1983

Inconsistent Standards of Review in Last Term's Establishment Clause Cases

Neal Devins
William & Mary Law School, nedevi@wm.edu

CHURCH/STATE LAW

By Neal Devins

Inconsistent Standard of Review in Last Term's Establishment Cases

LAST term, the U.S. Supreme Court issued decisions in three cases involving the establishment clause of the First Amendment.

In *Marsh v. Chambers*[1] the court ruled 6-3 that the state of Nebraska's practice of beginning each session of its state legislature with a prayer by a chaplain paid and approved by the state legislature was constitutional. In *Mueller v. Allen*,[2] the court upheld 5-4 a Minnesota tuition tax deduction scheme that permitted parents of public and private schoolchildren to deduct expenses incurred in providing "tuition, textbooks, and transportation" for their children.

Finally, in *Larkin v. Grendel's Den*,[3] the court invalidated by an 8-1 margin a Massachusetts statute that vested in the governing bodies of schools and churches the power to prevent the issuance of liquor licenses for premises within a 500-foot radius of the church or school.

This triology of cases points to the inability of the court to devise a standard of review that can be consistently applied in the resolution of establishment clause challenges. In fact, the apparent inconsistencies among last term's establishment clause decisions indicates that court precedents on this issue can be applied only to identical or near-identical fact situations and thus are of little practical significance.

The First Amendment of the Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion." This prohibition was made applicable to the actions of state governments by the 14th Amendment in a 1940 Supreme Court decision, *Cantwell v. Connecticut*.[4]

The court, since 1971, has made use of a three-part test designed to remedy and prevent the three primary evils against which the establishment clause was directed, namely, the "sponsorship, financial support, and active involvement of the sovereign in religious activities."[5]

This tripartite test provides that for a legislative enactment to pass constitutional muster: "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."[6] If any of these three elements are not satisfied, the statute will be found unconstitutional.

Although easily stated, the application of this three-prong test has been uneven. The court itself noted that "in many of these decisions we have expressly or implicitly acknowledged that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[7] In a similar vein, the court has recognized the limited precedential value of its establishment clause decisions:

> [E]stablishment clause cases are not easy; they stir deep feelings; and we are divided among ourselves . . . What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches to either end of the range of possible outcomes. This course sacrifices clarity and predicability for flexibility.[8]

Consequently, although the tripartite test "is well settled, our cases have also emphasized that it provides 'no more than [a] helpful signpost' in dealing with establishment clause challenges."[9] Last term's establishment clause trilogy demonstrates that the tripartite standard has itself become "unhelpful."

MARSH v. Chambers exemplifies the lack of standards in establishment clause adjudication.

Marsh upheld Nebraska's legislative chaplain provision. Aside from beginning each legislative session with a prayer, these "legislative" prayers were also recorded in the Legislative Journal and collected from time to time into prayer books, which were published at the public expense. Finally, Nebraska had selected the same Presbyterian minister as its chaplain for 16 years. In upholding this practice, the court declined, without explanation, to apply the tripartite test.[10]

The holding in *Marsh* is incredibly simple: That which the first Congress did in 1789, other legislative bodies can always do. Consequently, because the first Congress had a paid legislative chaplain, the state of Nebraska can pay a legislative chaplain.

The court felt that the first Congress would have been acutely aware of the meaning of the establishment clause since they crafted it. Had the court applied contemporary establishment clause standards, however, they undoubtedly would have found the legislative chaplain unconstitutional. As Justice William J. Brennan Jr. noted in his powerful dissent:

> That the 'purpose' of the legislative prayer is pre-eminently religious rather than secular seems to me to be self-evident . . . I have no doubt that, if any group of law students were asked to apply the tripartite test, to legislative prayer, they would nearly unanimously find the practice to be unconstitutional.[11]

The *Marsh* majority's abandonment of the tripartite test appears to have carved out an exception to its use of that standard when traditional practices are at issue. As noted in *Walz v. Tax Commission*, a 1969 decision that upheld New York City's practice of granting property-tax exemptions to religious and other social welfare organizations: "a page of history is worth a volume of logic."[12]

In *Walz*, the court emphasized that freedom of taxation for two centuries had not led to an established church or religion, but, on the contrary, had helped guarantee the free exercise

Mr. Devins, an attorney, is director of the Religious Liberty and Private Education Project at Vanderbilt University in Nashville, Tenn.

of all forms of religion. *Walz* made reference to the "inevitable" contacts between church and state in "modern life" as well as advancing the notion that "[w]hen the state encourages religious instruction . . . it follows the best of our traditions."[13]

THE PRINCIPLE of accommodation advanced in *Walz* was the basis of *Marsh*.[14] Like *Walz*, the *Marsh* opinion, written by Chief Justice Warren E. Burger, characterized the legislative prayer as a "tolerable acknowledgement of beliefs widely held among the people of this country."[15] Also similar to their holding in *Walz*, the court recognized the inevitability of contacts between church and state, ruling that "we are a religious people whose institutions presuppose a Supreme Being."[16]

For the court, "[i]n light of the unambiguous and unbroken history of more than 200 years there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[17] Unlike *Walz*, however, the legislative prayer could not be said to encourage religious diversity. In short, *Marsh* did not offer the tradeoff between desirable religious freedom and impermissible religious establishment that was a significant part of the *Walz* ruling.

Marsh's approval of Nebraska's legislative chaplain emphasized that "historical evidence sheds light not only on what the draftsmen intended the establishment clause to mean, but also on how they thought that clause applied to the practice authorized by the first Congress."[18] In direct contradiction to this view, the court upheld Minnesota's tuition tax deduction plan in *Mueller v. Allen* by noting that "[a]t this point in the 20th Century we are quite far removed from the dangers that prompted the framers to include the establishment clause in the Bill of Rights."[19]

Mueller viewed the Constitution as an evolving document designed to fill contemporary needs. *Marsh*, on the other hand, applied a rigid literal interpretation of the framers' views of the legislative chaplain. Considering that many of the original states had established churches prior to the adoption of the Constitution, *Marsh's* conclusion seems inapposite to the needs of our religiously diverse society. At the same time, *Marsh* and *Mueller* both stretched earlier establishment clause rulings by upholding state actions benefiting religious interests — *Mueller* by holding that the tripartite test need not be strictly applied and *Marsh* by refusing to follow the tripartite test.

Mueller may prove a breakthrough for government efforts to aid private schools and parents of private schoolchildren. Government efforts to benefit private education have been the subject of recurrent constitutional controversy since four-fifths of these schools are church-affiliated.

Mueller extended the scope of permissible government aid to religion because it suggests that government may aid private education so long as that aid is part of some general package that extends to a class of institutions significantly broader than private schools. Apparently, the fact that private schools will be the major beneficiaries of such aid is inconsequential.

This is well evidenced in *Mueller* where Justice William H. Rehnquist, writing for the court, contended: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[20]

THE justification advanced by the court for refusing to look at the actual beneficiaries of the Minnesota program was that parents of both private and public schoolchildren could take advantage of the tax deduction program. The court looked at the actual effects involved only in other state aid programs that are available solely to private schools and parents of private schoolchildren.

Yet, as noted by Justice Thurgood Marshall in dissent: "[The fact] that the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition. It is simply undeniable that the single largest expense that may be deducted under the Minnesota statute is tuition; an expense borne solely by parents of private schoolchildren."[21]

Mueller represents a substantial change in establishment clause analysis from a group of early and mid-1970s decisions, relied on by the dissent, which severely restricted state efforts to aid private schools. In *Committee for Public Education v. Nyquist*, for example, the court invalidated a New York statute which, in part, provided tuition reimbursement for low-income parents of children attending non-public elementary or secondary schools.[22]

Writing for the majority, Justice Lewis F. Powell stressed that the court would look at the *actual* effects of the enactment, instead of accepting as true the legislature's finding of secular effect.

Consequently, the court found irrelevant the fact that parents received the reimbursement, not private schools: "[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the establishment clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, *its substantive impact is still the same*."[23]

The court in *Mueller* recognized that "the economic consequences of the program in *Nyquist* and that in this case may be difficult to distinguish."[24] Yet, the court found *Nyquist* distinguishable since only parents of private schoolchildren could take advantage of the *Nyquist* aid package.

Consequently, the *Mueller* court was willing to accept at face value the state legislature's finding that the tax deduction had a secular effect since parents of both private and public schoolchildren could benefit from the deduction. For the court, "the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference . . . [W]hatever unequal effect [in the utilization of the tax deduction by parents of private schoolchildren] may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits . . . provided to the state and all taxpayers by parents sending their children to parochial schools."[25]

Mueller advances the proposition that neutral legislation whose benefits extend to religious institutions will be upheld. The court's refusal to look at the *actual* effect of the enactment can best be attributed to a changed

Continued on page 24

Establishment Cases Getting Uneven Review

Continued from page 23

judicial attitude about the role that private schools play in our educational system.

Under a restrictive view, the court adopted in a 1975 case, *Meek v. Pittinger*,[28] government could extend only "indirect," "remote" and "incident" benefits to religion. Although *Mueller* rejects this approach (at least so far as it applied to facially neutral legislation), the court adopted this restrictive view in the third case of last term's establishment clause trilogy, *Larkin v. Grendel's Den*.

LARKIN, invalidating a Massachusetts zoning law that vested in churches and schools the power to prohibit the granting of liquor licenses, rejected the proposition advanced in *Mueller* that "[t]he risk of significant religious or denominational control over our democratic processes — or even of statute. First, "[t]hat power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith."[31]

Second, "the mere appearance of a joint exercise of legislative authority by church and state provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."[32] Correlative to this, the court noted that the Massachusetts statute "enmeshes churches in the processes of government and creates the danger of 'political fragmentation and divisiveness along religious lines' [citation omitted]. Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution."[33]

This trilogy of cases points to the inability of the court to devise a standard of review that can be consistently applied in the resolution of establishment clause challenges.

deep political division along political lines — is remote."[27]

Instead, Chief Justice Burger, writing for the *Larkin* court, approved the application of strict standards such as those used by the court in *Nyquist*, namely, "[laws] with only a remote and incidental effect advantageous to religious institutions [can pass constitutional muster]."[26]

In a similar vein, the *Larkin* court approved of the Jeffersonian "wall of separation" between church and state metaphor holding that

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction *and churches excluded from the affairs of government*. The Constitution demands that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.[29]

For the court, "[t]he framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."[30] The use of history in *Larkin*, unlike *Marsh*, was not tied into actual practices of the first Congress. Instead, the *Larkin* court applied its views of the framer's intentions to a contemporary setting. Yet, unlike *Mueller*, *Larkin* concluded that "the dangers that prompted the framers to include the establishment clause in the Bill of Rights" are still present.

Larkin recognized that the Massachusetts statute had a valid legislative purpose of protecting spiritual and educational centers from the "hurly burly" associated with liquor outlets. The court also recognized that it would uphold a statute that prohibited all liquor sales within a reasonable distance of church or schools.

Yet, the court felt that the discretionary power granted churches was fatal to the constitutionality of the

In dissent, Justice Rehnquist assailed the majority's reasoning as an attempt to turn "a quite sensible Massachusetts liquor zoning law [into] . . . some sort of sinister religious attack on secular government reminiscent of St. Bartholemew's Night."[34] Justice Rehnquist felt that since the majority conceded the constitutionality of a flat ban of liquor sales near a church or school, the court should wait until some church is alleged to have abused its discretionary authority before reaching the establishment clause issue.

Justice Rehnquist, however, ignored the majority's underlying concern that church and state should be separate, not partners, under the establishment clause. For the majority, government cannot, under any circumstances, cede discretionary rule-making authority to religious institutions — no matter how miniscule or sensible such a grant of rule-making authority may be. In *Marsh*, however, the court, by focusing on concerns of religious accommodation, not separation, approved of a different sort of partnership between church and state.

THE NOTION that the court applied conflicting analyses in *Marsh*, *Mueller* and *Larkin* is self-evident.

To summarize: *Marsh* did not view the establishment clause as an evolving constitutional doctrine. *Marsh* also refused to pay attention to the actual effects of the Nebraska program, noting that the state was not bound to appoint a Presbyterian minister.

Mueller did view the establishment clause as an evolving doctrine, although it concluded that evolution has resulted in a loosening of strict separationist standards. *Mueller* also refused to look at the actual effects of the Minnesota program since its benefits extended to both public and non-public schools.

And *Larkin*, like *Mueller* and unlike *Marsh*, sought to apply establishment clause precepts in a contemporary setting. Yet, unlike *Mueller*, *Larkin* concluded that strict separationist concerns were still valid. Finally, *Larkin*, unlike *Marsh* and *Mueller*, looked at the possible effects of the Massachusetts zoning law.

The tripartite test has failed the court. Depending on the facts of a particular case, the court has oscillated on both the purposes of the establishment clause and what is and is not significant in any component of the three-part test. Instead of reflecting contemporary societal needs in the context of the general protections accorded by the Bill of Rights, the tripartite test has evolved into an analytical subterfuge permitting the court to justify its holdings in the name of judicial standards, but without forcing the court to have any enduring standards.

There is a more reasonable standard of review than the tripartite test, considering the court's inability to apply that standard consistently. This new standard of review would involve an ad hoc balancing of the three underlying values of the establishment clause, namely, neutrality, religious accommodation and separation.

Neutrality reflects a belief that all religions should be treated in a similar manner; that government should not extend special benefits or impose special impediments on any religion. Religious accommodation recognizes the inevitability of certain contacts between government and religion as well as the propriety of some of these contacts to encourage religious practice. Separation seeks to ensure "the integrity of both church and state by immunizing each from contamination by the other" by prohibiting government from favoring of religion over irreligion or vice-versa.[35]

Last term's trilogy of cases, in many ways, implicitly undertakes this type of ad hoc balancing approach.

In *Marsh*, religious accommodation was viewed as being more central than either neutrality concerns of the state's utilization of the same Presbytyrian minister or separation concerns of favoring religion over irreligion through the legislative prayer.

In *Mueller*, separation concerns of a disproportionate portion of the state largesse being used by parents of parochial schoolchildren were outweighed by the court's implicit recognition of a permissible religious accommodation to the interests of those parents.

Finally, in *Larkin*, separation concerns of a church-state rule-making partnership outweighed religious accommodation concerns of granting discretionary authority in churches to determine the issuance of liquor licenses.

Were the court to adopt this balancing standard, there would be great "play in the joints" to permit the court to confront openly the difficult questions raised in establishment clause lawsuits. In any event, the court should no longer rely on patently arbitrary distinctions to set the parameters of establishment clause jurisprudence.

---

(1) 43 CCH S. Ct. Bull. 4937 (1983).
(2) 43 CCH S. Ct. Bull. 4419 (1983).
(3) 51 U.S.L.W. 4025 (1982).
(4) 310 U.S. 296, 303 (1940).
(5) Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973).
(6) Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
(7) Mueller at 4424 quoting Nyquist at 761 quoting Lemon at 612.
(8) Committee for Public Education v. Regan, 444 U.S. 646, 662 (1980).
(9) Mueller at 4425 quoting Hunt v. McNair, 413 U.S. 734, 741 (1973).
(10) The 8th U.S. Circuit Court of Appeals had applied the tripartite standard and held that the chaplain provision violated all three elements of the test. Chambers v. Marsh, 675 F.2d 229 (8th Cir. 1982).
(11) 43 CCH S. Ct. Bull. 4837, 4954-57 (Brennan, J., dissenting).
(12) 397 U.S. 664, 676 (1970).
(13) Id. at 672, quoting Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).
(14) Id. at 676.
(15) 43 CCH S. Ct. Bull. at 4945.
(16) Id., quoting Zorach v. Clauson, 343 U.S. at 313.
(17) Id.
(18) Id. at 4945.
(19) 43 CCH S. Ct. Bull. at 4431, quoting Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part and dissenting in part).
(20) 43 CCH S. Ct. Bull. 4432-33.
(21) Id. at 4441 (Marshall, J., dissenting).
(22) 413 U.S. 756 (1973).
(23) Id. at 786, emphasis supplied.
(24) 43 CCH S. Ct. Bull. at 4428, n.6.
(25) Id. at 4428 and 4433.
(26) 421 U.S. 349 (1975).
(27) 43 CCH S. Ct. Bull. at 4431, quoting Wolman v. Walker, 433 U.S. at 263 (Powell, J., concurring in part and dissenting in part).
(28) 51 U.S.L.W. 4026, quoting 413 U.S. 756, 783, n. 39.
(29) Id. at 4028, quoting Lemon v. Kurtzman, 403 U.S. at 625 (court's emphasis).
(30) Id.
(31) Id. at 4028.
(32) Id.
(33) Id.
(34) Id. (Rehnquist, J., dissenting).
(35) Note, "Towards a Constitutional Definition of Religion," 90 Harv. L. Rev. 1056, 1058 (1978).