10-1972

Lemon v. Kurtzman

Lewis F. Powell Jr.

5/17/72--LAH

Follow lead of Justices who sat on this Case. (8-0 - Chief)

This case arises out of Court's decision last term holding Pa's law unconst. that authorized the state to pay salaries, etc. of teachers in private schools.

Q - Was decision to be applied retroactively? (as to $23,000,000 committed by State prior to decision) DISCUSS

No. 71-1470 OT 1971
Lemon v. Kurtzman
Appeal from USDC ED Pennsylvania (hastie, Luongo, Troutman)

This appeal--and two motions which I will discuss later--~~was~~ were circulated today and will be discussed at conference this Friday. This case arises out of the Court's landmark church-state opinion of last Term, holding unconstitutional a Pennsylvania statute authorizing the state to pay nonpublic schools for teacher salaries, textbooks, and supplies in secular courses. Upon holding the statute unconstitutional (8-0; per, CJ), the case was remanded to the three-judge ct in the USDC ED Pa for reconsideration in light of the Ct's opinion. The DC issued in December an Order granting the successful plaintiffs summary judgment and entering a partial permanent injunction prohibiting any future arrangements under the defunct statute. But, the DC refused to prohibit the State from paying some 23 million dollars already promised to the schools under

contracts which had been negotiated while the case was on appeal (the 1970-71 school year). Appellants have perfected this appeal challenging this limitation in the DC's decision.

The issue, as framed by the DC, was whether the decision of this Court last Term was to be accorded full or limited retroactivity. The DC held that retroactivity is a matter to be determined by the courts and that it is a determination made essentially in a vacumn. The general rule recognized by the DC is that decisions are to be accorded full retroactivity but that when circumstances dictate, a case may be restricted to prospective application. The DC then undertook to evaluate the basis of this Court's decision to determine whether the decision itself required full retroactivity. Finding that no real conflict with the basis of the opinion was created by prospectivity, the DC proceeded to "balance the equities" between the parites. The balance was struck in favor of allowing the private schools to receive the funds promised them under the contracts, despite the fact that the statute under which the expenditures were authorized was under constitutional attack in this Court when the agreements were entered into, and despite the fact that the statute subsequently has been declared unconstitutional on its face.

The Supreme Court opinion was based on the existence of "excessive entanglements" in the statutory scheme. The religious schools were required to keep separate accounting records which could be examined by state auditors in order to assure that state funds were restricted to

secular classes; the state was empowered to review the textbooks selected to determine that they had no religious overtones; the conduct of teachers could be, apparently, monitored to make sure that no religious leanings crept into secular coursework. Enforcing these restrictions--necessary to assure that the state was not "establishing a religion"--would require a great deal of state interference in the educational-religious process. Such extensive "contacts" were found impermissible. Appellees now contend that there are no entanglements involved in simply reimbursing the religious nonpublic schools for last school term. Neither party in this case--nor the DC--is very clear about the practicalities here. There is no statement as to exactly how the payments are to be made. For instance, is the state going to audit the schools' books before turning the money over to them, or has an audit already been undertaken? Has the state already approved the textbooks or is the state going to review those texts as a condition to actual payment? What of the conduct of the individual teachers? What if a parent or other interested party tells the state officials that one teacher or another engaged in expositions on religious subjects during a natural history course last year? Should the state investigate and consider withholding payment on that ground? None of these questions is answered, although it is my inclination that the state presently contemplates nothing more than paying out the funds. It was precisely because the statute authorized such scrutiny, and because avoidance of a charge that the state was establishing religion mandated

close scrutiny, that this Court struck down the statute. In the absence of the clearest showing that there will be no entanglement in this disbursement, I would hold the decision fully applicable to this fund.

Nor does appellees' case seem particularly compelling on the balancing-the-equities aspect. These contracts calling for the expenditure of state funds were entered into after the DC originally upheld the statute and after the appellants had filed their notice of appeal in this Court. Both sides knew that the statute was of questionable constitutionality under prevailing precedents of this Court. Under such circumstances, the reliance argument seems weak. Moreover, it is not clear the extent to which the private schools embarked on programs, hired teachers, purchased books, etc that they would not have done but for the assurance of state reimbursement. It is my guess that much of the schools' activity would have gone forward irrespective of state assistance. Finally, it is not sufficient for the schools to contend that they are financially strapped and in desperate need of aid. This is one of the facts of life that was forcefully presented to this Court before the decision was handed down. That fact cannot now compel a different result.

While retroactivity questions often seem to raise difficult questions, I would adhere to the established rule that, absent compelling circumstances, constitutional decisions should have full applicability. Arguments of equity, reliance, and hardship should not countenance the commission of constitutional violation. Of course, to a healthy extent

you may wish to defer to the view of those Justices who were here last Term and participated in this case (Justice Marshall did not participate).

In addition to the appeal, two motions have been filed. When the DC ruled in this case, it also entered a 90-day stay of its order, barring the state from paying over the monies until the case could be resolved by this Court. Appellants ask that if the case is not finally disposed of before May 22d, an extension of the stay should be granted. It goes almost without saying that unless a stay is maintained in effect pending resolution, the actual payment will virtually render the case moot. Therefore, if the case is not disposed of finally on Friday, you should vote in favor of the motion to extend the time.

The appellees agree that the stay should remain in effect pending a final decision but they move that the case be given expedited consideration. By considering the case with such promptitude, the Court will be in effect granting that motion.

RECOMMENDATION

Obviously, the case should not be heard on the merits but should be handled by order. I recommend that the DC be summarily reversed in a short Per Curiam. Also, to the extent that they are not mooted by the decision, both motions should be granted.

REVERSE SUMMARILY IN SHORT PC; GRANT MOTIONS LAH

Court	*Voted on* ....., 19...		
Argued ....., 19...	*Assigned* ....., 19...	No. 71-1470	
Submitted ....., 19...	*Announced* ....., 19...		

LEMON

vs.

KURTZMAN

Deny 1. Motion to expedite

Yes 2. Continue stay until further order of this Court

3. motion to affirm ~~or reverse~~

4 motion to note { 6 to 3

5. motion to Reverse

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.							✓							
Powell, J.				✓										
Blackmun, J.				✓										
Marshall, J.								✓						
White, J.							✓							
Stewart, J.				✓										
Brennan, J.				✓										
Douglas, J.				✓										
Burger, Ch. J.				✓										

No. 71-1470 LEMON v. KURTZMAN

Argued 11/8/72

Tentative after argument:

Affirm: There was reliance on presumptions of Const., & on decisions of D.C. Inequitable to make our decision retroactive. Establishment of religion clause not impaired.

Bruton (for Appellant)

Schools became eligible for this aid by entering into ctts; on the basis thereof, the schools were reimbursed the following year.

Chronology: Its publicly announced when statute was passed, that they would challenge validity. Suit was filed in July '69. DC dismissed suit.

E

Factual error in Record: Ctts. of Jan 15 1970 were applicable to school year 1970-71

Bruton (cont)

Pls are not seeking return of money already paid out; only to prevent payment of some $2½ million

What is impact of decision of this Ct. in June 1971? Do it make unlawful the payment of future grants.

There is no ev. that State has followed statute in investigating use of funds to determine whether they were used properly - i.e. not in a manner violating the Establishment of Religion Clause.

Reliance point. First there is doubt whether ctts are "real contracts" - or the consideration is not clear. (C.J. notes that consid. may lie in fact that private schools relieve public treasury of sub. outlays)

State regards this scheme as a subsidy - rather than a ctt.

Pls basic position is that this is a subsidy & state may terminate subsidies

Bruton (cont)

In view of confusion as to the date of cits (Jan 15 1971 rather than 1970), Pls argue that the school year in quest. was 1970/71 & hence schools did not rely on cits in ~~cits~~ setting up budgets. (DC's op. is therefore wrong on its facts — Appendix p 9 ~~to~~ — Juris. Statement).

Ball (for Pa & schools)

~~Agree~~ Both sides agree that the order of this Ct. ~~may be~~ need not be applied retroactively. depends on "interests of justice"

Interests of Justice: needs of these schools — which educate 23% of children of Pa

Ball

Chronology (see p 3 of Stath's Brief)

Immediately after passage of Act in June 1968. By Fall, an Office had been set up to adm. Act, & regulations were promulgated. Suit not brought until June 3 1969, almost year after enactment.

CTTs were entered into in Jan 1969 — 1181 schools made these CTTs — although negotiations occurred prior thereto. Payments were to be made always after the school year — in the fall thereafter: e.g. in fall of 1969 for year 68-69.

These are valid CTTs under Pa. law.

Schools had to replace certain sectarian books, provide appropriate teachers for these & subjects, for standardized testing

Ball (cont)

Act calls for ~~stock~~ reimbursement for actual costs — Read statute + regulations re to what must be done — what investigations must be made.

Payment now can't affect what will be done in schools — this in all part.

The is a presumption ~~tha~~ that all prescribed ~~e~~ action by public officials will be taken — i.e. that State here has — or will — make all prescribed investigations to assure that Act was complied with.

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

March 15, 1973

Re: No. 71-1470 Lemon v. Kurtzman

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

cc: The Conference

LAH 3/15/73 No 71-1470

Re: Lemon v. Kurtzman

Judge:

I think there is no reason not to join the CJ's circulated draft in this case. I looked closely at each of the arguments in an effort to discern why Justice White might have preferred to join only in the result. It now occurs to me that the most probable reason is that he dissented in Lemon I. The present opinion does go back into the rationale of that case and discusses the application of the constitutional principle.

I agree & will join

If our chambers had been assigned this opinion, I would have urged you to write a shorter, narrower opinion. It seems to me that this case can be fairly disposed of entirely on the basis of a federal court's traditional equitable power to fashion an appropriate remedy. In exercising that prerogative the salient fact would be that appellants did not seek to enjoin enforcement of the law in the course of this litigation. The appellants even went so far as to state that they would withdraw their request for a preliminary injunction in recognition of the practical realities of the case. Under these circumstances, and in view of the fact that the constitutional judgment was not entirely foreclosed, I think the State could legitimately rely on the presumtively constitutionality of the law. All this could be said without (1) discussion of retroactivity, and (2) discussion of the constitutional foundation of the Lemon I case.

JOIN LAH

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,

WHR

The Chief Justice

Copies to the Conference

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,

Bill

The Chief Justice

cc: 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: Douglas, J.

Circulated: 3-26-73

Recirculated: _____

2nd 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, 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. . . ." [1]

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

[1] The Remonstrance is reprinted in 330 U. S., at 63 and in 397 U. S., at 719.

or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." We reiterated the same idea in *Zorach* v. *Clauson,* 343 U. S. 306, 314, and in *McGowan* v. *Maryland,* 336 U. S. 420, 443, and in *Torcaso* v. *Watkins,* 367 U. S. 488, 493. We repeated the same idea in *McCollum* v. *Board of Education,* 333 U. S. 203, 210, and added that a State's tax-supported public schools could not be used "for the dissemination of religious doctrines" nor could a State provide the church "pupils for their religious classes through use of the States' compulsory public school machinery." *Id.,* at 212.

MR. JUSTICE BRENNAN in his separate opinion in *Lemon I* put the matter succinctly when he said,

> ". . . for more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions." 403 U. S., at 648–649.

So there was clear warning that those who proposed such subsidies were treading on unconstitutional ground. They can tender no considerations of equity that should allow them to profit from their unconstitutional venture.

The issues presented in this type of case are often caught up in political strategies, designed to turn judicial or legislative minorities into majorities. Lawyers planning trial strategies are familiar with those tactics. But those who use those tactics and lose have no equities that make constitutional what has long been declared to be unconstitutional. From the days of Madison the issue of subsidy has never been a question of the amount of the subsidy but rather a principle of no subsidy at all.

The problems of retroactivity involved in criminal cases is therefore inapplicable. There the question is

whether the newly announced rule goes to the fairness of the trial that had been completed under the old rule. See *Johnson* v. *New Jersey,* 384 U. S. 719, 726–727. Here there is no new rule supplanting an old rule. The rule of no subsidy has been the dominant one since the days of Madison. We deal with the normal situation that governs judicial decisions. Normally they determine legal rights and obligations with respect to events that have already transpired. By definition courts decide disputes that have already arisen. A losing litigant has no equity in the fact that he "relied" on advice that turned out to be unreliable or wrong.[2] A decision overruling a prior authority may at times deny a litigant due process if applied retroactively. See *Brinkerhoff-Farrs Trust & Savings Co.* v. *Hill,* 281 U. S. 673. Only a compelling circumstance has been held to limit a judicial ruling to prospective applications. The disruptive effect in criminal law enforcement is one example. *Stovall* v. *Denno,* 388 U. S. 293, 300. Likewise a ruling on the legality of municipal bonds has been given only prospective application where many prior bonds had been issued in good faith on a contrary assumption. *Phoenix* v. *Kolodziejski,* 399 U. S. 204, 213–215.

Retroactivity of the decision in *Lemon I* goes to the very core of the integrity of the judicial process. Constitutional principles do not ride on the effervescent arguments advanced by those seeking to obtain unconstitutional subsidies. The happenstance of litigation is no criterion for dispensing these unconstitutional subsidies. No matter the words used for the apologia, the subsidy

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[2] The rule of *Burton* v. *United States,* 391 U. S. 123, which rejected *Delli Paoli* v. *United States,* 352 U. S. 232, was given retrospective effect. We said, "The element of reliance is not persuasive, for *Delli Paoli* has been under attack from its inception and many courts have in fact rejected it." 392 U. S., at 295.

today given to sectarian schools out of taxpayers' monies exceeds by far the "three pence" which Madison condemned in his Remonstrance.

I would reverse the judgment below and adhere to the constitutional principle announced in *Lemon I*.

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

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

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
11/20/72								
circulated 3/9/73		will dissent 3/22/73	join ~~PS~~ WOD 3/26/73	Concur in judgment 3/14/73		join CB 3/29/73	join CB 3/15/73	join CB 3/15/73
2nd draft 3/28/73	3rd draft 3/27/73	~~Circulated 2nd draft 3/26/73~~						
		join WOD 3/26/73						
					71-1470 Lemon v. Kurtzman			