University of Arkansas at Little Rock Law Review

Volume 7 | Issue 2 Article 5

1984

Constitutional Law—Legislative Prayer Does Not Violate Establishment Clause

Caswell Bruton Blackard III

CONSTITUTIONAL LAW—LEGISLATIVE PRAYER DOES NOT VIOLATE ESTABLISHMENT CLAUSE. *Marsh v. Chambers*, 103 S. Ct. 3330 (1983).

Since 1965, the Nebraska Legislature has begun each session with a prayer by Robert E. Palmer, a Presbyterian minister.[1] Palmer receives $319.75 per month for each month the legislature is in session. This salary is paid out of public funds.[2] Ernest Chambers, a Nebraska legislator and taxpayer, brought suit[3] to enjoin the practice, claiming it violated the establishment clause of the first amendment.[4] The district court[5] held the establishment clause was not violated by the prayers, but was violated by paying the chaplain from public funds. The Eighth Circuit Court of Appeals enjoined the practice as a violation of the establishment clause.[6] The United States Supreme Court granted certiorari[7] and reversed the Eighth Circuit by a six to three vote. The Court held that the practice of legislative prayer, having been conducted for over two centuries in the United States Congress, did not violate the establishment clause. *Marsh v. Chambers*, 103 S. Ct. 3330 (1983).

The historical purpose and meaning of the establishment clause is not clear,[8] but it is common to look to the views of Madison and Jefferson as an indication that church matters should be completely separate

---

1. A chaplain is chosen biennially by the Executive Board of the Legislative Council. Marsh v. Chambers, 103 S. Ct. 3330, 3332 (1983).

2. *Id.*

3. The suit was brought under 42 U.S.C. § 1983 (1976) which states in pertinent part:

> Every person who, under color of any statute . . . of any State . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding. . . .

Id.

Chambers had standing to sue by being both a member of the Legislature and a taxpayer whose taxes were used to pay the chaplain. 103 S. Ct. at 3332 n.4.

4. U.S. CONST. amend. I states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

5. 504 F. Supp. 585 (D. Neb. 1980).

6. 675 F.2d 228 (8th Cir. 1982).

7. 103 S. Ct. 292 (1982).

8. *See, e.g.*, P. KAUPER, RELIGION AND THE CONSTITUTION 47 (1964); J. NOWAK, R. ROTUNDA & J. N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 849 (1978); L. PFEFFER, CHURCH STATE AND FREEDOM 247 (1967); Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 267 (1968).

from government.[9] In 1784, Madison opposed a bill in the Virginia Legislature to levy taxes for the support of teachers of religion and, in 1785, wrote his "Memorial and Remonstrance Against Religious Assessments."[10] This treatise condemned even requiring "a citizen to contribute three pence only of his property"[11] to support any religious establishment. Jefferson's "Virginia Bill for Religious Liberty" proclaimed that the taxing of a person to support opinions in which he did not believe was "sinful and tyrannical."[12]

Although the views of Madison and Jefferson were certainly influential in the drafting of the establishment clause,[13] it would be inaccurate to regard them as the only views. The first amendment was approved by Congress and ratified by the states, and their intent must also be considered.[14] It is clear that following the adoption of the first amendment, aid to religious entities and practices did not completely end.[15]

The practice of legislative prayer using paid chaplains was one such practice that did not end.[16] Having begun in the Continental Congress in 1774, the practice was adopted by the First Congress.[17] One of the first items of business was to pass a statute providing for payment of chaplains.[18] The practice was not questioned until the 1820's when Madison wrote: "Does not this involve the principle of a national establishment. . .? The establishment of the chaplainship to Congress is a palpable violation of . . . Constitutional principles. . . ."[19] The first legal challenge came in 1928 in *Elliott v. White*[20] in which a district court held that the plaintiff, as a taxpayer, did not have standing to

---

9. NOWAK, *supra* note 8, at 849.

10. PFEFFER, *supra* note 8, at 111. The "Memorial" is set forth in Everson v. Board of Educ., 330 U.S. 1, 63-72 app. (1947).

11. Choper, *supra* note 8, at 267.

12. *Everson*, 330 U.S. at 13 (quoting Virginia Bill for Religious Liberty, 12 HENING, STATUTES OF VIRGINIA 84 (1823)).

13. Madison was a member of the Congressional Committee which drafted the first amendment. KAUPER, *supra* note 8, at 49.

14. NOWAK, *supra* note 8, at 850.

15. *Id.* Thus it is apparent that the states and Congress did not fully adopt Madison and Jefferson's views of complete separation of church and state.

16. Other examples include tax exempt status of churches and religious teaching within public schools. *Id.*

17. PFEFFER, *supra* note 8, at 247.

18. Act of Sept. 22, 1789, ch. 17, §4, 1 Stat. 71. Madison himself was a member of the committee arranging for congressional chaplains. PFEFFER, *supra* note 8, at 247.

19. PFEFFER, *supra* note 8, at 249 (quoting E. Fleet, *Madison's "Detached Memoranda,"* III WILLIAM AND MARY QUARTERLY 558-59 (1946)).

20. 23 F.2d 997 (D.C. Cir. 1928).

challenge this Congressional practice as a violation of the establishment clause.[21]

The Supreme Court's first significant ruling involving the establishment clause as applied to the states[22] occurred in 1947 in *Everson v. Board of Education*.[23] The Court upheld a statute allowing payment of transportation costs of all students including those in parochial schools. Justice Black, writing for the majority, stated the statute did not breach the "wall between church and state"[24] but added that no tax could be levied to support religious activities.[25]

A year later in *Illinois ex rel. McCollum v. Board of Education*,[26] the Court invalidated a public school program whereby students were released for one hour to attend religious instruction given on the school premises. But in 1952, a similar program was upheld in *Zorach v. Clauson*[27] where the instruction was conducted off school premises. Justice Douglas, writing for the majority in *Zorach*, stated that the first amendment does not say that in all instances there must be a separation of church and state.[28]

There appeared to be no clear standard of review in *Everson*, *McCollum*, or *Zorach*. However, the Court applied a two-part test in *School District of Abington v. Schempp*.[29] In order to avoid violation of the establishment clause under this test, an enactment must have a secular legislative purpose and a primary effect which neither advances nor inhibits religion.[30] In *Schempp*, the Court held a school program of voluntary prayer failed the test since, even though the prayer was voluntary and nondenominational, the effect was to aid the advancement of religion.[31]

The purpose and effect test was expanded in *Walz v. Tax Com-*

---

21. *Id.* at 998.

22. The first amendment was made applicable to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940).

23. 330 U.S. 1 (1947).

24. *Id.* at 18.

25. *Id.* at 16.

26. 333 U.S. 203 (1948).

27. 343 U.S. 306 (1952).

28. *Id.* at 312. Justice Douglas listed police and fire protection to religious groups and "prayers in our legislative halls" as examples of accepted church-state relationships. *Id.*

29. 374 U.S. 203 (1963).

30. *Id.* at 222.

31. *Id.* at 223. The Court later used the purpose and effect test to invalidate a statute making it unlawful for teachers in state schools to teach a theory of human biological evolution (Darwinism). Epperson v. Arkansas, 393 U.S. 97 (1968). The Court held the statute had a religious purpose.

mission[32] to prohibit a statute which involved the government in an "excessive entanglement with religion."[33] By adding the excessive entanglement element in *Walz*, the Court upheld property tax exemptions for churches, stating that more government involvement would occur if the exemptions were eliminated.[34]

The purpose-effect-entanglement test is the standard used today.[35] The test was applied by the Eighth Circuit Court of Appeals[36] in *Marsh* to determine whether Nebraska's use of legislative prayer offered by paid chaplains violated the establishment clause. The court found that the practice violated all three elements of the test: 1) the purpose of the practice was to advance one religious view over others; 2) the primary effect was to advance religion and give preference to one religious view; 3) the practice fostered government entanglement with religion.[37]

The United States Supreme Court in *Marsh* did not apply the purpose-effect-entanglement test. Chief Justice Burger, writing for the majority, placed great emphasis on the history of legislative prayer to determine what the draftsmen intended the establishment clause to mean.[38] Noting that paid legislative chaplains and opening prayers existed in the First Congress prior to the adoption of the first amendment and have continued ever since, the Court stated that it was clear that the draftsmen did not consider the practice to be a violation of the establishment clause.[39]

Conceding that historical patterns alone normally do not resolve an issue, the majority nevertheless stated that such "an unbroken practice . . . is not something to be lightly cast aside."[40] The Court thus

---

32. 397 U.S. 664 (1970).

33. *Id.* at 674. *See* NOWAK, *supra* note 8, at 863-68.

34. This would include tax valuation of church property, tax liens, and tax foreclosures. 397 U.S. at 674.

35. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The test is often referred to as the *Lemon* test since it was so clearly set forth in that case.

36. 675 F.2d at 234-35.

37. *Id.* The court had previously applied the same test in Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979). In *Bogen*, the practice of opening county board meetings using an unpaid clergyman was upheld. The court stated the primary effect of the activity was the accomplishment of the board's purpose of establishing order and a solemn tone for the meeting. The court also found on the basis of the facts that there was no excessive entanglement of government and religion.

38. 103 S. Ct. at 3334.

39. *Id.* The Court also noted the practice has been followed in Nebraska since before it attained statehood. *Id.*

40. 103 S. Ct. at 3335 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)).

held that legislative prayer has become "part of the fabric of our society"[41] and is not an establishment of religion.

The Court next addressed the issue of whether the use of one Presbyterian chaplain for sixteen years constituted an establishment of religion. Again, the Court held it did not.[42] Evidence indicated that Nebraska's chaplain was reappointed only because his performance was acceptable to the legislature and not for the purpose of advancing a particular belief.[43]

Justice Brennan, joined by Justice Marshall, dissented. Confronted with the fact that he had endorsed legislative prayer in *Schempp*,[44] Justice Brennan admitted that his earlier position was wrong and that he now believes legislative prayer violates the establishment clause.[45] The dissent stated that if the purpose-effect-entanglement test were applied, the practice of legislative prayer would fail all three parts.[46]

Justice Brennan listed four purposes for separation and neutrality of church and state via the establishment clause. First, it serves to guarantee the individual right to conscience whereby a person is not required to support a faith with which he does not agree.[47] Second, it prevents the state from interfering in the "essential autonomy" of religion.[48] Third, the clause prevents religion from being trivialized and degraded by being attached to government.[49] Fourth, it prevents sensitive religious issues from being disputed in political arenas.[50]

Attacking the majority's historical argument, the dissent stated that many practices considered constitutional at one time should not necessarily be considered constitutional today.[51] Justice Brennan viewed prayer as a serious theological exercise which the state must avoid.[52]

Justice Stevens also dissented, stating that the appointment of a

---

41. 103 S. Ct. at 3336.

42. *Id.*

43. *Id.* The Court stated that "long tenure does not in itself conflict with the Establishment Clause." *Id.*

44. 374 U.S. at 299-300 (Brennan, J., concurring).

45. 103 S. Ct. 3337-38.

46. *Id.* at 3338-40.

47. *Id.* at 3341.

48. Justice Brennan stated this may occur by the state deciding religious issues or supervising religious institutions or officials. 103 S. Ct. at 3342.

49. *Id.*

50. *Id.*

51. *Id.* at 3348. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (fourth amendment extended to a person's expectation of privacy); Brown v. Board of Educ., 347 U.S. 483 (1954) (separate but equal schools for racial minorities unconstitutional).

52. 103 S. Ct. at 3349.

member of one religious faith as chaplain for sixteen years violated the establishment clause.[53]

The Court in *Marsh* is certainly correct in holding that the drafters of the first amendment did not intend legislative prayer to be a violation of the establishment clause. However, by using history rather than the purpose-effect-entanglement test, the decision in *Marsh* is inconsistent with past establishment clause cases. It is now uncertain when the test is to be applied, and the Court's decision gives no guidance on this question. As the dissent suggests, it is quite possible to reach an opposite result when using a history method rather than the purpose-effect-entanglement test. The *Marsh* holding may indicate the Court will first consider history before applying the test; or the Court may give deference to state-sponsored religious practices and not apply the test at all. In any event, the decision in *Marsh* indicates that the purpose-effect-entanglement facets of the test will not necessarily be the sole criterion in deciding future establishment clause cases.[54]

Caswell Bruton Blackard III

53. *Id.* at 3351-52.

54. The Court recently returned to the purpose-effect-entanglement test in Lynch v. Donnelly, 104 S. Ct. 1355 (1984), to hold that a city's inclusion of a nativity scene in its annual Christmas display did not violate the establishment clause. However, the opinion again contained a long discussion of the history of government's acknowledgement of religion to explain "why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause." *Id.* at 1361.