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

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Inconsistent Standard of Review in Last Term's Establishment Cases

AST term, the U.S Supreme Court issued decisions in three cases involving the establishment clause of the First Amendment. In *Marsh v. Chambers*, the court ruled 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 *Buckley v. Valeo*, 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*, the court invalidated by an 8-2 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 indicate that court precedents on this issue may 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, *Everson v. Board of Education*.

The court, since 1961, 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." 11

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; and finally, the statute must not foster an excessive government entanglement with religion. 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 line of demarcation in this extraordinarily sensitive area of constitutional law." 12 In a similar vein, the court has recognized the limited precedential value of its establishment clause decisions.

The court felt that the First Amendment 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. 13

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." 14

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
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." 12

THE PRINCIPLE of accommodation advanced in Walz was the basis of Marshall. 13 Like Walz, the Marshall 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." 14 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."15

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."16 Unlike Walz, however, the legislative prayer could not be said to encourage religious diversity. In short, Marshall did not offer the tradeoff between desirable religious freedom and impermissible religious establishment that was a significant part of the Walz ruling.

Marshall'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."17 In direct contradiction to this view, the court upheld Minnesota's tuition tax deduction plan in Mueller v. Allen by noting that "[i]n 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."18

Mueller viewed the Constitution as an evolving document designed to fill contemporary needs. Marshall, on the other hand, applied a rigid literal interpretation of the framers' view of the legislative chaplain. Considering that many of the original states had established churches prior to the adoption of the Constitution, Marshall's conclusion seems inappropriate to the needs of our religiously diverse society. At the same time, Marshall and Mueller both stretched earlier establishment clause rulings by upholding state actions benefitting religious interests—Mueller by holding that the tripartite test need not be strictly applied and Marshall 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 a 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 fear 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, opined: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reflecting the extent to which various classes of private citizens claimed benefits under the law."19

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 schoolchildren 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 obscure the fact that the 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."20

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.21

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 to 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 schoolchildren and parents of private schoolchildren.22

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, "[t]he Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden on all its citizens and encourages desirable expenditures for educational purposes is entitled to substantial weight."23 Whatever unequal effect, if any, 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.

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

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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. Pitinger, 421 U.S. 672 (1975), government could extend only "incidental" aid to church schools. This view 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 the secular establishment; it could be employed for explicitly religious goals, for example, favoring liquor licenses for religious institutions over those for nonchurches or adherents of that faith." Second, "the more appearance of a joint exercise of legislative authority by church and state provides a significant risk of governmental interference with minds of some by reason of the power conferred." Correlative to this, the same case construed 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 the line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.

Larkin, invalidating a Massachusetts zoning law that aided churches and schools the power to prohibit the granting of liquor licenses, rejected the proposition advanced by the government and a part of the state's significant religious or denominational control over our democratic processes -- or even of deep political division along political lines -- is remote." In dissent, Justice Rehnquist asserted that the majority's reasoning "is an attempt to turn a 'quaint' Massachusetts liquor zoning law into some sort of sinister religious attack on secular government reminiscent of St. Bartholomew's Night." Justice Rehnquist felt that the majority, in spite of the constitutionality of a flat ban of liquor sales near a church or school, the court was wrong. In the view of the court, no church or other governmental unit could be said to have "incidental" aid, unless the church school was taught to "be a 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." For the court, "the framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." The use of history in Larkin, unlike Meek, was not tied into actual practices of the past at Church and State separation. Instead, the Meek court applied its views of the framers' intentions to a contemporary setting. Yet, unlike Meek, 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 "influence" of a commercial institution 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 school.

Yet, the court felt that the discretionary power granted churches was fatal to the constitutionality of the 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 occasioned 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 the contemptuous societaleed 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.

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