meant to foreclose,

*Together with No. 89, *Alton J. Lemon et al. v. David H. Kurtzman et al.* and No. 153, *Eleanor Taft Tilton et al. v. Elliot L. Richardson et al.*

K

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 569 AND 570.—OCTOBER TERM, 1970* From: Brennan, J.

John R. Earley et al.,
Appellants,
569 v.
Joan DiCenso et al.

William P. Robinson, Jr.,
Commissioner of Educa-
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On Appeal From the United
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[June —, 1971]

MR. JUSTICE BRENNAN, concurring in result.

I agree that the judgment in Nos. 569 and 570 must be affirmed and that the judgment in No. 89 must be reversed. I agree also that No. 153 should be remanded but for reconsideration different from that directed by the Court. In my view the Federal Higher Education Facilities Act is unconstitutional insofar as it authorizes grants of federal tax monies to sectarian institutions, but is unconstitutional only to that extent. I therefore think there must be a remand for a hearing to determine whether the four institutional appellees here are sectarian institutions.

I continue to adhere to the view that to give concrete meaning to the Establishment Clause

“the line we must draw between the permissible and the impermissible is one which accords with

*Together with No. 89, *Alton J. Lemon et al. v. David H. Kurtzman et al.* and No. 153, *Eleanor Taft Tilton et al. v. Elliot L. Richardson et al.*

10: The Chief Justice
 Mr. Justice Black
 ✓ Mr. Justice Douglas
 Mr. Justice Harlan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 569 AND 570.—OCTOBER TERM, 1970* From: Brennan, J.

John R. Earley et al.,
 Appellants,

569 v.

Joan DiCenso et al.

William P. Robinson, Jr.,
 Commissioner of Educa-
 tion of the State of
 Rhode Island, et al.,
 Appellants,

570 v.

Joan DiCenso et al.

Circulated: _____
 Recirculated: 6/15/71

On Appeal From the United
 States District Court for
 the District of Rhode
 Island.

[June —, 1971]

MR. JUSTICE BRENNAN.

I agree that the judgment in Nos. 569 and 570 must be affirmed. In my view the judgment in No. 89 must be reversed outright. I dissent in No. 153 insofar as the plurality opinion and the opinion of my Brother WHITE sustain the constitutionality, as applied to sectarian institutions, of the Federal Higher Education Facilities Act. In my view that Act is unconstitutional insofar as it authorizes grants of federal tax monies to sectarian institutions, but is unconstitutional only to that extent. I therefore think that our remand of the case should be limited to the direction of a hearing to determine whether the four institutional appellees here are sectarian institutions.

*Together with No. 89, *Alton J. Lemon et al. v. David H. Kurtzman et al.* and No. 153, *Eleanor Taft Tilton et al. v. Elliot L. Richardson et al.*