

# The Burger Court Opinion Writing Database

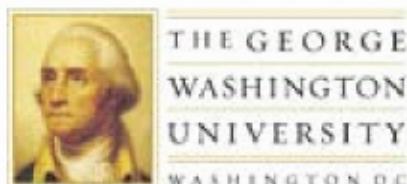
*Lemon v. Kurtzman*

411 U.S. 192 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



To: Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: MAR 9 1973

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Recirculated: \_\_\_\_\_

No. 71-1470

Alton J. Lemon et al.,  
Appellants, } On Appeal from the United  
v. } States District Court for  
David H. Kurtzman, Etc., et al. } the Eastern District of  
Pennsylvania.

[March —, 1973]

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

On June 28, 1971, we held that the Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. The case was remanded to the Three-Judge District Court for further proceedings consistent with our opinion. *Lemon v. Kurtzman*, 403 U. S. 602 (1971) (*Lemon I*). On remand, the District Court entered summary judgment in favor of appellants and enjoined payment, under Act 109, of any state funds to nonpublic sectarian schools for educational services performed after June 28, 1971. The District Court's order permitted the State to reimburse nonpublic schools for services provided before our decision in *Lemon I*. Appellants made no claim that appellees refund all sums paid under the Pennsylvania statute<sup>1</sup> struck down in *Lemon I*.

Appellants, the successful plaintiffs of *Lemon I*, now challenge the limited scope of the District Court's injunction. Specifically, they assert that the District Court

<sup>1</sup> Non-public Elementary and Secondary Education Act, 109 (24 P. S. §§ 5601-5609).

3  
12, 14, 15-16 file

To: Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 71-1470

Recirculated: MAR 28 1973

Alton J. Lemon et al.,  
Appellants,  
v.  
David H. Kurtzman, Etc.,  
et al. } On Appeal from the United  
States District Court for  
the Eastern District of  
Pennsylvania.

[March —, 1973]

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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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES<sup>MC</sup>

From: Douglass, J.

No. 71-1470

Circulated: 3-26-73

Alton J. Lemon et al.,  
Appellants,  
v.  
David H. Kurtzman, Etc.,  
et al. } On Appeal from the United States District Court for the Eastern District of Pennsylvania. Recirculated:

[March —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

There is as much a violation of the Establishment Clause of the First Amendment whether the payment from public funds to sectarian schools involved last year, the current year, or next year. Madison in his Remonstrance stated “[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment. . . .”<sup>1</sup>

Whether the grant is for teaching last year or at the present time taxpayers are forced to contribute to sectarian schools a part of their tax dollars.

The ban on that practice is not new. *Lemon I*, 403 U. S. 602, did not announce a change in the law. We had announced over and again that the use of taxpayers' money to support parochial schools violates the First Amendment, made applicable to the States by virtue of the Fourteenth.

We said in unequivocal words in *Everson v. Board of Education*, 330 U. S. 1, 16, "No tax in any amount, large or small, can be levied to support any religious activities

<sup>1</sup> The Remonstrance is reprinted in 330 U. S., at 63 and in 397 U. S., at 719.

P1  
CN  
3/2/73

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice O'Conorquist

## 3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 71-1470

Alton J. Lemon et al.,  
Appellants,  
v.  
David H. Kurtzman, Etc., et al.

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

[March —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting.

There is as much a violation of the Establishment Clause of the First Amendment whether the payment from public funds to sectarian schools involved last year, the current year, or next year. Madison in his Remonstrance stated “[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment. . . .”<sup>1</sup>

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 22, 1973

RE: No. 71-1470 - Lemon v. Kurtzman

Dear Chief:

In due course I plan to circulate a  
dissent in the above.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 26, 1973

RE: No. 71-1470 Lemon v. Kurtzman

Dear Bill:

Please join me.

Sincerely,

*Bill*

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

March 26, 1973

71-1470, Lemon v. Kurtzman

Dear Bill,

Please add my name to your dissenting opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Douglas

Copies to the Conference

7  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 12, 1973

Re: No. 71-1470 - Lemon v. Kurtzman

Dear Chief:

Please note at the foot of your opinion  
in this case that Mr. Justice White concurs in  
the judgment.

Sincerely,



The Chief Justice

Copies to Conference

3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 27, 1973

Re: No. 71-1470 - Lemon v. Kurtzman

Dear Chief:

Please join me.

Sincerely,

H. A. B.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 15, 1973

Re: No. 71-1470 Lemon v. Kurtzman

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

cc: The Conference

27  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 15, 1973

Re: No. 71-1470 - Lemon v. Kurtzman

Dear Chief:

Please join me in your opinion for the Court in  
this case.

Sincerely,

W.W.

The Chief Justice

Copies to the Conference