Ethical Challenges in Mounting Contemporary Establishment Clause Cases

Presented by Lori Lipman Brown for Widener University Delaware Law School symposium April 12, 2024

Introduction

My local football team in Washington, D.C., finally changed its name to The Commanders in 2022. Since 2020, they had been determining what new name to choose to replace the former name which was offensive to most Native Americans. The offensive name had existed for 85 years; thus, we could accurately say it was historic. Like many street names, school names, and commemorative statues, the battle cry of, "It's historical," no longer wins in the public square. Previously, those who were offended by these historical remnants of an explicitly anti-inclusive society were told they must continue to live with them in perpetuity. This is no longer the case, except when it comes to the Establishment Clause of the First Amendment of the United States Constitution.

Looking Backwards

Let's begin with an overview of the standard test that was used to determine whether a law violates the Establishment Clause of the First Amendment, beginning in the 1970s.

In *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), the Supreme Court considered the constitutionality of real property tax exemptions for property owned by religious organizations. They upheld the practice explaining that these exemptions did not involve any excessive government entanglement in religion. In his concurring opinion, Justice Brennan looked at the long history of the practice since the founding of the United States.

The Supreme Court came to the opposite conclusion regarding the state of Rhode Island paying a salary stipend to certain teachers in private religious schools, and the state of Pennsylvania paying for the purchase of secular educational materials in such schools. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) found that both programs at issue involved excessive entanglement of government with religion. The Court distinguished this from Walz in part by virtue of it being new and innovative (thus setting the stage for expansion of the state's oversight). The case produced a three-part test that came to be known as The Lemon Test. All three parts had to be met for a law to withstand an Establishment Clause challenge:

1) There must be a secular legislative purpose
2) The primary effect neither advances nor inhibits religion
3) There must be no excessive government entanglement with religion

Although the test existed, it was used with such varying results that one must wonder if the Justices took whatever specific facts they liked or disliked and made them fit or fail one or more of the requirements. The 5-4 Supreme Court decision in *Lynch v. Donnelly*, 456 U.S. 668 (1984) found that including a creche in a municipal Christmas display in Pawtucket, Rhode Island was not unconstitutional. Explaining the Court's extensive reliance on the history and context of the display, Chief Justice Burger citied the Court's "unwillingness to be confined to any single test or criterion in this sensitive area."

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court upheld government funding of chaplains to give prayers at legislative bodies. Justice Brennan in his dissent (joined by Justice Marshall) points out that the reasoning in the majority's decision clearly did not apply any test, but instead carved out an exception for legislative prayer.

In *Town of Greece v. Galloway*, 572 U.S. 565 (2014), the Supreme Court cited *Marsh v. Chambers* in upholding even explicitly sectarian prayers in the Nebraska Legislature (as long as no religious group was prohibited from volunteering to give a prayer).

In 2004, many nonreligious Americans as well as religious Americans who supported the healthy separation of church and state, were excited to read the briefs presented by Michael Newdow in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004). Newdow, an atheist, was challenging teacher-led recitations of the Pledge of Allegiance that included the addition of "under God." Originally written in 1892 (and standardized in 1942), President Eisenhower signed a law to insert that phrase "under God" between "one nation" and "indivisible" in 1954. (Two years later, Eisenhower changed the national motto from "e pluribus unum" [out of many, one] to "In God we trust." The Supreme Court agreed to hear the case. Instead of deciding the Establishment Clause issue involved, the Court found that Newdow lacked standing to sue because the child's mother, Sandra Banning, has "what amounts to a tie-breaking vote" regarding education of the children. (Ms. Banning, a religious woman, did not object to the practice of teacher-led recitation of the revised pledge.)

In 2019, when Newdow challenged the words "In God We Trust" on U.S. currency (post-1956 motto change), the U.S. Court of Appeals for the Eighth Circuit found that this phrase can stay on the currency because it "does not compel citizens to engage in religion." The Supreme Court rejected Newdow's appeal, allowing that appeals court decision to stand. Thus, they did not have the unenviable job of explaining how claiming that "we" trust in God on U.S. currency was not an establishment of religion by the government.

In the case of *American Legion v. The American Humanist Association,* 588 U.S. ____ (2019), 139.S.Ct.2067 (2019), the Court declared that they would not use the Lemon Test regarding long-standing monuments, in part because it would be difficult to discern the original purpose and that the primary effect of such monuments could have changed

over many years in a community. Despite this reasoning, the Court did add their thoughts on the original purpose of the 40-foot cross erected in 1925 on private land that was then donated to the state of Maryland in 1961. The Court concluded that the original purpose was as a memorial to fallen World War I soldiers. They also concluded that the cross is a secular war memorial – not a Christian display. They did not look at what a 40-foot cross symbolizes in our current multi-cultural society. Justice Alito (writing for five justices) did look at one aspect of the changing interpretation of the cross over the years when he wrote:

“That the cross originated as a Christian symbol and retains that meaning in many contexts, does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.”

He did not address the concerns of groups such as the Jewish War Veterans of the United States whose amicus brief explained that it did not signify a memorial to ALL the soldiers who had died; it was a Christian symbol.

By 2022, the Court was ready to explicitly get rid of the Lemon test. In *Kennedy v Bremerton School District*, 597 U.S. 507 (2022), the Lemon test was eliminated. The Kennedy case wasn’t decided based on the Establishment Clause claim of the school district, but rather on the Free Speech and Free Exercise Clauses of the First Amendment. The Court found that stopping a public high school coach from leading pregame locker-room prayers would be seen as hostile towards religion.

The Court has often relied on history and tradition in permitting government-sponsored prayer, religiously symbolic memorials, and even recitation of religious language in otherwise purely patriotic exercises.

The context of the “historical” origins regarding statues and names on buildings and streets is now considered when looking to whether they should remain. Memorialization of those who fought to protect the institution of slavery started popping up, not immediately following the Civil War, but rather during the early 1900s as part of the Jim Crow segregation movement. They were an attempt to quash cultural acceptance of Blacks as equal. This was a time of lynchings and legal segregation. These factors are important to those who have successfully fought to remove them from government and the public square.

The same can be said of the “historical” name of DC’s football team (as well as that of Cleveland’s major league baseball team). As people learned how offensive these names (generally used as pejoratives) are to many Indigenous people, public sentiment changed. While these changes are not embraced by all, it is no longer enough to claim that history requires anyone who is rightfully offended to accept the indignant language.

However, the historical use of “Under God” in the revised Pledge of Allegiance, and “In God We Trust” on paper money since the mid-1950s, was explicitly in response to the Cold War and an attempt to divide “good” Americans from “Godless Commies.” Coming on the heels of Joseph McCarthy’s witch-hunts for Communists, “IN GOD WE TRUST” was put on our currency and replaced “E PLURABUS UNUM” (out of many, one) as our national motto. The Courts have referenced historical longevity when allowing these clearly religious incursions by the U.S. government; but have not looked back at the divisive reasons for their original placements.

Even statements and actions contemporaneous with challenges based on the Establishment Clause have been ignored when trying to discern whether there is a secular purpose for an action or excessive entanglement of government with religion. For example, while Donnelly was going through the courts, there was a campaign to “keep Christ in Christmas.” As Justice Brennan points out in his dissenting opinion (joined by Justices Marshall, Blackmun, and Stevens), such a campaign shows that the purpose of the creche display was not a secular one.

A Legislative Fly in the Ointment

Given the current state of Jurisprudence regarding challenges to the Establishment Clause, how are we to advise individuals who approach an attorney or legal organization that handles these kinds of matters? Compounding the difficulty of successfully litigating an Establishment Clause challenge to a government action are two laws that were passed that require heightened standards protecting the free exercise of religion beyond what the Constitution required. In other words, these acts of Congress elevate the Free Exercise Clause over the Establishment Clause when a conflict arises. Since passage of the Religious Freedom Restoration Act in 1993, courts have even extended these protections to for-profit corporations and allowed private companies to refuse to cover birth control in their employer-sponsored health care plans (*Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 [2014]). And in 2000, Congress passed the Religious Land Use and Institutionalized Person’s Act. This act has allowed religious organizations to receive exceptions to zoning and land use laws that all nonreligious landowners must abide by. Although the religious group must show a “substantial burden” if they are required to follow the law, there are no exceptions for substantial burdens that the nonreligious may also face by implementation of land use laws. It also gives special rights to religious persons who are institutionalized, for example in prison, that nonreligious persons do not have (also after a showing of substantial burden to their exercise of their religion).

Ethical Considerations

The American Bar Association’s Model Rules of Professional Conduct, which are mirrored in Delaware Lawyers’ Rules of Professional Conduct, includes the following:

Rule 1.5: Fees
Client-Lawyer Relationship
(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

…[This rule continues with parts “d” and “e” that do not apply to our topic.]

Some of these lawsuits can be excessively costly. The possibility of appeals obviously increases the cost. And damages may be difficult to assess. Often, these cases result in injunctive relief without damage awards. There may even be questions of who has standing to bring a case. Many of these types of lawsuits are handled by nonprofit organizations or on a contingency basis and clients needn’t be concerned about costs (unless clients are required to pay upfront during litigation for court costs or other expenses). In many jurisdictions, the “loadstar formula” (used to determine how much the court will award the prevailing party for attorney fees) may be adjusted up in complex or public interest lawsuits, as well as other factors which might apply to some Establishment Clause cases. But even that only offsets these fees if your client wins, and only at the conclusion of possibly lengthy adjudication. Be honest with your client about the specifics of possible costs.

> **Rule 2.1 Advisor**
> Counselor
> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

The comments included with this rule give wide latitude for an honest assessment of the case, but also practical considerations. Since First Amendment law[1] is constantly in flux, it seems appropriate to prepare a client for possible changes (in interpretation, precedents, and even federal law) during the course of litigation. The current direction of the law seems to be pointing towards greater leeway for the incursion of religion into government.

However, as society changes and the number of Americans who describe themselves as nonreligious has increased substantially over the years, this may change. Over the years, the Supreme Court has overruled precedents that became less palatable to society or which caused detrimental effects. For example, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) overturned the precedent of *Plessy v. Ferguson*, 163 U.S. 537 (1896) regarding segregation. That one took far too long, but things happened a bit more quickly between *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld Georgia’s criminal law against certain sex acts in private between consenting adults; and *Lawrence v. Texas*, 539 U.S. 558 (2003), which ruled these laws unconstitutional.

[1] I am referencing First Amendment law generally, rather than just Establishment Clause law due to the fact that a case which may be argued using Establishment Clause, may be defended against based on the Free Speech and Assembly or Free Exercise Clause.

A much quicker turnaround occurred regarding the Supreme Court's decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). The 8-1 decision in Minersville held that it was not unconstitutional to require Jehovah's Witness school children to recite the pledge of allegiance in public school or be expelled. Following expulsion, the claimant family had to send their children to private school because state law required the children to receive an education. Thus, they were denied a free education afforded to other children, given their decision to exercise their religion. The Court found that the law was not intended to burden Jehovah's Witnesses, but rather served an important secular purpose. Justice Frankfurter wrote in that opinion that "the promotion of national cohesion" was an important secular goal and that, "National unity is the basis of national security."

Following the decision, around the U.S. there were over 1,000 physical attacks against Jehovah's Witnesses in hundreds of communities, as well as jailing, and tar and feathering of Jehovah's Witnesses. A Witness Hall was burned by a mob of thousands. Given these consequences of the Court's decision, they quickly took up another case posing the same question. In *Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the court ruled against forcing school children to pledge or salute the flag, thus overturning Minersville.

It is important to inform the client of the challenges, obstacles, and expected chances of success. If your client wants to try to push change, that has always been difficult. However, in important struggles, individuals – often with organizational assistance – have created change.

But your role as advisor goes even further. Especially when tackling change, and especially in the sensitive and politically charged area of religion, there may be severe personal costs that Plaintiffs pay. Even unidentified claimants (e.g., Doe, Roe) can often be tracked down based on the fact pattern and location of the case. Your client may face harassment, ridicule, and even physical violence. Our current political climate has seen individuals pay steep personal prices for challenging current law (or even for trying to enforce existing law). You (and/or your client) may need assistance from an expert in assessing how great a threat these factors pose. Groups such as the Anti-Defamation League and the Southern Poverty Law Center often track hate crimes which include attacks based on anti-Semitism, anti-Muslim sentiment, and other factors affecting religious minorities and the nonreligious. Comment 3 of Rule 2.1 mentions that it is appropriate to recommend experts in other fields that the client may need to consult. That comment seems more geared toward financial and psychiatric type specialties, but it may also have an application here in terms of consulting with these public interest groups.

Finally, there may be a very real danger of setting a precedent that is worse than the current state of the law. Individuals and various groups on all sides of these First Amendment issues often disagree about the efficacy of bringing certain fact patterns up to appellate courts. This is a very real strategic conundrum that may need to be addressed with the client at the outset, even though decisions regarding whether to appeal can be finalized when and if needed.

> **Rule 3.1 Meritorious Claims and Contentions**
> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law…[The rest of this rule deals specifically with criminal cases. Although some Free Exercise Clause defenses may arise in criminal cases, I expect there will be minimal, if any, overlap between the criminal justice system and Establishment Clause cases.]

Given the volatile nature of Establishment Clause law, even a fact pattern that seems to mirror a current negative precedent, may lend itself to an attempt to reverse or modify existing law. Of course, the best scenario is a situation that lends itself to making a good faith argument that the facts of this case are different from the precedents cited against your client; or that the facts of your case meet the requirements of supportive precedent. The key here is to be armed with clear arguments for the nonfrivolous nature of your claim.

> **Rule 3.2 Expediting Litigation**
> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment 1 of this rule specifies that there is nothing improper regarding seeking a postponement for legitimate personal reasons. However, improper delays for “the convenience of advocates,” or for “the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose,” will “bring the administration of justice into disrepute.” The comment also includes the possible motive of financial gain, which is not in the interest of the client.

The strategy of trying to stretch out litigation while awaiting a different judicial makeup that may be more amenable to your argument, appears to violate this rule. I would add that it also carries the strategic risk of new judicial appointees being even less accepting of your arguments.

Conclusion

The rules of professional conduct govern the appropriate ethical behavior all attorneys should follow. I have highlighted four that may raise special concerns for any lawyer working on First Amendment Establishment Clause cases. It is a huge undertaking to address the complexity of Constitutional issues. As our society comes to understand the diverse landscape of our religious (and nonreligious) constituencies, it is my hope that religious minorities and nonreligious Americans will someday receive the type of deference currently afforded to those who would impose a majority religion on minorities who don’t share their specific beliefs, but who share the rights granted to each individual in our Constitutional Democracy.