LEMON v. KURTZMAN (II)
SUPREME COURT OF THE UNITED STATES
411 U.S. 192
April 2, 1973
[5 - 3][1]

OPINION: BURGER/BLACKMUN/POWELL/REHNQUIST...**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 (Lemon I)[2].** 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 sectarian schools for services provided before our decision in Lemon I. Appellants made no claim that appellees refund all sums paid under the Pennsylvania statute 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 erred in refusing to enjoin payment of some $24 million set aside by Pennsylvania to compensate nonpublic sectarian schools for educational services rendered by them during the 1970—1971 school year. We noted probable jurisdiction and we affirm the judgment of the District Court.

[1] Justice Marshall did not participate.
[2] Case 1A-R-042 on this website.

(1)

The specifics of the Pennsylvania statutory scheme held unconstitutional in Lemon I need be recalled only briefly. Under Act 109, the participating nonpublic schools of Pennsylvania were to be reimbursed by the State for certain educational services provided by the schools pursuant to purchase-of-service contracts with the State. According to the terms of the contracts, the schools were to provide teachers, textbooks, and instructional materials for mathematics, modern foreign language, physical science, and physical education courses—'secular' courses of instruction. The State was not only to compensate the schools for the services provided, but also to undertake continuing surveillance of the instructional programs to insure that the services purchased were not provided in connection with 'any subject matter expressing religious teaching, or the morals or forms of worship of any sect.' Lemon I.

Under § 5607 of the Act, any nonpublic school seeking reimbursement was to 'maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement.' To this end, the school accounts were to be subject to audit by the State Auditor General. Actual payment was to be made by the Superintendent of Public Instruction 'in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered.'

In Lemon I, we held that, although Act 109 had a secular legislative purpose, the Act fostered 'excessive entanglement' of church schools and State through the requirement of ongoing state scrutiny of the educational programs of sectarian schools, the statutory post-audit procedures, and potential involvement in the political process. We found it unnecessary to decide whether Act 109 was constitutionally infirm on the additional ground that the 'primary effect' of any state payments to church-related schools would be to promote the cause of religion in contravention of the Establishment Clause of the First Amendment.

(2)

Against this backdrop, we turn to the events relevant to this appeal. On June 19, 1968, Act 109 became law. Approximately one month later, appellants publicly declared their intention of challenging the constitutionality of the new legislation. During the following six months, the State took steps to implement the Act, promulgating regulations and, in January 1969, entering for the first time into service contracts for the 1968—1969 school year (then in progress) with approximately 1,181 nonpublic schools throughout Pennsylvania. The schools submitted schedules in June 1969, at the conclusion of the 1968—1969 school year, specifying the precise items of expense during that year for which they would seek reimbursement, to be made during the 1969—1970 school year. On June 3, 1969, appellants filed their complaint, asking that Act 109 be declared unconstitutional and its enforcement enjoined.

Simultaneously with their 1969 complaint, appellants filed a motion for a preliminary injunction to restrain the responsible state officials from 'paying or processing for paying any funds pursuant to (Act 109).' However, appellants abandoned the request for preliminary relief in a letter of August 28, 1969, from their counsel to Judge Troutman. Appellants, describing their

position as a 'sensible recognition of the practical realities of the situation, . . . withdraw from any attempt to prevent initial payment to the nonpublic schools scheduled for September 2 (1969).' In the same letter, appellants' counsel mentioned the payments scheduled for December 2, 1969, but in fact no attempt was ever made to enjoin those reimbursements.

On November 29, 1969, a divided District Court granted appellees' motion to dismiss appellants' complaint for failure to state a claim on which relief could be granted. Appellants filed a notice of appeal to this Court on December 17, 1969; at no time before or after probable jurisdiction was noted on April 20, 1970, did appellants move for interlocutory relief pending appeal, even though on January 15, 1970, the schools entered into service contracts with the State for the 1969—1970 school year. Consequently, the District Court had no occasion to consider the exercise of injunctive power pendente lite.

In September 1970, the schools began performing services for the 1970—1971 school year, compensable under the terms of Act 109; and on January 15, 1971, contracts were entered into for that school year. On June 28, 1971, we held Act 109 unconstitutional and remanded the cause to the District Court for further proceedings consistent with our opinion. Not until appellants filed their motion for summary judgment, in August 1971, did they first indicate their intention to prevent reimbursement under Act 109 for the services already provided by the schools during the 1970—1971 school year.

(3)

Claims that a particular holding of the Court should be applied retroactively have been pressed on us frequently in recent years. Most often, we have been called upon to decide whether a decision defining new constitutional rights of a defendant in a criminal case should be applied to convictions of others that predated the new constitutional development. But 'in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases.' We have approved nonretroactive relief in civil litigation, relating, for example, to the validity of municipal financing founded upon electoral procedures later declared unconstitutional or to the validity of elections for local officials held under possibly discriminatory voting laws. In each of these cases, the common request was that we should reach back to disturb or to attach legal consequence to patterns of conduct premised either on unlawful statutes or on a different understanding of the controlling of judge-made law from the rule that ultimately prevailed.

Appellants urge, as they did in the District Court, a strange amalgam of flexibility and absolutism. Appellants assure us that they do not seek to require the schools to disgorge prior payments received under Act 109; in the same breath, appellants insist that the presently disputed payment be enjoined because an unconstitutional statute 'confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.' Conceding that we have receded from Norton in a host of criminal decisions and in other recent constitutional decisions relating to municipal bonds, appellants nevertheless view those precedents as departures from the established norm of Norton. We disagree.

The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is 'among the most difficult of those which have engaged the

attention of courts, state and federal . . ..' Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct 'is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application." However appealing the logic of Norton may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity. Appellants offer no persuasive reason for confining the modern approach to those constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none.

In Linkletter, the Court suggested a test, often repeated since, embodying the recent balancing approach; we looked to 'the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Those guidelines are helpful, but the problem of Linkletter and its progeny is not precisely the same as that now before us. Here, we are not considering whether we will apply a new constitutional rule of criminal law in reviewing judgments of conviction obtained under a prior standard; the problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional. True, the temporal scope of the injunction has brought the parties back to this Court, and their dispute calls into play values not unlike those underlying Linkletter and its progeny. But however we state the issue, the fact remains that we are asked to reexamine the District Court's evaluation of the proper means of implementing an equitable decree.

In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' Brown v. Board of Education[3]. Mr. Justice Douglas, speaking for the Court, has said,

> 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' Hecht Co. v. Bowles.

In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots.

(4)

[3] Case 1-29 on this website.

The constitutional fulcrum of Lemon I was the excessive entanglement of church and state fostered by Act 109. We found it unnecessary to decide whether the 'legislative precautions (of Act 109) restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses.' For, as we said of both Act 109 and the similar Rhode Island provision, '(a) comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed...These prophylactic contacts will involve excessive and enduring entanglement between state and church.' We further emphasized the reciprocal threat to First Amendment interests from enmeshing the divisive issue of direct aid to religions schools in the traditional political processes.

The sensitive values of the Religion Clauses do not readily lend themselves to quantification but, despite the inescapable imprecision, we think it clear that the proposed distribution of state funds to Pennsylvania's nonpublic sectarian schools will not substantially undermine the constitutional interests at stake in Lemon I. Act 109 required the Superintendent of Public Instruction to ensure that educational services to be reimbursed by the State were kept free of religions influences. Under the Act, the Superintendent's supervisory task was to have been completed long ago, during the 1970—1971 school year itself; nothing in the record suggests that the Superintendent did not faithfully execute his duties according to law. Hence, payment of the present disputed sums will compel no further state oversight of the instructional processes of sectarian schools. By the same tokens, since the constitutionality of Act 109 is now settled, there is no further potential for divisive political conflict among the citizens and legislators of Pennsylvania over the desirability or degree of direct state aid to sectarian schools under Act 109.

Two problems having constitutional overtones remain, but their resolution requires no compromise of the basic principles of Lemon I. There is, first, the impact of the single and final post-audit. The record indicates that the post-audit process will involve only a ministerial 'cleanup' function, that of balancing expenditures and receipts in the closing accounting—undertaken only once, and in that setting a minimal contact of the State with the affairs of the schools. Second, there is the question of impinging on the Religion Clauses from the fact of any payment that provides any state assistance or aid to sectarian schools—the issue we did not reach in Lemon I. Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding that interest is implicated only once under special circumstances that will not recur. There is no present risk of significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes. Finally, as will appear, even this single proposed payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971.

Offsetting the remote possibility of constitutional harm from allowing the State to keep its bargain are the expenses incurred by the schools in reliance on the state statute inviting the contracts made and authorizing reimbursement for past services performed by the schools. It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy. That there was such reliance by the schools is reflected by a well-supported District Court finding. The District Court found that there was no dispute 'that to deny the church-related

schools any reimbursement for their services rendered would impose upon them a substantial burden which would be difficult for them to meet.'

The significance of appellee schools' reliance is reinforced by the fact that appellants' tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the Lemon I litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State under Act 109. In June 1969, appellants initiated the litigation that culminated in Lemon I. Though initially appellants moved for a preliminary injunction to block the September 1969 payment of funds for services rendered during the 1968—1969 school year, for reasons of their own appellants withdrew the request. Funds were paid in September and December 1969, and in March and June 1970. In 1970, the State entered into new contracts with the nonpublic schools; appellants took no steps to block the making of these contracts or to prevent the State from disbursing funds, in September and December 1970, or March and June 1971, for services rendered during the 1969—1970 school year. Appellants, meanwhile, had filed a notice of appeal to this Court by the time the distribution of funds for the 1969-1970 school year began. It was only after our decision in Lemon I six months after the contracts for the 1970—1971 school year were perfected and after all services under those contracts had been performed—that appellants asserted their intention to block the payments due, beginning in the fall of 1971. Thus, for nearly two years, the State and the schools proceeded to act on the assumption that appellants would continue to adhere to a 'sensible recognition of the practical realities of the situation.'

There has been no demonstration by the appellee schools of the precise amount of any detriment incurred by them during the 1970—1971 school year in the expectation of reimbursement by the State. The complexity of such a determination for each of Pennsylvania's 1,181 nonpublic schools that contracted with the State under Act 109 is readily apparent. But we need not dwell on the matter of uncertainty. On this record the District Court could reasonably find reliance on the part of the appellee schools and reasonably could conclude that no more was needed to demonstrate retrospectively the degree of their reliance.

It is argued, though, that the schools were foolhardy to rely on any reimbursement by the State whatever, in view of the constitutional cloud over the Pennsylvania program from the outset. We conclude, however, that our holding in Lemon I 'decided an issue of first impression whose resolution was not clearly foreshadowed.' A three-judge district court, with one dissent, upheld Act 109. Soon after, another three-judge district court in Rhode Island held unconstitutional the Rhode Island statutory scheme we considered together with Pennsylvania's program in Lemon I. Nor were district courts alone in disagreement over the constitutionality of Lemon-style plans to provide financial assistance to sectarian schools. This Court was itself divided when the issue was ultimately resolved after full briefing and argument. And the Court acknowledged 'that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.'

That there would be constitutional attack on Act 109 was plain from the outset. But this is not a case where it could be said that appellees acted in bad faith or that they relied on a plainly unlawful statute. In this case, even the clarity of hindsight is not persuasive that the constitutional resolution of Lemon I could be predicted with assurance sufficient to undermine appellees' reliance on Act 109.

(5)

In the end, then, appellants' position comes down to this: that any reliance whatever by the schools was unjustified because Act 109 was an 'untested' state statute whose validity had never been authoritatively determined. The short answer to this argument is that governments must act if they are to fulfill their high responsibilities. As one scholar has observed, the diverse state governments were preserved by the Framers 'as separate sources of authority and organs of administration—a point on which they hardly had a choice.'

Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers—the officers of Pennsylvania—have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review. We do not engage lightly in post hoc evaluation of such political judgment, founded as it is on 'one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law.' San Antonio Independent School District v. Rodriguez.

Federalism suggests that federal court intervention in state judicial processes be appropriately confined. Likewise, federalism requires that federal injunctions unrelated to state courts be shaped with concern and care for the responsibilities of the executive and legislative branches of state governments. In short the propriety of the relief afforded appellants by the District Court, applying familiar equitable principles, must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.

Affirmed.

CONCURRENCE: WHITE concurs in the judgment.

DISSENT: DOUGLAS/BRENNAN/STEWART...There is as much a violation of the Establishment Clause of the First Amendment whether the payment from public funds to sectarian schools involves last year, the current year, or next year. Madison in his Remonstrance stated: 'The 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 . . ..'

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 did not announce a change in the law. We had announced over and over 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[4]: 'No tax in any amount, large or small, can be levied to support any religious activities 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[5], in McGowan v. Maryland[6], and in Torcaso v. Watkins[7]. We repeated the same idea in McCollum[8] 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 state's compulsory public school machinery.'

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.'

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 them 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 problem 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. 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. A decision overruling a prior authority may at times deny a litigant due process if applied retroactively. 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. 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.

[4] Case 1A-R-022 on this website.
[5] Case 1A-R-025 on this website.
[6] Case 1A-R-028 on this website.
[7] Case 1A-R-032 on this website.
[8] Case 1A-R-023 on this website.

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 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.