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What Happened When DOGS Tasted Lemon: Australian Reflections on the Contemporary Relevance of Chief Justice Burger's Opinion in Lemon v. Kurtzman

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Professor Josh Blackman, of the South Texas College of Law, recently wrote that Chief Justice Warren Burger ?may be the least influential member of the Burger Court. In modern-day discussions about constitutional law, he barely registers. Justice Blackmun wrote Roe. Justice Powell wrote the Bakke concurrence. Justice Rehnquist led the federalism revolution. Justice Stevens led the Court's liberal wing for decades.?[1]

What about Lemon v. Kurtzman!?[2] Controversy swirls around the Court's treatment of the establishment clause and its three-prong test for determining the constitutionality of government assistance for religion in that case;[3] yet the fact of dissention alone must surely cement Lemon's place as among the most significant of the Court's pronouncements. But more than that, the ?Lemon test? has endured for fifty years as a core component of First Amendment jurisprudence.[4] Together, the controversy and the ongoing importance of the test give Lemon, and so Chief Justice Burger, a lasting place in the American pantheon of constitutional jurisprudence.

Many others have written about Lemon and its attendant controversy as part of its fiftieth anniversary in 2021.[5]This article will not add to that literature. Instead, while the days of Chief Justice Burger's Lemon legacy in American law may be numbered,[6] here I show how it nonetheless retains some relevance not only to contemporary US establishment clause jurisprudence?most recently in Espinoza v. Montana Department of Revenue[7] and in the pending Supreme Court decision in Carson v. Makin[8]?but also, and much more importantly, beyond American borders in what might seem a most unexpected way. It forms an important component of the interpretation given by the High Court of Australia (the Australian equivalent to the Supreme Court of the United States) to the establishment clause found in the Australian Constitution. For that reason, Chief Justice Burger, and Lemon, has an odd yet enduring Australian legacy found in the High Court's decision in Attorney-General (Vic); Ex Rel Black v Commonwealth.[9]

I pause here to make three preliminary points. First, to explain the title of this article. While I say more about it in Part IV, Attorney-General (Vic); Ex Rel Black v Commonwealth involved a challenge brought by an advocacy group known as the Australian Council for the Defence of Government Schools, or, as it more commonly known by its acronym, ?DOGS'.[10] That acronym has been used ever since as the name of the case. Today, one need only mention the DOGS Case and it will be immediately understood by any Australian lawyer to be a reference to Attorney-General (Vic); Ex Rel Black v Commonwealth; indeed, the case is so-called even in formal judicial and academic documents.[11] Hence, the title, and the question I address in this article: What happened when DOGS tasted Lemon? I am of course referring to Australian DOGS! Second, in 2021, Lemon and DOGS both marked important anniversaries: the former its fiftieth, the latter its fortieth; yet, notwithstanding the passage of time, in an area of law that moves quickly, both remain important statements of the law concerning establishment in their respective jurisdictions. Third, Chief Justice Burger's three-prong test in Lemon inextricably links the American and the Australian constitutions, not simply comparatively, but in a substantive way, giving that jurist an enduring legacy, not only within the United States, but also beyond its borders, and for the constitution of another nation.

Those preliminary points made, I want to do four things in this article. First, to provide the briefest of refreshers to Lemon and its significance in American Constitutional jurisprudence. Second, to compare the religion clauses found in the two constitutions. Third, to examine the High Court's decision in DOGS. Fourth, to offer concluding reflections on the Australian legacy of Lemon, and, perhaps surprisingly, the American legacy of DOGS.

[1] Josh Blackman, Will Chief Justice Burger's Official Biography Ever Arrive?, The Volokh Conspiracy (August 31, 2021)

https://reason.com/volokh/2021/08/31/will-chief-justice-burgers-official-biography-ever-arrive/?.

[2] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[3] See, e.g., William E. Thro & Charles J. Russo, Lemon v. Kurtzman: Reflections on a Constitutional Catastrophe, Canopy Forum (November 1, 2021) https://canopyforum.org/2021/11/01/lemon-v-kurtzman-reflections-on-a-constitutional-catastrophe/.

[4] See Robert S. Alley, The Constitution & Religion: Leading Supreme Court Cases on Church and State, 82-96 (1999); Herbert M. Kritzer & Mark J. Richards, Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases, 37(4) Law & Soc. Rev. 827 (2003).

[5] See, e.g., Thro & Russo, supra note 3.

[6] See Justice Gorsuch's sustained criticism in a concurring opinion in Shurtleff v. Boston, 596 U. S. (2022). It is widely expected that the Court will adopt that criticism explicitly so as to overturn Lemon in its pending decision in Kennedy v. Bremerton School District, No. 21-418.

[7] Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020).

[8] Carson v. Makin, No. 20?1088, now pending before the Supreme Court of the United States. See also, The Supreme Court Seems Ready to Poke a Hole in the Church-State Wall, The Economist (December 11, 2021), https://www.economist.com/united-states/2021/12/09/the-supreme-court-seems-ready-to-poke-a-hole-in-the-church-state-wall.

[9] Attorney-General (Vic); Ex Rel Black v. Commonwealth (hereinafter ?DOGS Case?) (1981) 146 C.L.R. https://staging.hcourt.gov.au/assets/publications/judgments/1981/022--ATTORNEY-GENERAL_(VICT.);_EX_REL._BLACK_v._THE_COMMONWEALTH--(1981)_146_CLR_559.html 559 (Austl.).

[10] Id. at 575.

[11] On the name of the Australian Council for the Defense of Government Schools (DOGS) and the High Court decision, see Press Release 746, DOGS: Australian Council for the Defense of Government Schools Promoting Public Education, Freedom of Religion is Protected by Section 116: Read Murphy's Dissenting Judgement DOGS Case 1981. See also Paul Babie, National Security and the Free Exercise Guarantee of Section 116: Time for a Judicial Interpretive Update, 45(3) Fed. L. Rev. 351 (2017).

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