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

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

AST term, the U.S. Supreme Court issued decisions in three cases involving the establishment clause of the First Amendment. In *Marl v. Chambers*, the court ruled that the 1864 resolution of Nebraska’s legislature to have a chaplain paid by the state legislature was constitutional. In *Mueller v. Allen*, the court upheld a Minnesota law 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 an 8-1 margin a Massachusetts statute that vested 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 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. In fact, the apparent inconsistencies among last term’s establishment clause decisions indicate 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*. The court, since 1941, has made use of a three-prong 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.”

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 third, 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.” In a similar vein, the court has recognized the limited precedential value of its establishment clause decisions.

Establishment clause cases are not easy; they often do not fit.

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*Marshall v. Chambers* exemplifies the lack of standards in establishment clause adjudication. The holding in *Marl* 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.”

The *Marl* 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.”

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 religion. THE NATIONAL LAW JOURNAL Monday, Oct.
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." 19

The principle of accommodation advanced in Walz was the basis of Marsh. 20 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." 21 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." 22

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." 23 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." 24 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." 25

Mueller viewed the Constitution as an evolving document designed to fulfill contemporary needs. Marsh, 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, 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 recting the extent to which various classes of private citizens claimed benefits under the law." 26

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, "[t]he fact that the Minnesota statute makes some small benefit available to all parents cannot alter the fact that a 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." 27

Mueller represents a substantial change in establishment clause analysis from a group of early and mid-1970s decisions, relying on 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. 28

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 legislator's finding of secular effect. Consequently, the court found relevant 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.

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The court in Mueller recognized that "the economic consequences of the program in Nyquist and that in this case may be difficult to distinguish." 29 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 among citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference." 30 Whatever unequal effect, [i]n 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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Getting Uneven Review

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In dissent, Justice Rehnquist asserted that the majority's reasoning is an attempt to turn "a quiet decision of the Massachusetts liquor zoning law into" a "sort of sinister religious attack on secular government reminiscent of St. Bartholomew's Night." Justice Rehnquist felt that the majority concealed the constitutionality of a flat ban of liquor sales near a church or school, the court would wait until some church is alleged to have abused its discretion 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 minor or sensible such a grant of rule-making authority may be. In Larkin, however, the court, by focusing on concerns of religious accommodation, not separation, approved of a different type of partnership between church and state.

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

To summarizer, Marsh did not view the establishment clause as an evolving constitutional doctrine. Marsh also refused to pay attention to the actual effects of the NAbRaak 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 had resulted in a less stringent separationist standard. Mueller also refused to look at the actual effects of the Minnesota program's 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. Unlike Larkin, Marsh 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 contemporaneous societal deeds 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.

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. When the court adopts this balancing standard, there would be great "play in the joints" to permit the court to confront 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 1st Bl. 445 (1963).
2. 43 CCH 1st Bl. 446 (1963).