Constitutional Law - Legislative Chaplaincy Program Held Not to Violate the Establishment of Religion Clause - Marsh v. Chambers

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INTRODUCTION

The Establishment of Religion Clause declares, “Congress shall make no law respecting an establishment of religion.”1 Since Everson v. Board of Education,2 the Supreme Court has given the Establishment Clause a broad interpretation.3 The interpretation has not, however, developed without some confusion. At times the Court and some individual justices have argued that there must be a complete separation between religion and government.4 In other cases the Court has taken the position that the Establishment Clause does not require total disassociation between church and state.5 There has been much scholarly dissatisfaction with some of the Court’s applications of the Establishment Clause,6 and a great deal of public outrage generated by some of the individual decisions.7

The majority of cases addressing the Establishment Clause have dealt with the questions of state aid to religiously affiliated schools8 and religious activities in public schools.9 The question of

3. Id. at 15.
6. See, e.g., Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3, 9-11 (1979), in which the author contends that the framers never intended the Establishment Clause to apply to the states.
the constitutionality of legislative chaplains has essentially gone unaddressed. The Supreme Court recently ventured into this uncharted wilderness, when, in *Marsh v. Chambers*, the Court ruled that a Nebraska legislative chaplaincy program did not violate the Establishment Clause. In addition to being the first Supreme Court case dealing with legislative chaplains, *Marsh* also marked a departure from the Court’s usual method of Establishment Clause analysis.

**THE CASE**

Rule one, sections two and twenty-one, of the Rules of the Nebraska Unicameral requires the Nebraska legislature to select a chaplain to open each legislative session with an invocation. Since 1965 the sole chaplain had been one particular Presbyterian minister. The State paid the chaplain $320 per month for each month the legislature was in session. In addition, the legislature expended several hundred dollars to print several hundred copies of compilations of the prayers. The books were distributed to members and non-members of the legislature. Senator Chambers, a member of the legislature, brought an action claiming the Establishment Clause prohibited the compensation to the chaplain, the printing of the prayer books, and the invocations themselves.

The district court considered the three claims to be severable, and upheld the invocations. The court, however, said that compensating the chaplain had the effect of advancing religion, and that the funding for the printing of the prayer books had no secular purpose and were each a violation of the Establishment Clause. The Eighth Circuit Court of Appeals affirmed in part and reversed in part, saying the district court erred by not considering the practice as a whole, and that under such an analysis the entire program was unconstitutional. Petitioners accepted the district court’s ruling regarding the printing of the prayer books and

11. Chambers v. Marsh, 675 F.2d 228, 230 (8th Cir. 1982).
13. Id. at 591.
14. Chambers v. Marsh, 675 F.2d 228, 233 (8th Cir. 1982).
15. Id. at 235.
appealed only that part of the court of appeals decision holding that opening the legislative sessions with a prayer by a state paid chaplain violated the Establishment Clause. The Supreme Court in a six-to-three decision reversed, holding that such a practice was not violative of the Establishment Clause.

**BACKGROUND**

The freedom to believe or disbelieve any religious doctrine is, for the most part, unquestioned in present-day America. But, this freedom does not spring from the earliest days of the first colonists. Many of the early settlers journeyed to the New World to achieve a measure of religious freedom unattainable in Europe, which had state sponsored religions. The settlers, however, proved to be as intolerant of religious dissenters and nonconformists as the leaders of the countries they left. Religious dissenters were punished or banished from the colonial settlements. Also, all the colonists were required to contribute to the support of the established church. Such establishment of religious orthodoxy and churches was more common than not. Finally, as a result of the persistence of crusaders like Roger Williams, the concept of government non-interference with religion began to take hold in the colonies. Gradually, toleration of dissenters became accepted and support of religion and the churches passed from the state to the followers.

The events of 1785, within the Virginia colony, are viewed as one of the historic first steps in the disentanglement of government from religion. Patrick Henry had introduced a bill in the Virginia legislature that would impose taxes to support the Christian religion. James Madison, in his persuasive Memorial and Remonstrance, argued that religious affairs were properly beyond the purview of government and that the proposed tax would violate the right to support the religion of one’s choice. Henry’s bill was defeated. The result was the adoption of Thomas Jefferson’s *A Bill*

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17. *Id.* at 3332.
18. *Id.* at 3337.
20. *Id.* at 101.
21. *Id.* at 102-103.
22. *Id.* at 103.
23. *Id.* at 104.
for Establishing Religious Freedom,\textsuperscript{24} which stated that every man should be free to worship as he sees fit and that no one should be compelled to support any religion or engage in any religious activity.\textsuperscript{25} The events in Virginia had a profound effect on similar developments in other states and in the adoption of the First Amendment religion clauses.\textsuperscript{26}

In-depth consideration of the Establishment Clause by the Supreme Court began with the case of \textit{Everson v. Board of Education}.\textsuperscript{27} The Court enunciated a broad “no aid to religion” policy, decreeing that government must be neutral toward religion, neither hindering nor advancing it.\textsuperscript{28} Despite this statement, the court held that the aid, bus fare reimbursements to parents of children attending parochial schools, was not prohibited by the Establishment Clause.\textsuperscript{29} In \textit{Zorach v. Clauson}\textsuperscript{30} the Court softened the harsh “no aid” rhetoric of \textit{Everson} by upholding a New York practice of dismissing pupils early from school so they could attend religious classes off the school grounds.\textsuperscript{31} The Court felt that neutrality demanded some accommodations by the government to religion, and that such accommodations did not violate the Establishment

\begin{itemize}
  \item \textit{Id.} at 15-16.
  \item \textit{Id.} at 17.
  \item 343 U.S. 306 (1952).
  \item \textit{Id.} at 315.
\end{itemize}

\textit{Id.} at 104.

\textit{Id.} at 105.


28.

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and \textit{vice versa}. 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.”

\begin{itemize}
  \item 12 Hening, Statutes of Virginia (1823) 84.
  \item KAUPER, supra note 19, at 104.
  \item \textit{Id.} at 105.
  \item \textit{Id.} at 15-16.
  \item \textit{Id.} at 17.
  \item Id. at 105.
  \item \textit{Id.} at 15-16.
  \item \textit{Id.} at 17.
  \item 343 U.S. 306 (1952).
  \item \textit{Id.} at 315.
\end{itemize}
However, there was still no clear standard to guide either the Supreme Court itself or lower courts in deciding Establishment Clause problems.

In *Abington School District v. Schempp*, the Court, for the first time, expressly stated a test for deciding Establishment Clause issues. To pass constitutional muster, the law must have a secular purpose and its primary effect must neither advance nor inhibit religion. In addition to the two-part test, the Court continued to stress neutrality as a vital factor in analyzing Establishment Clause questions, stating “a wholesome neutrality” was essential. Furthermore, the Court refused to equate neutrality with promoting secularism. In *Walz v. Tax Commission*, the Court applied a refinement of the two-part test developed in *Schempp*, adding to the primary effect part of the test the requirement that an act not result in excessive government entanglement with religion. In essence, the Court seemed to equate excessive entanglement with primary effect. In *Lemon v. Kurtzman*, the Court set the excessive entanglement factor apart as a separate element of the test, resulting in a three-pronged analysis. The three-pronged test is the most elaborate and highly-developed guide for deciding Establishment Clause questions. Though some individual justices have expressed dissatisfaction with some facets of the standard, it has been affirmed by subsequent decisions.

To pass the first part of the *Lemon* test, the law or act in

32. *Id.* at 314-15.
34. Though not expressly articulated, the Court seemed to implicitly use the same test in *McGowan v. Maryland*, 366 U.S. 420, 445 (1961).
35. 374 U.S. at 222.
36. *Id.*
37. *Id.* at 225.
39. *Id.* at 674.
40. 403 U.S. 602 (1971).
41. *Id.* at 613.
42. Justice White concurring in *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 768 (1976), would eliminate the entanglement test and use only the purpose and effect tests. Justice Stevens, concurring in part and dissenting in part in *Wolman v. Walter*, 433 U.S. 229, 265 (1977), would scrap the three-part standard altogether and adhere to the strict “no aid” dictates of *Everson*.
question must have a secular legislative purpose. In deciding whether this requirement is met, the stated purpose of the legislature is considered. However, the courts are not foreclosed from further scrutiny merely because the legislature says the law in question is for the achievement of a legitimate secular goal. Yet in application the Supreme Court has, for the most part, routinely upheld the stated legislative purpose as secular. The reason for such deference would appear to be the Court's desire to avoid as much direct confrontation with the state legislatures as possible. Since violation of any of the three parts of the test voids the questioned practice, the Court, when confronted with an objectionable law or act, can void it because of the manner in which it was carried out, rather than because it was done for an impermissible purpose. Nevertheless, the Court has occasionally voided legislation on the basis of a finding of no secular purpose. Also, the Court, on one occasion, held that if a law presently has a legitimate secular purpose, the fact that it was originally enacted for religious reasons does not result in a violation of the secular purpose test.

Under the second part of the Lemon test, the law or act must have a primary effect that neither advances nor inhibits religion. Primary effect does not necessarily mean the law's single most important result. The Court has stated that even if the primary effect is to promote a legitimate secular goal, the act can still be examined to see if its direct and immediate effect is one that advances or inhibits religion. In Tilton v. Richardson, the Court held that the mere possibility that academic facilities built with

52. 403 U.S. 672 (1971).
government funds might be used for religious purposes after the expiration of the government’s twenty year interest, violated the primary effect test, and required the inspection period to be extended indefinitely.\textsuperscript{53} However, not all aid to religious institutions will violate the primary effect test. The Court has made this clear by suggestions in dicta that social services such as fire and police protection can be provided to them.\textsuperscript{54} Also, the Court has stated that the primary effect test is not violated merely because aid frees up other funds or resources that could be used for religious purposes.\textsuperscript{55} An important factor in deciding if the effect test has been breached is the pervasiveness of religion in the benefited institution. The Supreme Court has said:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious missions or when it funds a specifically religious activity in an otherwise substantially secular setting.\textsuperscript{56}

However, if a distinction can be established between secular and non-secular functions, then aid may be allowed to further the secular activity.\textsuperscript{57}

To clear the final \textit{Lemon} hurdle, the law or act under review must not cause an excessive entanglement between government and religion.\textsuperscript{58} The Court has adopted the position that religion and government need not be completely separate in all instances.\textsuperscript{59} Rather, “the test is inescapably one of degree.”\textsuperscript{60} There are primarily four factors to examine in deciding whether the degree of entanglement is excessive.

The first factor is the resulting relationship (caused by the statute) between government and religion.\textsuperscript{61} The most important

\begin{itemize}
  \item \textsuperscript{53} \textit{Id.} at 683-84.
  \item \textsuperscript{54} Zorach v. Clauson, 343 U.S. 306, 312 (1952); Walz v. Tax Commission, 397 U.S. 664, 671 (1970).
  \item \textsuperscript{55} Hunt v. McNair, 413 U.S. 734, 743 (1973); Tilton v. Richardson, 403 U.S. 672, 679 (1971).
  \item \textsuperscript{56} Hunt v. McNair, 413 U.S. 734, 743 (1973).
  \item \textsuperscript{57} Roemer v. Maryland Public Works Board, 426 U.S. 736, 755 (1976).
  \item \textsuperscript{58} \textit{See, e.g.,} Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); Tilton v. Richardson, 403 U.S. 672, 684-85 (1971).
  \item \textsuperscript{60} Walz v. Tax Commission, 397 U.S. 664, 674 (1970).
  \item \textsuperscript{61} Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).
\end{itemize}
consideration appears to be insuring that the aid does not entail government surveillance of religious institutions and activities.\textsuperscript{62} Surveillance is not only viewed as an evil in itself, but in some instances also presents the potential danger of government direction of religious institutions.\textsuperscript{63}

The second factor to consider is the character and purposes of the benefited institution.\textsuperscript{64} This factor seems quite similar to the "pervasiveness of religion standard" the Court uses in analyzing the primary effect of the practice in question.\textsuperscript{65} One commentator has suggested that with regard to the character and purposes of the institution and the resulting relationship between government and religion, the Court is engaging in mere subjective speculation and paying little attention to the factual record.\textsuperscript{66} For example, the Court considered parochial schools in \textit{Lemon}\textsuperscript{67} to be of a more religious nature than religiously affiliated colleges in \textit{Tilton}\textsuperscript{68} and \textit{Roe-mer v. Maryland Public Works Board}\textsuperscript{69} despite the fact that evidence in \textit{Lemon} showed that the teachers had not injected religion into secular subjects.\textsuperscript{70}

The third factor is the nature of the aid provided.\textsuperscript{71} Prior Court decisions indicate that aid which can be screened for religious content or use, such as textbooks\textsuperscript{72} and buildings,\textsuperscript{73} is more likely to be approved than outright grants of money.\textsuperscript{74}

The risk of political division along religious lines is the fourth

\textsuperscript{62}. \textit{See id.} at 619. Wolman v. Walter, 433 U.S. 229 (1977), shows how important this consideration can be in the Court's decisions. In that case the Court upheld certain provisions of the aid package to non-public schools (\textit{e.g.} the supplying and scoring of standardized tests and the providing of therapeutic services to students) partly on the basis that no government surveillance would be required, while voiding funds for field trips because such supervision would be required to make sure none of the funds were spent for religious teaching.


\textsuperscript{64}. \textit{id.} at 615.

\textsuperscript{65}. \textit{See, e.g., id.} at 616.


\textsuperscript{67}. 403 U.S. 602 (1971).

\textsuperscript{68}. 403 U.S. 672 (1971).

\textsuperscript{69}. 426 U.S. 736 (1976).

\textsuperscript{70}. Ripple, \textit{supra} note 66, at 1217.


\textsuperscript{73}. \textit{See, e.g., Tilton v. Richardson}, 403 U.S. 672 (1971).

As the Court said in *Lemon*, for most issues such division would be perfectly acceptable. However, political division along religious lines is a danger the Establishment Clause was designed to prevent. Otherwise people may make political decisions based on religious belief rather than on analysis of the issues. The Court has taken the position that annual funding appropriations are more likely to cause a danger of such divisiveness than one-time funding, due to the repeated confrontations between supporters and opponents of the aid.

Excessive entanglement is not only a danger itself but has become an early-warning device, indicating when an act or law is close to violating the Establishment Clause. This part of the test is useful as a signal because excessive entanglement does not have to actually exist for an act or law to be constitutionally void. In *Lemon* the mere possibility that the salary supplements would go to teachers who might advance religion in the classroom would require government surveillance, which would in turn result in excessive church-state entanglement, which made the act unconstitutional. Consequently, the excessive entanglement test may become a means of avoiding church-state conflicts before they arise.

In addition to the three-prong test enunciated in *Lemon*, neutrality has continued to be an important consideration. The government must maintain a “wholesome neutrality” toward religion, neither favoring one sect over another nor religion in general over non-religion. While the command of neutrality does not mean church and state must be completely separate, it does require that there be no concert of action between them.

Although there have been some references to various types of government-funded chaplaincy programs in some Supreme Court

75. Id. at 621.
76. Id.
79. Id. at 619.
80. Ripple, supra note 66, at 1215.
cases, prior to *Marsh* no Supreme Court decision had ever directly concerned chaplains of any kind. The few state and lower federal court cases dealing with chaplains are, therefore, important to consider in analyzing the Supreme Court’s decision in *Marsh*.

The Supreme Court has said that although all religions and sects need not be provided with equal facilities and religious personnel, the Free Exercise Clause requires that all prison inmates be given reasonable opportunities to practice their religious beliefs. Courts which have been asked whether state provided chaplains are constitutional have answered in the affirmative. The contention that state-funded prison chaplains violate the First Amendment ignores the requirement of balancing the Free Exercise Clause with the Establishment Clause. The Court in *Theriault v. Carlson* upheld state-supported prison chaplains, following the reasoning of Mr. Justice Brennan in his concurrence in *Schempp*. Brennan felt that since the government had taken away the inmates’ privilege of worshiping when and where they desired, an argument could be made that the government could, consistent with the Establishment Clause, provide chaplains to prison inmates so as not to violate the Free Exercise Clause.

The Court in *Carlson* also made the observation that prison officials must tend to the emotional and spiritual needs of all prisoners, and that it would be impossible to have a chaplain for each religion or sect. A representative selection must therefore be provided. Thus, apparently with regard to prison chaplains, and probably military chaplains as well, neutrality demands can be relaxed.


90. Id. at 381.


Legislative or quasi-legislative chaplains have been challenged in four cases. In *Lincoln v. Page*\(^93\) guest clergyman were invited to give an invocation before the commencement of local town board meetings. The prayers were not composed by any government official and the ministers received no compensation. The persons invited to give the prayers were rotated.\(^94\) The New Hampshire Supreme Court failed to apply the purpose and effect test, which was the standard in effect at that time, and instead simply held that the facts failed to show an Establishment Clause violation.\(^95\) Although acknowledging that even minor infringements on the Establishment Clause could not be tolerated, the Court nevertheless found that the infringement complained of was not blatant and had a long history of acceptance. This seemed to be the basis for the decision upholding the constitutionality of the town board invocations.\(^96\)

A somewhat more in-depth analysis of the issue appears in the case of *Colo v. Treasurer and Receiver General*.\(^97\) In *Colo*, the Massachusetts Supreme Court was asked to rule on the state legislature’s practice of compensating chaplains for both the state Senate and House. The chaplains gave a brief prayer before each daily legislative session. For twenty years the same Catholic priest had functioned as the Senate’s chaplain. In the House the same Catholic priest had presided as chaplain for twenty-four years. The chaplains received $9500 and $7800 per year respectively.\(^98\) The Massachusetts Supreme Court applied the *Lemon* three-prong establishment of religion test and upheld the compensation.\(^99\) The court said the invocations had a secular purpose as they helped the legislators solemnly reflect on the duties they were about to perform.\(^100\) The primary effect was held not to be religious, even though the court admitted the prayers were religious in nature. The court distinguished mature adults, who were not likely to be influenced by the prayers, from impressionable children in a classroom, who might feel bound to follow what is being taught, and determined that no religious belief was being advanced by the leg-

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94. 241 A.2d at 800.
95. *Id.* at 801.
96. *Id.* at 800.
98. 392 N.E.2d at 1196.
99. *Id.* at 1200.
100. *Id.*
islative invocations. Additionally, the court found no excessive entanglement because no government supervision was required and there was no evidence of political division along religious lines. The court in Colo seemed to have overlooked the fact that political divisiveness does not have to be real. The potential for political divisiveness seems to be enough to strike a practice on entanglement grounds. Also, the court apparently ignored the command that government not favor one religion or sect over another.

In Bogen v. Doty the Eighth Circuit Court of Appeals was faced with a county board of commissioners' practice of having local clergymen open their meetings with an invocation. No compensation was paid, but only Christian clergymen had been invited to participate in the program. The Court of Appeals ruled that the practice had a secular purpose in that an air of solemnity was thereby created. The appellate court held that although the invocations might have some religious effect, the primary effect was to establish a solemn atmosphere for the meetings. As for excessive entanglement, the fact that there was no annual funding seemed to persuade the Court that no risk of political division along religious lines existed, and, therefore, this part of the test was not violated. Although upholding the practice, the Court of Appeals sternly warned the Board that the practice came very close to violating the Establishment Clause. If for example, the Board denied clergyman of other faiths an opportunity to participate, the court said this would present an Establishment Clause problem since the Board would thereby effectively be giving preference to one religion over another.

In Marsa v. Wernik, the New Jersey Supreme Court took an innovative approach to a challenge of a town council's practice of having a member of the Council give an invocation prior to the

101. Id.
102. Id.
103. Id. at 1201.
105. 598 F.2d 1110 (8th Cir. 1979).
106. Id. at 1112.
107. Id. at 1113-14.
108. Id. at 1114.
109. Id.
110. Id.
meetings. The court felt that the excessive entanglement test was unnecessary in cases where the government was directly involved since, if there is a religious purpose or effect, the government is necessarily entangled with religion due to its direct involvement.\textsuperscript{112} The court held that the purpose of the practice was not religious, but rather was to achieve an air of solemnity.\textsuperscript{113} The court also held that the primary effect of the practice did not advance religion.\textsuperscript{114} In coming to this conclusion, the New Jersey Supreme Court relied on several characteristics of the practice, including: (1) the fact that the content of the prayers was not plainly religious; (2) the fact that prayers served a legitimate secular purpose; (3) the fact that there was no official government support of the prayers, which were instead the statements of individuals; (4) the fact the prayers were not directed at impressionable children; and (5) the long history of acceptance the practice enjoyed.\textsuperscript{115} However, the court, like the Eighth Circuit Court of Appeals in \textit{Bogen}, warned the Council that if there should be a more express government endorsement of the content of the prayers or if the prayers were to become more religiously oriented, there could be serious Establishment Clause problems.\textsuperscript{116}

\textbf{ANALYSIS}

The majority in \textit{Marsh} held that the Nebraska legislature's practice of opening sessions with prayers by a state-employed chaplain did not offend the Establishment Clause.\textsuperscript{117} In reaching this conclusion, however, the Court abandoned express use of the \textit{Lemon} three-prong test and ignored formerly well-settled principles of neutrality.

The Court made no attempt to expressly apply the three-prong standard to the case. Instead, the Court relied on an historical examination of legislative chaplaincy programs.\textsuperscript{118} The Court noted that such prayers had received widespread acceptance since colonial times.\textsuperscript{119} In particular, the Court focused on the fact that

\begin{itemize}
\item \textsuperscript{112} 430 A.2d at 894.
\item \textsuperscript{113} Id. at 896.
\item \textsuperscript{114} Id. at 898.
\item \textsuperscript{115} Id. at 899.
\item \textsuperscript{116} Id. at 900.
\item \textsuperscript{117} \textit{U.S. at } 103 S. Ct. at 3337.
\item \textsuperscript{118} Id. at 3332-36.
\item \textsuperscript{119} Id. at 3333.
\end{itemize}
three days prior to Congressional approval of the Bill of Rights, Congress approved the appointment of paid legislative chaplains. The Court felt this clearly showed that such legislative chaplaincy programs were not considered by the framers as violative of the Establishment Clause.\textsuperscript{120} While acknowledging that a constitutional violation does not become constitutionally acceptable as a result of long-term use, the Court nevertheless stated that "... an unbroken practice ... is not something to be lightly cast aside."\textsuperscript{121} The majority obviously considered that due to their longevity, legislative chaplaincy programs were entitled to such deference,\textsuperscript{122} and that generally such programs were not in violation of the Establishment Clause.\textsuperscript{123}

The Court then examined the specific features of the Nebraska program and held that no part of the program created an Establishment Clause violation. The Court held that the long-term relationship with a single minister of a particular denomination did not result in the advancement of the beliefs of that particular church.\textsuperscript{124} The majority felt that the fact that compensation was paid to the minister did not create a violation, due to the long-term practice of paying such chaplains.\textsuperscript{125} The Court concluded its inquiry into the Nebraska practice by holding that where there was no evidence of any attempt to advance any religious belief through the prayers, the content of the prayers was not properly subject to judicial scrutiny and content could not be used to void the practice.\textsuperscript{126}

Justice Brennan, relying in his dissent on the Lemon three-prong standard,\textsuperscript{127} said that the Nebraska practice violated all three parts of the test. Regarding secular purpose, Brennan refused to even acknowledge that the invocations might have the secular purpose of establishing a solemn atmosphere prior to the legislative sessions.\textsuperscript{128} As for primary effect, he felt the legislative prayers were clearly religious, tending to put the power and prestige of the

\textsuperscript{120} Id. at 3333-34.
\textsuperscript{121} Id. at 3334, quoting Walz v. Tax Commission, 397 U.S. 664, 678 (1970).
\textsuperscript{122} Id. at 3335.
\textsuperscript{123} Id. at 3336.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 3337.
\textsuperscript{127} Id. at 3338.
\textsuperscript{128} Id.
state behind a particular religious belief.\textsuperscript{129} Finally, Brennan felt that the excessive entanglement prong was violated due to the possibilities of required government surveillance over the chaplain and political division along religious lines.\textsuperscript{130}

Justice Stevens' brief dissent focused on the contention that the State's long-term association with one particular minister of one particular denomination showed a preference for one religion over another.\textsuperscript{131}

By holding that the framers did not intend to prohibit legislative prayers, the Court is in effect approving those lower court decisions which have held that such invocations are not per se unconstitutional. In light of the actions of the framers regarding legislative chaplaincies, such a conclusion may be both rational and justified.\textsuperscript{132} However, the Court's holding that this particular chaplaincy program was constitutional is irreconcilable with previous interpretations of the Establishment Clause and has the potential for throwing Establishment Clause analysis into chaos.

As Justice Brennan pointed out in his dissent,\textsuperscript{133} if the \textit{Lemon} three-prong standard and its present interpretation had been expressly employed, the Nebraska practice would have certainly been ruled unconstitutional. The Court could have said that the purpose of the prayers was to achieve a solemn atmosphere before the legislative sessions. In this way the Court could have granted the legislature a large measure of the deference usually accorded such bodies in Establishment Clause cases as well as recognized that some forms of "ceremonial prayers" do not offend the Establishment Clause. Nonetheless, the Nebraska practice would have still violated the primary effect and excessive entanglement prongs of the \textit{Lemon} test. Due to the long-term relationship between the State and the single minister employed, the "direct and immediate", if not the primary effect gives preference to the religious beliefs of a specific denomination or sect. Because of the use of state funds to compensate a chaplain who enjoyed such a special relationship

\textsuperscript{129} Id. at 3339.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 3351-52.
\textsuperscript{132} But see Choper, The Religion Clauses of The First Amendment: Reconciling The Conflict, 41 PIR Ry. L. Rev. 673, 676-77 (1980), in which the author suggests that in attempting to analyze the Establishment Clause, it might be unwise to place too much emphasis on the intent of the framers, because a literal following of this intent might jeopardize values held important today.
\textsuperscript{133} ___ U.S. at ___, 103 S. Ct. at 3338.
with the state, there was a risk of political division along religious lines; thus, the excessive entanglement test was violated.

Considering the Court’s recent reaffirmation of the three-prong standard in Mueller v. Allen,\textsuperscript{134} there is a clear possibility that the Court’s failure to expressly utilize the three-prong standard in Marsh is the result of a premeditated decision by the Court to reach a desired result regardless of prior precedent. It could be argued, however, that while the Court did not expressly use the Lemon standard, the Court did implicitly employ the three-prong standard in the Marsh case. After looking at the historical background of such chaplaincy programs, the Court appears to implicitly conclude that they have a secular purpose.\textsuperscript{135} The court then states:

The Court of Appeals was concerned that Palmer’s long tenure has the effect of giving preference to his religious views. We, no more than Members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advanced the beliefs of a particular church.\textsuperscript{136}

This statement is a direct refutation of the holding of the court of appeals that the primary effect prong of the test was violated due to the long-term relationship with the one particular minister.\textsuperscript{137} Thus, the Court is strongly implying that there is no violation of the primary effect prong. The Court then holds that the program is not violated by the fact that public funds are used to compensate the chaplain.\textsuperscript{138} This statement overturns the court of appeals’ holding that payments of government funds to a minister who enjoyed such a long-term relationship with the state resulted in the potential for political division along religious lines and, thus, violated the excessive entanglement prong.\textsuperscript{139} Thus, once again the Court implicitly holds that one of the prongs of the test was not violated. In essence, the Court seems to have employed the Lemon three-prong test without ever having explicitly said so. There is

\textsuperscript{134} \textit{U.S. at } 103 S. Ct. \textit{at } 3062 (1983).

\textsuperscript{135} “In 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.” \textit{U.S. at } 103 S. Ct. \textit{at } 3336.

\textsuperscript{136} \textit{U.S. at } 103 S. Ct. \textit{at } 3336.

\textsuperscript{137} Chambers v. Marsh, 675 F.2d 228, 234 (1982).

\textsuperscript{138} \textit{U.S. at } 103 S. Ct. \textit{at } 3336.

\textsuperscript{139} Chambers v. Marsh, 675 F.2d 228, 235 (1982).
nothing inherently wrong with this mode of analysis. The Court may of course adopt new methods of analysis or discard old methods as it seems fit. Furthermore, the Court may overrule an entire line of cases interpreting a constitutional principle. It is surprising, however, that after many years of express utilization of the *Lemon* standard in Establishment Clause cases, the Court would, without explanation, suddenly refrain from utilizing it in *Marsh*. The Court undoubtedly realized that an attempt to justify the holding on the basis of previous interpretations of the three-prong standard could not withstand close scrutiny. Thus, rather than call attention to the inconsistency of the decision with previous cases, the Court chose to base the holding on an historical analysis coupled with unsupported conclusions regarding the act’s primary effect and potential for excessive entanglement.

Although the rationale behind the Court’s method of analysis may be confusing, the result of the decision is fairly clear. In *Marsh* the court has greatly relaxed the interpretation and application of the *Lemon* standard and, thus, created an atmosphere regarding Establishment Clause cases which is more favorable toward religion. Litigants can forcefully argue that *Marsh* stands for the proposition that the primary effect prong is not breached merely because of a special “arrangement” between the government and one sect or denomination. It could also be argued that *Marsh* holds that payment of public funds to one sect or denomination does not violate the excessive entanglement prong.

The Court’s opinion appears to blatantly disregard the well-established principle of “wholesome neutrality.” Clearly by allowing Nebraska to maintain this special relationship with the representative of one particular denomination, the Court has condoned the favoring of one sect over another. Although as previously pointed out, such a relationship might be acceptable for prison and military chaplaincy programs, there were no facts present in *Marsh* to justify ignoring neutrality concepts. Clearly Nebraska has placed the power and prestige of the state behind one particular denomination, and the Supreme Court has accepted this as non-violative of the Establishment Clause. This not only adversely affects the “touchstone” of neutrality, but may also have major implications on the future evolution of the secular purpose and primary effect prongs of the *Lemon* standard. One commentator has suggested that the Court has for some time equated neu-

140. See p. 152 infra.
trality with the purpose and effect prongs. If this is so, then this relaxation of neutrality standards may, in the near future, result in significant changes in the results reached through application of the secular purpose and primary effect prongs.

Another result in *Marsh* is the increased difficulty in predicting how the Court will rule in Establishment Clause cases. While the Court has hardly been a model of consistency in deciding Establishment Clause issues, the *Lemon* standard coupled with neutrality principles did give the area some predictability. The failure to expressly use the three-prong standard, the apparent alteration of the interpretation of the primary effect and excessive entanglement prongs, and the deviation from well-settled principles of neutrality will all work to make preparation and argument of Establishment Clause cases more difficult.

**Conclusion**

*Marsh* held that a Nebraska legislative chaplaincy program did not offend the Establishment Clause even though the State had employed the same chaplain for almost twenty years. Instead of expressly employing the *Lemon* three-prong standard ordinarily used for Establishment Clause analysis, the Court embarked on an historical examination of the intent of the framers toward such programs. Also, the Court appeared to implicitly utilize the *Lemon* standard. This opinion is not only a startling departure from the usual method of analysis, but is also totally inconsistent with the wholesome neutrality dictates of numerous prior decisions.

Due to the long-term relationship between the State and the minister, the three-prong standard and neutrality considerations would seem to compel a different result. The holding in effect insulates virtually all legislative chaplaincy programs from Establishment Clause attack. Despite the Court's previous assertion that it could not approve the slightest breach in the wall separating church and state, the holding that the program was constitutional may not be as important as the Court's method of analysis. The holding not only will result in some confusion as to the mode of analysis being employed by the Court, but may also be used to inject more religious beliefs into society. It is conceivable that the Court could someday use the principles laid down in *Marsh* to overturn the School Prayer cases. However, considering the Court's

blatant disregard of precedent in analyzing the *Marsh*, case, it can be hoped that the Court will also ignore the *Marsh* holding when considering future Establishment Clause cases.

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