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THE UNPREDICTABILITY OF THE SUPREME COURT'S DOCTRINE IN ESTABLISHMENT CLAUSE CASES

JESSE H. CHOPER†

As Professor Sedler has made clear in his article, this is a discussion of the Establishment Clause from a *litigation* perspective.¹ His article provides an accurate description and very helpful analysis of the "doctrines and precedents" respecting "the law of the Establishment Clause" that the Supreme Court uses in adjudicating the issues.² It will be of great value to litigators in determining where their cases fit and how to structure their arguments, and it will be of similar assistance to the lower courts in locating the doctrinal context of the case before them.

That is the good news. The bad news concerns the quality of what Professor Sedler describes. He explicitly sets out to state principles that the Supreme Court has articulated.³ While his article implies that he approves of these "principles," in his remarks this afternoon, he declared that he was explaining, not endorsing what the Court has done, thus suggesting that he is reporting bad news.

I agree with the implication of his remarks because I do not believe that the Supreme Court has developed effective principles in regard to the Establishment Clause. In fact, I believe that the Court is unwilling to do so. In respect to principles for the religion clauses that I have proposed, I have conceded that a logical analytic framework produces at least some results that I do not like.⁴ I

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2. See id. at 1351-65.
3. See id. at 1338-51.
4. See JESSE H. CHOPER, *Securing Religious Liberty: Principles For*
believe that many, if not all, of the Justices of the Supreme Court feel the same. But when they do not like the result to which a principled analysis leads, they simply decline to reach it. As just one illustration of this dynamic, Professor Sedler writes, “The precedents are more important than the operational principles and subsidiary doctrines . . . .”5 Thus, “the result in the successful challenge to the display of an unadorned nativity scene on public property in Allegheny County depended on the analysis of the differences between the effect of such a display and the inclusive display that the Court had upheld in Lynch.”6

To the contrary, the different results in Lynch7 and Allegheny County8 did not have much at all to do with principles, doctrines, or analysis. Rather, most of the Justices believed that the displays were indistinguishable for Establishment Clause purposes.9 The difference in outcomes was attributable to the votes of just a few members of the Court who were willing to find a distinction that most commentators find unpersuasive.10

In sum, the Supreme Court’s doctrines, rules, and precedents are unworkable, confusing, contradictory, and unpredictable. I infer that Professor Sedler basically agrees when it comes down to how these doctrines are applied. Thus, the Court’s rules may inform a lower court where the case before it fits, but it cannot tell the judge how to decide the case. Similarly, the Court’s doctrines and precedents may tell litigators the cases that they must argue, but it cannot intelligently inform them as to what their chances of winning are.

Professor Sedler’s article is long, detailed, and comprehensive. One cannot do it justice in a brief analysis. Nor, for that matter,
can a criticism of the Supreme Court's doctrine be properly developed in a short time. Thus, to make my point, I will take a few examples that Professor Sedler has raised in respect to his discussion of the "overriding principle of . . . official neutrality toward religion." 

This approach has been very influential in Supreme Court opinions. Professor Sedler describes it as follows:

The overriding principle of the Establishment Clause is that the Establishment Clause commands complete official neutrality toward religion. The government cannot favor religion over non-religion, and it cannot favor one religion over another. . . . [This means that] because the Establishment Clause does not require the government to be hostile to religion, the government can include religious institutions in the services it provides to the public generally, such as police and fire protection; and likewise, the government can include religious institutions among recipients of governmental funding to provide secular services.

This neutrality principle is attractive and responds to our nation's strong general commitment to equality. Not only has it been favored in many decisions over the years, it is presently advocated by at least three current members of the Court—Chief Justice Rehnquist, Justice Scalia, and Justice Thomas. Professor Philip Kurland of the University of Chicago Law School presented this approach to both religion clauses in 1961 in a path-breaking article, although he later abandoned it. Nevertheless, despite the neutrality approach's strong support, the Supreme Court majority, like Professor Kurland, is unwilling to live with all of its

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12. Id. at 1338-40 (footnotes omitted).
consequences. Accordingly, the Court has developed what Professor Sedler describes as “subsidiary doctrines”\textsuperscript{14}—rules that are unprincipled and that destroy the integrity of any broad precept of neutrality.

First, true neutrality is inadequately sensitive to religious freedom by flatly prohibiting all religious exemptions from general regulations no matter how greatly they burden religious exercise and how insubstantial the competing state interest may be. For example, not only would the neutrality principle not require exempting the sacramental use of wine and peyote from laws that generally prohibit these mind-altering substances, it would forbid such exemptions. In fact, Professor Marshall has advocated such a true neutrality principle.\textsuperscript{15} However, Professor Sedler’s explanation of the Court’s reasoning demonstrates its lack of allegiance to true neutrality:

[T]he exemption for sacramental wine during Prohibition does not violate the Establishment Clause. This is because . . . an exemption from a law of general applicability that is precisely tailored to protect the religious freedom of individuals and religious institutions is not considered to have the effect of advancing religion and so does not violate the Establishment Clause.\textsuperscript{16}

Although Professor Sedler, as usual, accurately describes the Supreme Court’s position, I fear that the Court’s reasoning begs the question. An exemption for religion from a law of general applicability “advances” religion by the ordinary understanding of that term. Nonetheless, even the three Justices of the Supreme Court who are serious advocates of the neutrality principle are unwilling to go as far as to say that a legislature cannot, if it wishes,

\textsuperscript{14} See Sedler, \textit{supra} note 1, at 1351.
\textsuperscript{16} Sedler, \textit{supra} note 1, at 1343 n.105 (emphasis added).
give an exemption from burdensome regulation.17

True neutrality not only requires burdens on religious freedom that are at odds with the values of the Free Exercise Clause, but also demands aid to religion that plainly conflicts with objectives of the Establishment Clause. Only one example is needed to dramatically reveal how the neutrality approach would require the use of tax funds for the purely religious functions of church organizations, as long as the legislative classification is broad enough. Suppose the state legislature allocated public money to private associations for the purpose of distributing replicas of their insignia to their members. The Rotary Club, the League of Women Voters, and religious groups would all be potential beneficiaries. Under the “official neutrality toward religion” rule, denying funds to sectarian organizations would constitute an impermissible religious classification, despite the fact that including such groups would designate tax funds to be used to purchase Latin crosses and Stars of David.

Now, I doubt that the Court would go that far and require such a payment. Rather, the majority of Justices would use what Professor Sedler calls the subsidiary doctrine barring “endorsement/symbolic union.”18 However, this subsidiary doctrine could apply to any neutral program that included religion. That is, when a general government aid program includes a religious group as one of its grantees, many observers may reasonably perceive this as an “endorsement or symbolic union” of church and state.19

The area of aid to church-related schools best illustrates the unpredictability of Supreme Court doctrine concerning neutrality. Professor Sedler describes a recent example of the problem:

In . . . Zobrest v. Catalina Foothills School District, the

18. See Sedler, supra note 1, at 1355.
Court held, five-four, that a school district which provided sign-language interpreters for hearing-impaired students in its schools was not precluded by the Establishment Clause from providing a sign-language interpreter for a hearing-impaired student who transferred to a parochial school. The issue in that case involved the application of a doctrine, first promulgated in *Everson v. Board of Education*, that while the Establishment Clause generally precludes the state from providing financial assistance to parochial schools,[20] it permits the state to provide certain benefits that it provides to children attending public schools to children attending parochial schools. The application of that doctrine in *Zobrest* interacted with another doctrine, that the government may not act in such a way as to create a symbolic union between government and religion.21

The nub of the problem becomes clear by examining the opinions in *Zobrest.*22 A five-Justice majority reasoned that paying the sign-language interpreter for a student in a parochial school was part of a neutral program because it provided sign-language interpreters to all students.23 Furthermore, in respect to "subsidiary doctrines" that the Court had developed on this subject,24 (1) the program did not provide financial assistance directly to the parochial school because the money went to the sign-language interpreter, who was a public employee; (2) any benefit to the parochial school resulted from the choices of parents to send their children there, not in any way from the government's choice; and (3) the sign language interpreter did not teach or counsel religion

20. One might question whether the *Everson* doctrine itself violates the neutrality principle. If the state gives financial assistance to the public schools and to private schools, then why not also to parochial schools?
because all he did was interpret.②5 Of course, all that was true.

On the other hand, the two Justices who dissented on the merits②6 argued that the situation was unprecedented: “Until now, the Court never has authorized a public employee to participate directly in religious indoctrination.”②7 That was also true. The sign-language interpreter communicated everything that went on in the parochial school, including the most indoctrinatory, proselytizing kinds of exercises. The Court had never before upheld the expenditure of public funds in such a context.

This matter of conflicting—or, as Professor Sedler calls it, “interacting”—principles may be analogized to a fable from the Jewish ghettos in Eastern Europe, in which the Rabbi was not just the religious leader of the community, but the main adjudicator of general disputes as well. As the story goes, a new Rabbi was appointed to this particular village and, naturally, the whole community turned up for the initial hearing on “cases.” They wanted to know whether the new Rabbi was a liberal, or a conservative, or something in between. The first case concerned a marital dispute. The wife made her argument. “My husband is lazy, doesn’t provide for our family, and doesn’t farm the land properly or milk the cows on time.” The wife concluded that her husband was to blame for the marriage’s problems. The new Rabbi stroked his beard and said, “Yes, you’re right.” The husband responded with his version of the situation. “My wife is a failure as a homemaker, does not take proper care of the children as they are never bathed properly, and neither the children nor I get our meals on time.” Similarly, the husband stated that his wife was to blame for the marriage’s difficulties. The new Rabbi again stroked his beard and said, “Yes, you’re right.” At this point, someone among the spectators shouted: “Rabbi, first you said that the wife was right in the dispute, then you said that the husband was right. They both

②6. Justices Blackmun and Souter found a violation of the Establishment Clause. See id. at 14 (Blackmun, J., dissenting). Justices Stevens and O’Connor dissented on procedural grounds. See id. at 24 (O’Connor, J., dissenting).
②7. Id. at 18 (Blackmun, J., dissenting).
can’t be right.” The Rabbi pondered the point and replied, “Yes, you’re right too.” The fable suggests the problem of deciding cases pursuant to confusing doctrine.

Professor Sedler, after reviewing essentially what I have just discussed about the Zobrest case, concludes:

"[I]n light of applicable doctrine and precedent, the issue presented in Zobrest was a close one, and the members of the Court disagreed on the application of that doctrine and precedent to the resolution of this issue. And again, the issue was a narrow one, and the precedential effect of the Court’s holding in the case is relatively limited." 28

What Professor Sedler stated may be true, but I believe that it is just a euphemism for saying that there is no principle under which the Court is resolving these cases.

The Court’s latest decision in the area of financial aid to education with respect to the Establishment Clause also illustrates the unpredictability and confusion in this area. Two terms ago, in the widely publicized ruling in Rosenberger v. Rector and Visitors of the University of Virginia, 29 the University of Virginia Student Activities Fund supported student newspapers, but refused to fund a newspaper by a religious student organization that strongly advocated a Christian viewpoint. 30 As Professor Sedler reports, Justice O’Connor observed that Rosenberger posed a direct conflict between two basic religion clauses principles, both of which Professor Sedler’s article recognizes. 31 The first principle is that government may not fund religious activities. This principle has been a long held precept with which most people would express agreement, at least as generally stated. The second principle is the now familiar neutrality precept—that government must be

28. Sedler, supra note 1, at 1330.
30. See id. at 827.
31. See Sedler, supra note 1, at 1336-37.
evenhanded in respect to religion and non-religion. The neutrality principle was the major force behind the doctrinally influential "equal access" cases decided during the previous fifteen years, but they did not involve the prohibition against funding religious programs. Rather, the government actions in *Widmar v. Vincent*, *Board of Education v. Mergens*, and *Lamb's Chapel v. Center Moriches Union Free School District* only concerned the provision of certain non-cost government benefits for religious groups along with other organizations.

The neutrality principle prevailed in *Rosenberger* by a vote of five to four, but with a highly qualified thrust. Justice Kennedy wrote the majority opinion in which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined. Justice Kennedy's opinion for the Court placed two important limitations on the scope of the ruling. First, he stressed that the university did not transfer money directly to the religious student organization that published the newspaper promoting a Christian perspective. Rather, the university made the check payable to the printer with which the religious organization contracted to produce the newspaper. While this invocation of form over substance may not amount to a very persuasive distinction, it plainly indicates the majority's discomfort in adopting a true neutrality approach.

Second, Justice Kennedy pointed out that the case did not involve general support for the activities of a religious institution. Rather, the Court confined its decision to financial aid for newspapers. The Court reasoned that if it barred the University of Virginia from funding religious newspapers, some university

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35. See *Rosenberger*, 515 U.S. at 839-40.
36. See *id.* at 822.
37. See *id.* at 825.
38. See *id*.
39. See *id.* at 826.
40. See *id.* at 844-46.
administrator would have to review all student publications and determine whether or not they were religious. This raises the specter of classic censorship and its consequent chilling effect on the freedoms of speech and press. Justice Kennedy’s second argument is plainly more appealing than his first distinction. More importantly, however, is that this point underlines the Court’s reluctance to ground its decision in a true neutrality principle. Instead, the majority restricted its rationale to government funding of newspapers published by religious organizations.

The most critical limiting distinction came in a concurrence written by Justice O’Connor. It is important to note that the fact that it is a separate opinion does not diminish its importance because Justice O’Connor is one of the five members of the Court that made up the majority. She stressed that the money for the University of Virginia’s Student Activities Fund came from student fees, not from the university’s general account. Justice O’Connor opined that it may be possible that any students who object to the way the money is spent have a right under the First Amendment to opt out and get a refund of some percentage of their student fees. That is a far-reaching limitation. Taxpayers have no constitutional right to opt out if they do not like the way government spends compulsorily raised tax funds. Thus, virtually all other government expenditure programs are distinguishable from the one in Rosenberger. Otherwise, the true neutrality principle would permit all forms of aid to religion, as long as they were part of a larger program. I am confident that at least two members of that majority—Justices O’Connor and Kennedy—are not willing to go that far. The difficulty is that they provide no principle to tell us how far they are inclined to go.

41. See id. at 845.
42. See id. at 851 (O’Connor, J., concurring).
As these examples illustrate, the Court has failed to adopt coherent principles of law governing the Establishment Clause. As a result, any principles derived from the Court’s decisions are unworkable and cannot provide a mechanism for attorneys and judges to determine the correct outcome of any given case. Accordingly, I criticize Professor Sedler’s message, but surely not the messenger.