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SUPREME COURT CASE 31

Lemon v. *Kurtzman,* 1971

HISTORICAL BACKGROUND

THROUGHOUT the 1960s and 1970s, the Supreme Court frequently considered cases involving the separation of church and state. As noted in *Walz* v. *Tax Commission,* the Court created precedents that at times appeared contradictory, but that aimed to uphold a "constitutional neutrality." As Chief Justice Burger put it in his majority opinion in *Walz,* 1970, let "no religion be sponsored nor favored, none commanded, and none inhibited." Burger conceded that the evolution of the neutrality standard had not proceeded in "an absolutely straight line." Fearing too powerful a precedent, the Court avoided "rigidity" and tried instead to formulate "general principles on a case-by-case basis." With the case of *Lemon* v. *Kurtzman,* the Court would attempt to codify the principles on which these matters would be judged in the future.

The *Lemon* decision usually refers to a combination of two cases, both concerned with State statutes allowing some support of private, religious education. The issue of assistance to private, religious schools had been considered in *Everson* v. *Board of Education,* 1947, when the Court found it constitutional to assist student transportation to religious schools. In *Walz* v. *Tax Commission,* 1970, the Court established a new precedent that discouraged "excessive entanglement" between church and state.

CIRCUMSTANCES OF THE CASE

In *Lemon* v. *Kurtzman* the Court considered a Pennsylvania law that allowed the State superintendent of schools to "purchase" certain educational services from parochial schools. The State reimbursed the parochial schools for books, materials, and teachers' salaries as long as the courses taught were "secular" and the books were approved by the superintendent. A group of Pennsylvania residents, including Lemon, sought an injunction against Kurtzman, the superintendent of public instruction for the State of Pennsylvania, in a Pennsylvania federal court. The court upheld the Pennsylvania law as being legal and constitutional under the 1st Amendment. Lemon and the group appealed.

In the second case, *Earley* v. *DiCenso,* a Rhode Island State law established a fund to pay a 15 percent salary supplement to teachers in parochial schools under certain specific conditions. The schools could not exceed the per-pupil expenditures for secular subjects taught in public schools. The teachers whose salaries were being supplemented had to teach secular subjects as they were taught in public schools. They had to use the same books and materials, and they could not give religious instruction. The supplement was paid to about 250 teachers in Roman Catholic schools. Rhode Island taxpayers (*DiCenso*) brought suit against the State's Department of Education (*Earley*) in a federal court. The court found the Rhode Island law a violation of the separation of church and state as defined by the Supreme Court. Rhode Island appealed.

CONSTITUTIONAL ISSUES

The Court considered once again some familiar questions on church-state relations. Did State assistance to private, religious schools violate the Establishment Clause of the 1st Amendment? On the other hand, did withholding State assistance to private, religious schools violate the 1st Amendment's Free Exercise Clause?

ARGUMENTS

For Lemon and DiCenso: The assistance to private, Roman Catholic schools favors one religion over others. It constitutes "sponsorship" of the Catholic Church, which is prohibited by the Establishment Clause of the 1st Amendment. The *Walz* decision set a precedent barring "excessive entanglement" of the State in religious affairs. The Pennsylvania and Rhode Island statutes created such an "entanglement" by involving the State in decisions about class content and teaching as well as in the auditing and bookkeeping of the parochial schools.

For Kurtzman and Earley: Withholding State assistance to these schools just because they are religious would interfere with the free exercise of religion as practiced in parochial schools, and as upheld by the Court itself in *Everson,* 1947. The State statutes in question clearly define the qualifications for aid. They do not allow parochial schools to be favored over public schools, but they do allow those schools to be more equal.

DECISION AND RATIONALE

By votes of 8–0 and 8–1, the Court overwhelmingly found both State laws in violation of the Establishment Clause in that they provided State aid to parochial schools. The majority opinion, written by Chief Justice Warren Burger, relied heavily on precedent, especially the "excessive entanglement" criterion spelled out in *Walz,* 1970. "In the absence of precisely stated constitutional prohibitions," Burger wrote, "we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"

Burger then spelled out a three-part test for judging the constitutionality of State aid to religious education. First, a statute must "have a secular legislative purpose. . . ." Second, "its principle or primary effect must be one that neither advances nor inhibits religion; . . . finally the statute must not foster 'excessive government entanglement with religion.'"

The Court concluded that "the cumulative impact of the entire relationship arising under the statutes in each state involves *excessive entanglement* between government and religion," so the statutes failed part three of the *Lemon* test.

Burger very carefully detailed the specific "entanglements" the Court discerned before it rejected the statutes. In order to determine whether Rhode Island parochial school teachers met the conditions for receiving the salary supplement, State administrators would have to observe classes, making sure that the teaching was in no way "religious." The State would also have to audit financial records to determine that per-pupil costs were not higher than those in public schools.

Burger cited with foreboding the "self-perpetuating and self-expanding propensities" of "modern governmental programs." He feared that given these propensities, the programs under question might eventually present a real danger of State control over religion. He wrote that certain steps, "which when taken were thought to approach 'the verge' [of excessive government involvement], have become the platform for further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop." To prevent government's sliding in that direction, the Court drew the line of "excessive entanglement" to exclude the types of aid the contested statutes provided.

QUESTIONS FOR DISCUSSION

1. Did these cases hinge on the Establishment Clause or the Free Exercise Clause, or both?
2. The Court's decision avoided considering whether these State statutes "advanced or inhibited" religion (part two of the *Lemon* test). Judge the effect of these statutes for yourself . Did they meet the Court's criterion of "constitutional neutrality"?