

The Burger Court Opinion Writing Database

Lemon v. Kurtzman

403 U.S. 602 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

May 6, 1971

No. 89 - Lemon v. Kurtzman

No. 569 - Earley v. DiCenso

No. 570 - Robinson v. DiCenso

No. 153 - Tilton v. Richardson

MEMORANDUM TO THE CONFERENCE:

Enclosed are proposed opinions in the above cases.

At present I believe the two state cases can be combined but I am open to suggestions on that score. There is some risk that each state will feel itself "tarred" with the entanglement aspects of the other state's program.

Regards,

WRB

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

From: The Chief Justice

Circulated: MAY 6 1971

Recirculated: _____

No. 89 - Lemon v. Kurtzman

No. 569 - Earley v. DiCenso

No. 570 - Robinson v. Di Censo

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

B

8, 9, 11, 13

To: Mr. Justice Black
 Mr. Justice Douglas ✓
 Mr. Justice Harlan
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun

From: The Chief Justice

1st DRAFT

Printed

Circulated:

JUN 4 1971

Re-circulated:

SUPREME COURT OF THE UNITED STATES

Nos. 89, 569, AND 570.—OCTOBER TERM, 1970

Alton J. Lemon et al., Appellants,	On Appeal From the United States District Court for the Eastern District of Pennsylvania.
89 v. David H. Kurtzman, as Superintendent of Public Instruction of the Com- monwealth of Pennsyl- vania, et al.	
John R. Earley et al., Appellants,	On Appeal From the United States District Court for the District of Rhode Island.
569 v. Joan DiCenso et al.	
William P. Robinson, Jr., Commissioner of Educa- tion of the State of Rhode Island, et al., Appellants,	On Appeal From the United States District Court for the District of Rhode Island.
570 v. Joan DiCenso et al.	

[June —, 1971]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

WD

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

CHAMBERS OF
THE CHIEF JUSTICE

June 16, 1971

No. 89 - Lemon v. Kurtzman
No. 569- Earley v. DiCenso
No. 570- Robinson v. DiCenso

Dear Harry:

I have added citations to the District
Court opinions as you requested.

Regards,



Mr. Justice Blackmun

8, 9, 11, 12, 13, 14, 15, 17

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated:

Nos. 89, 569, AND 570.—OCTOBER TERM, 1970 Recirculated: JUN 16 1971

Alton J. Lemon et al., Appellants, 89 v. David H. Kurtzman, as Superintendent of Public Instruction of the Com- monwealth of Pennsyl- vania, et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.
John R. Earley et al., Appellants, 569 v. Joan DiCenso et al.	On Appeal From the United States District Court for the District of Rhode Island.
William P. Robinson, Jr., Commissioner of Educa- tion of the State of Rhode Island, et al., Appellants, 570 v. Joan DiCenso et al.	

[June —, 1971]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

15-

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

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

FROM: The Chief Justice

Circulated:

Recirculated: 11/23/71

SUPREME COURT OF THE UNITED STATES

out
Nos. 89, 569, AND 570.—OCTOBER TERM, 1970

Alton J. Lemon et al. Appellants,	89 v. David H. Kurtzman, as Superintendent of Public Instruction of the Com- monwealth of Pennsyl- vania, et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.
John R. Earley et al., Appellants,	569 v. Joan DiCenso et al.	On Appeal From the United States District Court for the District of Rhode Island.
William P. Robinson, Jr., Commissioner of Educa- tion of the State of Rhode Island, et al., Appellants,	570 v. Joan DiCenso et al.	

[June 28, 1971]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

WD

TM

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

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 89, 569, AND 570.—OCTOBER TERM, 1970

Fees: Douglas, J.

Circulated: 5/8/71

Circulated:

Alton J. Lemon et al., Appellants,	On Appeal From the United States District Court for the Eastern District of Pennsylvania.
89 v. David H. Kurtzman, as Superintendent of Public Instruction of the Com- monwealth of Pennsyl- vania, et al.	
John R. Earley et al., Appellants,	On Appeal From the United States District Court for the District of Rhode Is- land.
569 v. Joan DiCenso et al.	
William P. Robinson, Jr., Commissioner of Educa- tion of the State of Rhode Island, et al., Appellants,	On Appeal From the United States District Court for the District of Rhode Is- land.
570 v. Joan DiCenso et al.	

[May —, 1971]

MR. JUSTICE DOUGLAS.

These cases involve two different statutory schemes for providing aid to parochial schools. *Lemon* deals with the Pennsylvania Nonpublic Elementary and Secondary Education Act, L. 1968, Act 209. By its terms the Pennsylvania Act allows the State to provide funds directly to private schools to purchase "secular educational services" such as teachers' salaries, textbooks, and educational materials. 24 Pa. Stat. Ann. § 5604. Reimburse-

5th DRAFT

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

SUPREME COURT OF THE UNITED STATES

Nos. 89, 569, AND 570.—OCTOBER TERM, 1970

5/11/71

Alton J. Lemon et al., Appellants,	On Appeal From the United States District Court for the Eastern District of Pennsylvania.
89 v. David H. Kurtzman, as Superintendent of Public Instruction of the Com- monwealth of Pennsyl- vania, et al.	
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,	On Appeal From the United States District Court for the District of Rhode Is- land.
570 v. Joan DiCenso et al.	

[May —, 1971]

MR. JUSTICE DOUGLAS.

These cases involve two different statutory schemes for providing aid to parochial schools. *Lemon* deals with the Pennsylvania Nonpublic Elementary and Secondary Education Act, L. 1968, Act 209. By its terms the Pennsylvania Act allows the State to provide funds directly to private schools to purchase "secular educational services" such as teachers' salaries, textbooks, and educational materials. 24 Pa. Stat. Ann. § 5604. Reimburse-

May 24, 1971

Dear Hugo:

In No. 89 - Lemon v. Kurtzman and its two companion cases, I have made some changes which I would like to submit to you before I have a recirculation. They are obvious changes and need no comment, except to say I adopted your suggestion on page one and join the opinion of the Court.

W. O. D.

Mr. Justice Black

WD

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

1, 2, 4, 17

6th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 89, 569, AND 570.—OCTOBER TERM, 1970

Circulated:

5-26

Recirculated:

Alton J. Lemon et al.,
 Appellants,

89 v.
 David H. Kurtzman, as
 Superintendent of Public
 Instruction of the Com-
 monwealth of Pennsyl-
 vania, et al.

On Appeal From the United
 States District Court for
 the Eastern District of
 Pennsylvania.

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 Is-
 land.

[June —, 1971]

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BLACK
 joins, concurring.

While I join the opinion of the Court, I have expressed
 at some length my views as to the rationale of today's
 decision in these three cases.

They involve two different statutory schemes for
 providing aid to parochial schools. *Lemon* deals with
 the Pennsylvania Nonpublic Elementary and Secondary
 Education Act, L. 1968, Act 209. By its terms the
 Pennsylvania Act allows the State to provide funds di-

BR
✓ 1st Qtr of 1971
✓ & concurred in
6/9/70

To: *Mr. Chief Justice*
Mr. Justice Black
Mr. Justice Marshall
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Harlan
Mr. Justice Blackmun

7th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 89, 569, AND 570.—OCTOBER TERM, 1970:—

Dated: 6/14/71

Alton J. Lemon et al.,
Appellants,

89 *v.*
David H. Kurtzman, as
Superintendent of Public
Instruction of the Com-
monwealth of Pennsyl-
vania, et al.

On Appeal From the United
States District Court for
the Eastern District of
Pennsylvania.

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,

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

570 *v.*

Joan DiCenso et al.

[June —, 1971]

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BLACK
joins, concurring.

While I join the opinion of the Court, I have expressed
at some length my views as to the rationale of today's
decision in these three cases.

They involve two different statutory schemes for
providing aid to parochial schools. *Lemon* deals with
the Pennsylvania Nonpublic Elementary and Secondary
Education Act, L. 1968, Act 209. By its terms the
Pennsylvania Act allows the State to provide funds di-

January 27, 1971

Re: Aid to Parochial Schools Cases

Dear Chief:

This is with reference to the Clerk's memorandum of January 26, regarding the application that has been made to defer the arguments in the cases already here (Nos. 89, 153, 569 and 570), pending the filing of an appeal, possibly on an accelerated basis, in a similar case decided by the District Court in Connecticut, Johnson v. Sanders.

My inclination is to grant the motion, whether or not this results in postponing the arguments in the cases already here until next Term. However, if the consensus among the Brethren is not to postpone the pending cases, I would be prepared to go along with that course.

In light of Mr. Seaver's memorandum that you requested that the returns of the individual Justices on the application be made to him, I am also sending Mr. Seaver a copy of this letter.

Sincerely,

J. M. H.

The Chief Justice

CC: The Conference

W D

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

CHAMBERS OF
JUSTICE JOHN M. HARLAN

June 7, 1971

Re: Nos. 153, 89, 569 and 570 - Parochial
Aid Cases

Dear Chief:

You have convinced me -- contrary to my initial view -- that tenable distinctions do exist between the federal case and the three state cases, and I am glad to join your opinion in each case.

If end-of-Term pressures permit, I may write something in addition, but if I do it will be of a tenor that will not qualify in any way my joinder of your opinions.

Sincerely,


J. M. H.

The Chief Justice

CC: The Conference

BREK

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

CHAMBERS OF
JUSTICE JOHN M. HARLAN

June 22, 1971

Re: Nos. 89, 569 and 570 - State Parochial Aid Cases

Dear Chief:

I have some difficulty with the addition of the phrase "and thus conflict with the Free Exercise Clause" in the concluding sentence, just before the commencement of subdivision (b) on page 15 of your recirculation of June 16.

As I see it, the non-involvement or non-entanglement principle reflects a set of values deducible from the Establishment and Free Exercise clauses taken together. See my concurring opinion in Walz.

The phrase just referred to seems to me to gear the non-entanglement principle entirely to the Free Exercise clause, and thus falls short of fully conveying the scope of the First Amendment problem presented by the aspect of the Rhode Island scheme being discussed in this part of your opinion. Moreover, if non-entanglement is solely a Free Exercise problem, one might be led to wonder why the appellees in 569 and 570 have standing to raise the question.

Your preceding circulation, which omitted the phrase in question, did not give rise to these difficulties and I would much prefer to see the phrase omitted.

Sincerely,


J. M. H.

The Chief Justice

CC: The Conference

To:CJ

CIRC?

89,569,570

RE: School cases

As I pointed out in my Walz concurrence, I regard the non-involvement or non-entanglement principle as reflecting a set of values deducible from the Establishment and Free ^{Fallin} Exercise clauses ~~read~~ together. Thus, for me, the ~~recent~~ addition of the phrase "and ^{is}" thus conflict with the Free Exercise Clause" ^{your reservation of June 16th} on page 15 of our opinion for the Court in Nos. 89 et al., which I have joined, does not fully state the scope of the First Amendment problem posed by the aspect of the Rhode Island scheme there being discussed. Moreover, if this is solely a Free Exercise problem, one might be led to wonder why the appellees in Nos. 569 and 570 have standing to raise the question. Before the phrase was

added, I think the thrust of that paragraph was fully compatible with my view that the entanglement principle forbids certain kinds of governmental relationships with sectarian institutions in order to preserve the autonomy and independence of each. Therefore, I hope you will consider deleting that phrase from your final draft.

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 29, 1971

Re: Nos. 89, 153, 569 and 570, O. T. 1970

Dear Bob,

I am opposed to the motion to postpone the
oral argument in these cases.

Sincerely yours,

P.S.

Mr. E. Robert Seaver
Clerk of the Court

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 7, 1971

No. 89 - Lemon v. Kurtzman
No. 569 - Earley v. DiCenso
No. 570 - Robinson v. DiCenso

Dear Chief,

I am glad to join your opinion for the Court
in these cases.

Sincerely yours,

PSI
i

The Chief Justice

Copies for the Conference

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 89.—OCTOBER TERM, 1970*

From: White, J.

Circulated:

6-11-71

Recirculated:

Alton J. Lemon et al.,
 Appellants,

v.

David H. Kurtzman, as
 Superintendent of Public
 Instruction of the Com-
 monwealth of Pennsyl-
 vania, et al.

On Appeal From the United
 States District Court for
 the Eastern District of
 Pennsylvania.

[June —, 1971]

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

It is our good fortune that the States of this country long ago recognized that instruction of the young and old ranks high on the scale of proper governmental functions and not only undertook secular education as a public responsibility but also required compulsory attendance at school by their young. Having recognized the value of educated citizens and assumed the task of educating them, the States now before us assert a right to provide for the secular education of children whether they attend public schools or choose to enter private institutions, even when those institutions are church-related. The Federal Government also asserts that it is entitled, where requested, to contribute to the cost of secular education by furnishing buildings and facilities to all institutions of higher learning, public and private alike. Both the United States and the States urge that if parents choose to have their children receive instruction in the required sec-

*Together with No. 153, *Eleanor Taft Tilton et al. v. Elliot L. Richardson et al.*; No. 569, *John R. Earley et al. v. Joan DiCenso et al.*, and No. 570, *William P. Robinson, Jr., et al., v. Joan DiCenso et al.*

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

p. 5

3rd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 89.—OCTOBER TERM, 1970*

Recirculated: 6-16-71

Alton J. Lemon et al.,
 Appellants,

v.

David H. Kurtzman, as
 Superintendent of Public
 Instruction of the Com-
 monwealth of Pennsyl-
 vania, et al.

On Appeal From the United
 States District Court for
 the Eastern District of
 Pennsylvania.

[June —, 1971]

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

It is our good fortune that the States of this country long ago recognized that instruction of the young and old ranks high on the scale of proper governmental functions and not only undertook secular education as a public responsibility but also required compulsory attendance at school by their young. Having recognized the value of educated citizens and assumed the task of educating them, the States now before us assert a right to provide for the secular education of children whether they attend public schools or choose to enter private institutions, even when those institutions are church-related. The Federal Government also asserts that it is entitled, where requested, to contribute to the cost of secular education by furnishing buildings and facilities to all institutions of higher learning, public and private alike. Both the United States and the States urge that if parents choose to have their children receive instruction in the required sec-

*Together with No. 153, *Eleanor Taft Tilton et al. v. Elliot L. Richardson et al.*; No. 569, *John R. Earley et al. v. Joan DiCenso et al.*, and No. 570, *William P. Robinson, Jr., et al., v. Joan DiCenso et al.*

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

pp 2, 6, 8

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: White, J.

Circulated:

No. 89.—OCTOBER TERM, 1970*

Recirculated: 6-18-71

Alton J. Lemon et al.,
Appellants,
v.
David H. Kurtzman, as
Superintendent of Public
Instruction of the Com-
monwealth of Pennsyl-
vania, et al.

On Appeal From the United
States District Court for
the Eastern District of
Pennsylvania.

[June —, 1971]

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

It is our good fortune that the States of this country long ago recognized that instruction of the young and old ranks high on the scale of proper governmental functions and not only undertook secular education as a public responsibility but also required compulsory attendance at school by their young. Having recognized the value of educated citizens and assumed the task of educating them, the States now before us assert a right to provide for the secular education of children whether they attend public schools or choose to enter private institutions, even when those institutions are church-related. The Federal Government also asserts that it is entitled, where requested, to contribute to the cost of secular education by furnishing buildings and facilities to all institutions of higher learning, public and private alike. Both the United States and the States urge that if parents choose to have their children receive instruction in the required sec-

*Together with No. 153, *Eleanor Taft Tilton et al. v. Elliot L. Richardson et al.*; No. 569, *John R. Earley et al. v. Joan DiCenso et al.*, and No. 570, *William P. Robinson, Jr., et al., v. Joan DiCenso et al.*

WD

TM

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1971

Re: Nos. 89, 569, and 570 - Lemon v. Kurtzman
Earley v. DiCenso
Robinson v. DiCenso

Dear Bill:

Please add the following at the
foot of your concurring opinion:

MR. JUSTICE MARSHALL took no
part in the consideration or
decision of No. 89. While in-
timating no view as to the con-
tinuing vitality of Everson v.
Board of Education, 330 U.S. 1
(1947), he concurs in Mr. Justice
Douglas' opinion covering Nos.
569 and 570.

Sincerely,


T.M.

Mr. Justice Douglas

cc: The Conference

June 9, 1971

Re: Nos. 89, 569, 570 - Lemon v. Kurtzman, etc.

Dear Chief:

Subject to what may be forthcoming in any further writing in these cases, please join me in your proposed opinion.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

June 9, 1971

Re: Nos. 39, 569, 570 - Lemon v. Kurtzman, etc.

Dear Chief:

Subject to what may be forthcoming in any further writing in these cases, please join me in your proposed opinion.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

P. S. Would there be any merit in inserting a sentence or two to the effect that one possible solution is for the public school system to supply the teaching of the secular subjects? This was your own idea expressed at conference, so I assume you have decided not to press it further at this time.

June 16, 1971

Re: Nos. 89, 569, 570 - Lemon v. Kurtzman, etc.

Dear Chief:

I am a little curious. Is there a reason why the district courts' opinions are not cited? Each is published, the Pennsylvania one at 310 F. Supp. 35, and the Rhode Island one at 316 F. Supp. 112. These citations might be worked in at the appropriate places on pages 4 and 6 of your recirculation of today. Perhaps, however, you have a reason for not using the citations.

Sincerely,

H. A. B.

The Chief Justice