



## *Lemon v. Kurtzman*

This moot court is based on the Supreme Court case of *Lemon v. Kurtzman* (1971). This case involves the constitutionality of Rhode Island and Pennsylvania statutes that sought to subsidize non-religious (secular) elements of the academic curriculums at primary and secondary religious schools.

The lesson should begin with an overview of the federal and state court system and a brief explanation of appellate advocacy and the difference between a trial and an appellate argument. In order to make the event as interactive as possible in the large group, give the students the summary of the facts followed by a brief discussion of the Supreme Court decision. Students should then be asked to take a stand “for or against” the majority decision. If one side lacks enough support, students should be encouraged to challenge themselves to defend the position they disagree with. Being able to understand and represent the other side’s arguments is the sign of a sharp legal mind.

Once students have taken sides, divide them into three groups, Petitioner (Lemon, a Pennsylvania parent challenging the constitutionality of these programs), Respondent (Kurtzman, the Pennsylvania Superintendent of Public Instruction defending the constitutionality of these programs) or Supreme Court Justices. The groups can then on their own prepare their arguments to the Supreme Court during the mini moot court. A group of 9 students should be selected to serve as the Justices of the Supreme Court.

In the small groups, have the students discuss the fact pattern and the applicable law.

### **Instructions for the students**

Start is with the BRAINSTORMING SHEET & ARGUMENT SHEET. Review the case, then work through the SHEETS which will help the group prepare their arguments. During the discussion period you will need to select

representatives (2-4) who will act as the advocates during the moot court. Students (Advocates) from each side will present a brief argument that reflects their group's strongest points for an affirmative or negative response to the question posed. Afterwards the mock Supreme Court will decide the outcome of the case. Students will be instructed that all students on each side can raise their hand to answer questions posed by the Justices of the Court if their advocates need assistance or do not have a satisfactory answer. Advocates will only have 15 minutes to present their arguments to the Supreme Court. Lemon may reserve up to five (5) minutes for rebuttal which must be done at the start of their oral argument (kindly remind Lemon to reserve time if he or she forgets as a rebuttal is a powerful tool during oral arguments). The rebuttal should focus on responding to issues that the government raised during their oral argument. You will also need to craft responses to any questions the Supreme Court might ask. The ARGUMENT SHEET is an excellent way to organize your group's thoughts.

# BRAINSTORMING SHEET

Which side do you represent?

Your Group's Arguments (Rank from best to worst):

Opposition's Arguments (Rank from best to worst):

Counterarguments To Opposition's Arguments:

Possible Supreme Court Questions:

Responses To Supreme Court Questions:



## FACT PATTERN *Lemon v. Kurtzman*

How do you think the Court should decide the matter?

We will argue and decide it today.

### **BACKGROUND:**

The First Amendment to the Constitution of the United States provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Although originally only applying to the federal government, the Court, subsequently interpreted the guarantee of liberty in the Fourteenth Amendment to carry over this right onto the states. This is a result of incorporation, a doctrine under which most provisions of the Bill of Rights have been held to apply to state governments.

This case involves government programs in two states that provided financial assistance to private schools (most, but not all, of which were religious schools) and raises the question of whether these laws violated the First Amendment.

The first program at issue was the 1969 Rhode Island Salary Supplement Act. The state legislature was concerned that the growing disparity of salaries paid to private school teachers as opposed to their public school counterparts might cause a decrease in education quality at those schools. To address this problem the Salary Supplement Act authorized the state government to pay up to 15% of the salaries of teachers at private schools provided that the teachers met the following conditions: (1) the teacher must teach at a school that spent less per student on secular (non-religious) education than the average Rhode Island public school; (2) the teacher must teach only secular classes (and must not teach any subjects not taught in the state’s public schools); and (3) the teacher must only use materials that are used in the state’s public schools.

A year earlier Pennsylvania had enacted The Pennsylvania Nonpublic Elementary and Secondary Education Act. The law was enacted in response to a concern over rising costs in nonpublic education, and authorized the Pennsylvania Superintendent of Public Instruction to “purchase” certain “secular educational services” from these schools. In practice, the state directly reimbursed nonpublic schools for specified teacher salaries, textbooks, and educational materials. Schools wishing to be reimbursed were required to adhere to certain accounting procedures and were subject to audit from the state. Reimbursement under the law was

limited to the “secular subjects” of mathematics, foreign languages, physical science and physical education. Finally, all textbooks and materials used in the program had to be approved by the Pennsylvania Superintendent of Public Instruction, and the statute prohibited funding for any course that included "any subject matter expressing religious teaching, or the morals or forms of worship of any sect.”

Both state laws were challenged in federal district court. Because in each case, there was a challenge to the execution of a state law on the grounds of unconstitutionality, both were heard by three-judge district courts. Such courts are constituted by at least one judge from the appropriate United States Court of Appeals and two district court judges. Appeals from such courts go directly to the Supreme Court of the United States, assuming that that Court grants *certiorari*. In Rhode Island the finding was that that state’s statute violated the establishment clause while the federal court in Pennsylvania came to the opposite conclusion regarding that state’s law. Although the Pennsylvania and Rhode Island programs were not identical, the Supreme Court consolidated them (heard them together) on appeal because they raised the same basic question of law: does it violate the First Amendment’s *Establishment Clause* for state governments to provide financial support to religious schools when that financial support is directed only towards secular aspects of the school’s educational program?



## ARGUMENT SHEET

Look over these arguments below. Note whether they help Lemon (Petitioner(s)) or Kurtzman (Respondent(s)). You can also decide the arguments help both sides (B) or neither side (N).

1. \_\_\_\_\_ In *Everson v. Board of Education* (1947), the Supreme Court found constitutional a New Jersey law that reimbursed parents of religious school children for bus transportation expenses. In that opinion, however, Justice Hugo Black, writing for the Court’s majority, said that the New Jersey program was on “‘the verge’ of forbidden territory” in regard to what the First Amendment would allow.
2. \_\_\_\_\_ The First Amendment *does not* say “Congress shall make no law establishing a religion.” Instead, it says “Congress shall make no law respecting an establishment of religion. . . .”
3. \_\_\_\_\_ In *Walz v. Tax Commission* (1970), the Supreme Court held that the First Amendment’s *Establishment Clause* was intended to protect against “three main evils”: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”
4. \_\_\_\_\_ The Pennsylvania and Rhode Island programs did not give money to religious schools without restrictions; rather, the money was given on the condition that it only be used for pre-approved secular purposes.
5. \_\_\_\_\_ The overwhelming majority of schools that received financial support under the Pennsylvania and Rhode Island programs were affiliated with the Catholic Church, but schools affiliated with other religions or no religion at all were also eligible to receive funding under the programs.
6. \_\_\_\_\_ For a law to comply with the First Amendment’s establishment clause, it must satisfy three different requirements: (1) it must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; (3) it must not foster an “excessive government entanglement with religion.”
7. \_\_\_\_\_ Primary effect means overall effect.
8. \_\_\_\_\_ Primary effect means who receives the initial benefit
9. \_\_\_\_\_ Supreme Court opinions have recognized that a “total separation” between Church and State “is not possible in an absolute sense.” The Supreme Court has recognized that Church and State are not separated by a wall, but rather by a blurred barrier.

8. \_\_\_\_\_ Many of the teachers that received funding under the Rhode Island program were Catholic Nuns.

10. \_\_\_\_\_ In *Pierce v. Society of Sisters*, the Supreme Court held that the First Amendment requires states to release students attending private school from any obligations to attend public school.

11. \_\_\_\_\_ Every student that attends private school is one fewer student that a state is required to educate through its public education system, and state education systems would bear a greater burden (both logistically and financially) if fewer students went to private school

12. \_\_\_\_\_ In the 1930 case of *Cochran v. Louisiana* a unanimous Supreme Court upheld a state statute that provided textbooks to students in private schools, most of which were operated by the Catholic Church. This case is cited as an example of “the child benefit” theory. A divided Supreme Court upheld a similar program in *Board of Education v. Allen* (1968).







## SUPREME COURT DECISION LEMON V KURTZMAN, 403 U.S. 602 (1971)

Chief Justice Warren Burger wrote the opinion of the Court joined by six other justices. Justice Thurgood Marshall did not participate and Justice Byron White, who would have upheld the programs, dissented. The decision established what is still known as the *Lemon* test. “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Lemon* is generally seen as representing a high point in building ‘the wall of separation’ between church and state. More recent decisions have tended to allow government to channel more aid to religious schools without being found to violate the non-establishment clause.