ESTABLISHMENT CLAUSE PERMITS PRAYER ROOM IN STATE CAPITOL BUILDING

Van Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988)

In *Van Zandt v. Thompson*,[1] the United States Court of Appeals for the Seventh Circuit rejected an establishment clause[2] challenge to an Illinois House resolution[3] authorizing a prayer room in the state capitol building.

The Illinois House of Representatives adopted a resolution providing for the conversion of a hearing room in the state capitol to a room reserved for prayer.[4] Plaintiffs[5] filed suit in district court challenging the endorsement, establishment, and maintenance of a prayer room in the capitol as a violation of the establishment clause of the first amendment of the United States Constitution.[6]

The district court granted plaintiffs' motion for summary judgment.[7] The district court found the resolution unconstitutional under the first

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1. 839 F.2d 1215 (7th Cir. 1988).

2. The establishment clause of the first amendment provides: "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I.

3. The text of House Resolution 408 provides in part:

RESOLVED, BY THE HOUSE OF REPRESENTATIVES OF THE EIGHTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, that the Legislative Space Needs Commission is hereby authorized and directed to make available a room with facilities for prayer and meditation, primarily for the use of the members of the General Assembly, and the Commission shall arrange for the maintenance of the prayer room; and be it further RESOLVED, The Speaker of the House in conjunction with the House Minority Leader, shall arrange for the design and equipment of the prayer room and for the raising of private donations to fund the operations and maintenance of the prayer room . . . .

H.R. 408, *quoted in Van Zandt*, 839 F.2d at 1226.

4. 839 F.2d at 1216.

5. Van Zandt filed suit as an individual taxpayer. The Freedom From Religion Foundation, Inc. filed as a representative of its members who are Illinois taxpayers. The district court found both Van Zandt and the Foundation had standing to sue because the proposed prayer room would arguably place economic burdens on the State of Illinois and its taxpayers. Van Zandt v. Thompson, 649 F. Supp 583, 587 (N.D. Ill. 1986) (citing Marsh v. Chambers, 463 U.S. 783, 786 n.4 (1983)). Plaintiffs sought declaratory and injunctive relief.

6. The first amendment applies to the states through the fourteenth amendment. Everson v. Board of Education, 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940).

Plaintiffs also sought relief under article I, § 3 of the Illinois Constitution. The district court treated Illinois' constitutional prohibition on the establishment of religion as identical to the establishment clause prohibition under the United States Constitution. Van Zandt v. Thompson, 649 F. Supp. 503, 588 (N.D. Ill. 1980) (citing People *ex. rel.* Klinger v. Howlett, 56 Ill. 2d 1, 3-4, 305 N.E.2d 129, 130 (1973)).

7. *Van Zandt*, 839 F.2d at 1216.

and fourteenth amendments of the United States Constitution and article I, § 3 of the Illinois Constitution.[8] On appeal, the United States Court of Appeals for the Seventh Circuit reversed and held: the House resolution authorizing a prayer room in the state capitol does not violate the establishment clause.[9]

The Framers of the Constitution designed the religion clauses of the first amendment to promote principles of separation[10] and neutrality[11] between church and state.[12] In *Walz v. Tax Commission*,[13] the Supreme Court found that the Framers intended to afford protection against three main evils: government sponsorship, financial support, and active involvement in religious activity.[14] These prohibitions do not, however, mean that the Court never allows government involvement in religious activity.[15]

A year after the *Walz* decision, in *Lemon v. Kurtzman*,[16] the Court enunciated a three-prong test to determine whether a violation of the establishment clause exists. In *Lemon*, the Court struck down two state statutes[17] which provided for state aid to church-related schools and sec-

8. 839 F.2d at 1217. The district court entered a declaratory judgement invalidating H.R. 408 and a permanent injunction prohibiting any actions to establish a prayer room in the capitol. Van Zandt v. Thompson, 649 F. Supp. 583, 594-96 (N.D. Ill. 1986).

9. Van Zandt v. Thompson, 839 F.2d 1215, 1220 (7th Cir. 1988).

10. Thomas Jefferson advocated this concept of separation. "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)). *See also* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122-23, (1982); Stone v. Graham, 449 U.S. 39, 42, (1980); Abington School Dist. v. Schempp, 374 U.S. 203, 214-25, (1962).

11. *See* Epperson v. Arkansas, 393 U.S. 97 (1968) (first amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion).

12. *E.g.*, Wallace v. Jaffree, 472 U.S. 38, 60 (1985) ("established principle that the government must pursue a course of complete neutrality toward religion"). *But see Wallace*, 472 U.S. at 91-107, 113 (Rehnquist, J., dissenting) (history of establishment clause shows that "nothing in the establishment clause requires government to be strictly neutral between religion and irreligion").

13. 397 U.S. 664 (1970).

14. *Id.* at 668.

15. In *Walz* itself the Court upheld state property tax exemptions for religious organizations. *Id.* at 665. *See also* Lynch v. Donnelly, 465 U.S. 668 (1984) (upheld display of nativity scene on public property), *infra* notes 20-24 and accompanying text; Marsh v. Chambers, 463 U.S. 783 (1983) (upheld state-employed chaplain for legislature), *infra* notes 26-32 and accompanying text.

16. 403 U.S. 602 (1971).

17. *Lemon* and its companion case, *Early v. DiCenso*, combined challenges to similar Rhode Island and Pennsylvania statutes. The Rhode Island Salary Supplement Act funded secular education in non-public schools when the average per pupil expenditure on secular education in those schools was less than the average in the state's public schools during a specified period. *Id.* at 607;

ular teachers. The Supreme Court posed three criteria to determine if a statute violates the establishment clause.[18] First, the legislature must have adopted the law with a "secular legislative purpose." Second, the statute's "principal or primary effect must be one that neither advances nor inhibits religion." Third, the statute must not result in "excessive government entanglement with religion."[19]

In *Lynch v. Donnelly*,[20] the Court further clarified the role of the *Lemon* test in establishment clause challenges. The Court rebuffed an establishment clause challenge to a crèche placed on public property. The Court rejected an "absolutist"[21] approach to *Lemon*,[22] and instead

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R.I. GEN. LAWS §§ 16-15-1 - 16-15-16 (Supp. 1970). The Pennsylvania Elementary and Secondary Education Act authorized the state Superintendent of Public Instruction to "purchase" specified "secular educational series" from non-public schools. PA. STAT. ANN., Tit. 24, §§ 5601-5609 (Purdon 1971). The state legislature concluded that the state's educational goals could appropriately be fulfilled by government support of "those purely secular educational objectives achieved through non-public schools." 403 U.S. at 609.

18. 403 U.S. at 612-13. For an excellent analysis of the three prongs of the *Lemon* test, see Lieder, *Religious Pluralism and Education in Historical Perspective: A Critique of the Supreme Court's Establishment Clause Jurisprudence*, 22 WAKE FOREST L. REV. 813 (1987). Lieder argues that the Court fashioned the *Lemon* test from two competing conceptions of neutrality: that government should remain separate from religion and religious institutions and that government should treat religious and similarly situated non-religious institutions or activities equally. *Id.* at 824-30. Lieder also argues, however, that political pluralism protects religious groups sufficiently so that the Court may relax its scrutiny. *Id.*

For criticism of the *Lemon* test, see Choper, *Church, State and the Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 551 (1987); Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L. J. 1231 (1986).

19. In applying the test to the challenged statutes, the Court found both passed the first two criteria. The legislatures had a secular purpose of enhancing the quality of secular education. The effect of the statutes neither advanced nor prohibited religion because secular and religious education are identifiable and separable. 403 U.S. at 613. Both statutes, however, failed to pass the third prong of the test. In invalidating the statutes, the Court examined the character and purpose of the institutions that were benefited, the nature of the aid the state provides, and the resulting relationship between the government and religious authorities. The Supreme Court concluded that the cumulative impact of the entire relationship arising under the statutes in each state involved excessive entanglement between government and religion. *Id.* at 614.

The Court's use of the entanglement prong to strike down an otherwise valid statute is ironic. The entanglement test originally arose in *Walz* as an *exception* to the other two prongs — one that saved an otherwise invalid statute. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970).

20. 465 U.S. 668 (1984).

21. *Id.* at 678. The Court defined an "absolutist" approach as "mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith." Chief Justice Burger, writing for the majority, stated that "[i]n our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Id.*

22. The Supreme Court elsewhere has indicated that courts should employ the *Lemon* criteria

scrutinized the challenged conduct to determine "whether in reality, it establishes a religion or religious faith, or tends to do so."[23] As examples, the Court listed numerous illustrations of government acknowledgement of the American religious heritage that do not, in reality, establish religion.[24]

The Court has varied from case to case in the rigor with which it applies the *Lemon* test.[25] In *Marsh v. Chambers*,[26] the Supreme Court departed entirely from the *Lemon* analysis.[27] In *Marsh*, the Court approved a state legislature's practice of opening each session with a prayer read by a state-employed chaplain.[28] The Court utilized an his-

simply as a guide and not as a strict formula. Lynch v. Donnely, 465 U.S. 668, 679 (1984) (no single test or criteria in the establishment clause area); Mueller v. Allen, 463 U.S. 388, 394 (1983) (*Lemon* test is merely a helpful signpost); Meek v. Pittinger, 421 U.S. 349, 359 (1975) (*Lemon* criteria do not set "precise limits to the necessary constitutional inquiry); Hunt v. McNair, 413 U.S. 734, 741 (1973) (use as a constitutional guidepost).

23. Although the Court did not rely exclusively on the *Lemon* test, it did apply it, and found a crèche displayed in a city park during the Christmas season passed the three criteria. Celebrating the Holiday and depicting the origins of that Holiday are legitimate secular purposes. 465 U.S. at 681. The city did not endorse religion by including the crèche. Finally, it created no administrative entanglement because "the display requires far less ongoing, day-to-day interaction between the church and state than religious paintings in public galleries." *Id.* at 684. Although the Court applied the *Lemon* test, the dissent argued that the court's application of the test was "less-than-vigorous." *Id.* at 696. Certainly, even as the majority applied the test, it stated its "unwillingness to be confined to any single test or criterion in this sensitive area." *Id.* at 679.

24. 465 U.S. at 677. Much of this analysis supports the Seventh Circuit's decision in *Van Zandt*. Illinois House Resolution 408 referred to a number of *Lynch*'s historical examples. The *Lynch* Court specifically noted that Congress has long provided chapels in the Capitol for religious worship and meditation. *Id.* at 678. The *Lynch* court also quoted from Justice Douglas' famous dictum, "We are a religious people whose institutions presuppose a Supreme Being." *Id.* at 675 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

One scholar characterizes the Court's reasoning in *Lynch* as an "any more test," under whose terms government sponsorship of a religion is unobjectionable if it is no more than what the government has done in the past. Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall - A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 783.

25. *See* Choper, *Church, State, and the Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 551 (1987). Choper notes that "the area of government acknowledgement of religion best illustrates the Supreme Court ignoring its own doctrine, the subject of religion in the public schools best illustrates the Supreme Court adhering to its own doctrine." *Id.* at 554. The Supreme Court has consistently applied the *Lemon* test in establishment clause challenges affecting secondary and elementary school children. For example, in Stone v. Graham, 449 U.S. 39 (1980), the Supreme Court declared a state law which required the posting of a copy of the ten commandments on public classroom walls unconstitutional because it failed the secular purpose prong of the *Lemon* test. *Id.* at 41.

26. 463 U.S. 783 (1983).

27. *See also* Larson v. Valente, 456 U.S. 228 (1982) (Court did not find the *Lemon* test useful when there is substantial evidence of overt discrimination against a religious group).

28. 463 U.S. at 791. The Supreme Court opined that the legislative prayer presents no more potential for establishment than the provision of school transportation to a private religious school,

torical analysis[29] to reject an establishment clause challenge to this practice.[30] The Court found that the United States Congress had followed practices similar to those challenged in the state legislature at the time Congress drafted the first amendment.[31] Based on the deeply imbedded history and tradition of opening legislative sessions with prayer, the Court concluded that the Framers of the first amendment did not view paid legislative chaplains and opening prayers as an "establishment of religion."[32]

In *Van Zandt v. Thompson*,[33] the Court of Appeals for the Seventh Circuit held that establishing and maintaining a prayer room in a state legislative building does not violate the establishment clause.[34] The court offered two independent justifications for its decision, one based on *Marsh* and one on *Lemon*.[35]

Everson v. Board of Educ., 330 U.S. 1 (1947), beneficial grants for higher education at religious institutions, Tilton v. Richardson, 403 U.S. 672 (1971), or tax exemptions for religious organizations, Walz v. Tax Comm'n, 397 U.S. 664 (1979). *Marsh*, 463 U.S. at 791.

For additional cases upholding opening legislative and public meetings with prayer, see Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979) (opening of county board meetings with prayer by unpaid clergy); Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968) (opening of town meeting with prayer by unpaid clergy); Colo v. Treasurer and Receiver Gen., 378 Mass. 550, 392 N.E.2d 1195 (1979) (opening of legislative session with prayer by paid clergy).

29. Similarly, in *Walz* the Court refused "to construe the Religion Clauses with a literalness that would undermine that ultimate constitutional objective as illuminated by history." *Walz*, 397 U.S. at 671.

30. One scholar, Yehuda Mirsky, believes that in *Marsh* and *Lynch* the Supreme Court's de facto exception to traditional establishment clause doctrine effectively allows government to acknowledge religion formally and publicly without somehow endorsing it. Mirsky argues this doctrinal development is flawed in two respects. First, it is based on a misperception of the nature and origins of American public religion. Second, it creates as many constitutional problems as it purports to solve. Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986).

31. The first United States Congress adopted the policy of selecting a chaplain to open each session with prayer. *Marsh*, 463 U.S. at 788. The practice had a similar long tradition in the States' history. The Nebraska legislature had opened legislative sessions with prayer even before attaining statehood. Jour of Council, General Assembly 1st Sess. 16 (Jan. 22, 1855); *Marsh*, 463 U.S. at 790.

32. 463 U.S. at 786.

33. 839 F.2d 1215 (7th Cir. 1988).

34. *Id.* at 1220.

35. In dictum, the court also justified the prayer room as an "accommodation of religion." The court suggested that the prayer room is a necessary or desirable aid to individuals who wish to indulge their right to the free exercise of religion. *Id.* at 1223-224. Commentators have delineated two distinct meanings of the term "accommodation." Accommodation refers either to a measure that would violate the establishment clause if it were not compelled by the free exercise clause or to a measure that, while not compelled by free exercise, promotes free exercise values in ways that make it more acceptable under the establishment clause. *See, e.g.*, McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 4.

The court's first rationale is based on the historical principles espoused in *Marsh*, which the court argued is specially tailored to — perhaps even controlling for — legislatures' internal practices.[36] First, the court conceded that a prayer room does not have the long history of tradition as do opening prayers.[37] The *Van Zandt* court, however, relied on the broader tradition of legislative acknowledgement of the modest and nonintrusive role for spiritual values in their work.[38] The court reasoned that if legislators may collectively bow their heads while a clergyman opens a session with prayer, it is absurd to fault the designation of a room in which legislators may pray or meditate privately.[39]

Although the Seventh Circuit effectively decided the case applying *Marsh's* special jurisprudence for legislatures,[40] the court, in the alternative, applied *Lemon*.[41] The court found that even if the *Lemon* test applies to these legislative arrangements, the practice satisfies those criteria.[42]

First, the court found the requisite secular purpose. The court based its conclusion on the repeated references to "meditation" and the suggestion that legislators may legislate more effectively after spending time in quiet solitude.[43] Second, the Resolution did not have the primary effect of advancing religion in general nor any one sect in particular. The court found that where a body opens its daily sessions with public prayer, a later opportunity for legislators to pray or meditate individually gave little incremental benefit to religion.[44] Finally, the court found the prayer room would not engender administrative entanglements between religion and the state.[45]

The court did, however, place a limit on the scope of its ruling. Their

36. 839 F.2d at 1218, 1220. The court stated: "Legislators are not immune from the strictures of the establishment clause with respect even to their internal practices. But *Marsh*, the only authoritative case treating these problems, departed entirely from the *Lemon* analysis." *Id.* at 1220.

37. *Id.* at 1219.

38. *Id.*

39. *Id.* at 1220.

40. *Id.*

41. *Id.* at 1223.

42. *Id.* The district court reached the opposite conclusion in its application of the *Lemon* test. *See supra* notes 6-8 and accompanying text. Perhaps this different result is attributable to a "less-than-vigorous" application by the Court of Appeals. *See supra* notes 23, 27 and accompanying text.

43. *Id.* at 1221.

44. *Id.* at 1222.

45. *Id.* at 1222-223. The court opined that one reason *Marsh* apparently created a special branch of establishment clause jurisprudence was the unlikelihood of any significant entanglement resulting from a state legislature's ordering of its internal spiritual affairs. *Id.* at 1223.

review examined only whether Illinois' H.R. 408, considered with the administrative actions taken to date, violated the establishment clause.[46] The court stated that the prayer room might violate the first amendment if decorated or used in certain unspecified ways.[47]

The *Van Zandt* court took a logical step in extending the constitutionality of legislative prayers to legislative prayer rooms.[48] The court properly relied on *Marsh* in examining an establishment clause challenge to a legislature's internal religious practices.[49] The Supreme Court's flexible approach allowed the Court of Appeals to uphold a traditional interaction between church and state that does not threaten to destroy the neutrality towards the separation between government and religion.[50]

Based on *Marsh*, the court did not need to consider the *Lemon* test.[51] However, the court did not jeopardize its position by positing *Lemon* as a fall back rationale.[52] Additionally, by limiting its holding to the prayer room, the *Van Zandt* decision acknowledges the traditional role of religion in American society[53] without endorsing radical extensions of *Marsh*.

The court's decision in *Van Zandt* emphasizes the role of legislative religious practices within the confines of the establishment clause. It takes a small, carefully limited step in expanding the *Marsh* rationale and case line. *Van Zandt* thus increases other courts' abilities to rely on *Marsh*'s historical perspective in evaluating establishment clause challenges to legislative practices, and perhaps to all legislation concerning the relationship between church and state.

H.L.G.

46. *Id.* at 1218.

47. *Id.* at 1217-218. The court found that the intrusion of sectarian influences and religious emphases could give rise to an establishment clause violation. Thus, further developments in the decoration and use of the prayer room will not automatically or routinely pass constitutional muster. *Id.* at 1224.

48. *See supra* notes 25-30 and accompanying text.

49. *See supra* note 27 and accompanying text.

50. *See supra* notes 24, 28-30 and accompanying text.

51. *See supra* note 27 and accompanying text.

52. *See supra* notes 22-23 and accompanying text.

53. *See supra* notes 24, 28, 35 and accompanying text.