INTRODUCTION

The legislature of each of the fifty states and of the federal government begins each day with an opening prayer.\(^1\) Nebraska, sixteen other states, and the United States Congress regularly employ a chaplain or chaplains for this purpose.\(^2\) This practice has been challenged on numerous occasions as a violation of the first amendment Establishment Clause, but no case had reached the Supreme Court until \textit{Marsh v. Chambers}.\(^3\) The Court in \textit{Marsh} up-

\(^1\) See Brief of the Nat'l Conference of State Legislators as Amicus Curiae at 2, Marsh v. Chambers, 103 S. Ct. 3330 (1983) [hereinafter cited as \textit{Amicus Curiae} Brief].

\(^2\) \textit{Amicus Curiae} Brief at 3.

Arkansas Senate ($25 per diem); California Assembly ($400 per month); California Senate ($600 per month); Colorado Senate (3 chaplains; 1 rabbi, 2 Protestants) ($18.46 per diem); Connecticut House of Representatives ($3,000 per session); Connecticut Senate ($3,000 per session); Idaho House of Representatives ($15 per diem); Idaho Senate ($15 per diem); Kansas House of Representatives ($349-525 per month); Kansas Senate ($349-525 per month); Massachusetts House of Representatives ($10,500 per annum); Missouri House of Representatives (2 chaplains; 1 Protestant, 1 Catholic) ($325 per month); Missouri Senate ($600 per month); Montana House of Representatives ($10 per diem); Montana Senate ($10 per diem); New Hampshire House of Representatives ($10 per diem); New Hampshire Senate ($11 per diem); New York Assembly ($11,600 per annum); North Carolina House of Representatives ($103 per week); North Carolina Senate ($103 per week); Ohio House of Representatives ($4,492.80 per annum); South Carolina House of Representatives ($5,818 for 6 months, prorated if session exceeds 6 months); South Carolina Senate ($5,818 per annum); West Virginia Senate ($17 per diem); Wyoming Senate ($20 per diem).

\(^3\) 103 S. Ct. 3330 (1983). See Murray v. Morton, 505 F. Supp. 144, 146 (D.D.C. 1981), rev'd sub nom. Murray v. Buchanan, 505 F. Supp. 144, 146 (D.D.C. 1981), vacated, 50 U.S.L.W. 2534 (D.C. Cir. 1982) (en banc). Plaintiff's claim that congressional practice of maintaining and compensating chaplains for prayers was unconstitutional under the establishment clause expired on the District Court level to the threshold issues of standing and political question. 505 F. Supp. at 146. Plaintiffs did not have sufficient injury-in-fact to support their claims nor could they assert taxpayer standing in that taxpayer standing is limited to challenges to expenditures for general public purposes, not to challenge the constitutionality of Congress' decisions and expenditures concerning its internal affairs. \textit{Id.} The Murray court adhered to its earlier opinion in Elliott v. White, 23 F.2d 997 (D.C. Cir. 1928), also involving a challenge to congressional chaplaincy. 505 F. Supp. at 146. In Elliott, the plaintiff's claim was denied on the basis of the political question doctrine: "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional...[t]o do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another coequal department." Elliott, 23 F.2d at 998.

On rehearing, the Court of Appeals found that the Plaintiff in Murray had tax-
held the compensation and tenure of Nebraska's legislative chaplain as being within the bounds of the Establishment Clause.4

The Court once admonished that the line of separation between church and state "far from being a 'wall', is a blurred, indistinct, and variable barrier. . ."5 In order to more clearly define this "barrier," the Court has developed a formula for determining breach of Establishment Clause protection.6 However, the Court abandoned this formula in Marsh, and thereby carved out an exception to the Establishment Clause.7 This note will demonstrate that had the Court looked with an "unsentimental eye"8 and applied its traditional test for determining establishment of religion, the practice of governmental bodies paying chaplains to say prayers would have been held unconstitutional.

FACTS AND LOWER COURT HOLDINGS

Ernest Chambers is a state senator of the Nebraska Unicam-

payer standing under the double nexus analysis of Flast v. Cohen, 392 U.S. 83 (1968). Murray v. Buchanan, 50 U.S.L.W. at 2534. On the question of nonjusticiability due to a political question, the Court of Appeals concluded that under the criteria for determining a political question as set forth in Baker v. Carr, 369 U.S. 186 (1962), there was no basis for concluding that the constitutional interpretation required by the issue of congressional chaplaincies intrudes on congressional territory. Id. The issues of standing and justiciability are raised in Marsh. See notes 43-52 and accompanying text infra.

On the State level, both Houses of the Massachusetts legislature were permitted to retain and compensate a chaplain. Colo v. Treasurer and Receiver General, 378 Mass. 550, —, 392 N.E.2d 1195, 1201 (1979). There have also been cases involving local government entities and chaplains. See, e.g., Voswinkel v. City of Charlotte, 495 F. Supp. 588, 599 (W.D.N.C. 1980) (the court found the retention and compensation of a police chaplain unconstitutional under the Establishment Clause); Bogen v. Doty, 598 F.2d 1110, 1115 (8th Cir. 1979) (a county board's practice of having prayers said before board meetings was upheld); Lincoln v. Page, 109 N.H. 30, —, 241 A.2d 799, 801 (1968) (the practice of opening town meetings by unpaid clergy was approved).

4. Marsh, 103 S. Ct. at 3336. In this century, only Marsh and five other Establishment Clause cases have strayed from the area of religion in public schools. See Mueller v. Allen, 103 S. Ct. 3062, 3070-71 (1983) (the Court upheld a Minnesota statute allowing taxpayers a deduction for expenses incurred by their children attending elementary and secondary schools both secular and sectarian); Larson v. Valente, 102 S. Ct. 1673, 1685-86 (1982) (striking Minnesota's requirement that certain religious organizations register and report to the state); Larkin v. Grendel's Den, Inc, 103 S. Ct. 505, 512 (1982) (the grant of veto power over liquor licenses given to churches was found violative of the Establishment Clause); Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) (the Court declared tax exemptions for religious institutions constitutional); McGowan v. Maryland, 366 U.S. 420, 452 (1961) (approved state "blue laws").


7. See notes 138-188 and accompanying text infra.

eral Legislature. He commenced an action under 42 U.S.C. § 1983, challenging as violative of the first amendment Establishment Clause the compensation of the Nebraska state legislature's chaplain, the printing of prayer books by the state legislature and the offering of daily prayers before legislative sessions.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

11. The U.S. Const. amend. I reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Rule I, Section 2 of the Rules of Nebraska Unicameral provide: "In addition, the legislature shall advise and consent to the recommendations of the Executive Board of Legislative Council for the following officers: . . . Chaplain." Rule I, Section 21, of the Rules states: "The Chaplain shall attend and shall open with prayer each day's sitting of the legislature." (cited in Chambers v. Marsh, 504 F. Supp. at 586).

The district court concluded that "neither the voting, the inviting, the giving nor the hearing of the prayer is making a law, but that this basis alone does not determine whether the prayers are prohibited by the First and Fourteenth Amendments." Chambers v. Marsh, 504 F. Supp. at 588. The Eighth Circuit found that such state sanctioned, sponsored and financed prayer activities certainly reflect sufficient "law making" to present a justiciable claim under the Establishment Clause. Chambers v. Marsh, 675 F.2d at 233. See also Bogen v. Doty, 598 F.2d at 1114 (an informal rule was sufficient "law making" for the first amendment analysis); Voswinkel v. City of Charlotte, 495 F. Supp. at 600 (the employment contract of the police chaplain was law making). The states which provide for legislative chaplaincies by "law" are:

The United States District Court for the District of Nebraska ruled that compensating a chaplain and financing prayer books was unconstitutional, but that offering daily prayer was not. In upholding the offering of prayer, the court based its decision on the first amendment's prohibition that "Congress shall make no law respecting an establishment of religion . . . ." Under a literal reading of the first amendment, the court determined that neither the selection of a chaplain, nor the giving of a prayer, constituted "making a law." Therefore, the district court concluded that opening each legislative session with a prayer was not prohibited by the first amendment. The district court also recognized that this result could be reached by means of the Lemon v. Kurtzman purpose-effect-entanglement test. This three-part test was developed over numerous years of Establishment Clause litigation, and has become the test used by the Supreme Court to define permissible and impermissible involvements of church and state. In accord with the significance of the Lemon analysis to Establishment Clause questions, the district court proceeded to apply it to the Nebraska scheme.

The court first applied the Lemon analysis to the legislative prayer practice, viewing it as separate from the questions of compensating a chaplain and financing publication of prayer books. Under the first part of the analysis, the prayer practice was sustained, the court finding it to have a clearly secular purpose: bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner. The prayer practice also passed muster under the second part of the Lemon analysis, where the constitutional inquiry is whether the practice at issue has the

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13. Id. at 588; U.S. Const. amend. I.
15. Id.

In Lemon v. Kurtzman, the Supreme Court enunciated the rule for dealing with Establishment Clause cases:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." (citations omitted)

See also notes 86-102 and accompanying text infra.
18. See notes 86-126 and accompanying text infra.
20. Id. at 589.
"direct and immediate effect of advancing religion" rather than "a remote and incidental effect." The district court found that Nebraska's practice of offering prayer was neither a benefit nor hindrance to institutional or generic religion. The prayer practice was also sustained under the third part of the Lemon test, where the question is whether the practice at issue avoids or creates excessive governmental entanglement with religion. The district court concluded, based on the facts of the case at hand, that the mere recitation of a prayer minimally entangled the state of Nebraska in religious affairs.

The district court next turned to the question of whether paying a chaplain a salary and financing the publication of prayer books constituted legislation. The court concluded that those practices had the immediate effect of advancing religion: "The direct and immediate religious effect of Nebraska's funding a chaplain's salary is in securing a firm and continuing relationship with a particular cleric of one denomination to the virtual exclusion of all others . . . ." The district court reviewed the Supreme Court's holdings in regard to payment of public funds for religious activities, and concluded that paying a salary to a legislative chaplain and financing prayer books was impermissible.

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25. Id. at 591-92.
26. Id. at 592. The court found that the prayer books were not used to start the business of the day in a thoughtful manner. The use of the prayer book as meditative material for the legislators failed because it was distributed to nonlegislators as well. The court found the prayer book had no secular purpose. Id. at 591 and n.15.
27. Id. at 592.
28. Id. at 591-92. See Meek v. Pittenger, 421 U.S. 349, 372 (1975) (a state cannot loan religiously neutral equipment, to nonpublic schools because the ultimate effect of the state's activity might be a religious one); Sloan v. Lemon, 413 U.S. 825, 834-35 (1973) (a state cannot return a portion of private school's tuition fees to parents, because the ultimate effect may be a religious one); Tilton v. Richardson, 403 U.S. 672, 682-83 (1971) (the federal government cannot give unrestricted construction funds on loans to sectarian colleges, because the money could be used for religious need). Compare Sloan with Mueller v. Allen, 103 S. Ct. 3062 (1983). In Mueller, the Supreme Court upheld a Minnesota statute which allowed a deduction upon state income taxes for parents providing "tuition, textbooks and transportation" for their children attending any schools, whether public or private. 103 S. Ct. at 3070-71.
29. Chambers v. Marsh, 504 F. Supp. at 592. The district court deliberately did not deal with the question of appointing a chaplain, as distinguished from paying one: whether the legislature can avoid advancing or inhibiting religion and excessive entanglement with religion by appointing a single chaplain on a continuing
The United States Court of Appeals, Eighth Circuit, affirmed the district court's findings that compensating a chaplain and financing prayer books were unconstitutional, but reversed the finding that the offering of daily prayer was not.\footnote{Chambers v. Marsh, 675 F.2d at 235.} Before reaching the Establishment Clause issue, the Eighth Circuit addressed the defendant's claims that the action was barred by the tenth amendment, and by the doctrines of standing, abstention, and legislative immunity.\footnote{Id. at 231.} The court found no merit in these contentions.\footnote{Id.}

In addressing the substantive issue as to whether the Nebraska prayer practice violated the standard embodied in the Establishment Clause, the court of appeals also applied the \textit{Lemon} analysis.\footnote{Id. The court concluded that “[n]othing in National League of Cities v. Usury, 426 U.S. 833 (1976), the case which the Eighth Circuit relied on, even hints that the Tenth Amendment immunizes state action from constitutional scrutiny.” \textit{Id.} Chambers was deemed to have taxpayer and general citizen standing. \textit{Id. See infra.} The Abstention Doctrine was inapplicable in that the doctrine involves deferring federal action when ongoing state proceedings might obviate the need for federal relief. Here there are no state proceedings. Chambers v. Marsh, 675 F.2d at 231-32. Finally, legislative immunity can not be invoked in that the immunity is limited in scope to the Speech and Debate clause. \textit{Id.} at 232.} However, the Eighth Circuit did not separate the prayer practice from the issue of compensation, as the district court had done.\footnote{Id. at 233.} Rather, the court determined that “to assess whether the prayer practice has an impermissible purpose or effect, or whether it results in excessive entanglement, the established practice must be viewed as a whole.”\footnote{Id. at 233.}

The court of appeals viewed Nebraska's practice as falling within what it termed the “ceremonial prayer category,” but as exceeding the permissible bounds thereof.\footnote{Id. at 234.} In applying the first

\textit{basis . . . is problematical.” The district court chose to leave the question unresolved. \textit{Id.} at 593.}}
part of the *Lemon* analysis, the court found that for sixteen years Nebraska had paid one minister, who represented one denomination, and that the purpose of this practice was to advance and give preference to one religious view.\(^{37}\) Under the second part of the *Lemon* test, the court held that the effect of the practice unmistakably advanced religion.\(^{38}\) Under the third part of the analysis, the Eighth Circuit viewed Nebraska's legislative prayer practice as putting the state in a quagmire:\(^{39}\) by using state monies to compensate the same minister for sixteen years, and by publishing this minister's prayers, the state was clearly entangled with religion.\(^{40}\) The court noted that such entanglement had the potential to cause political division along religious lines.\(^{41}\) The Eighth Circuit thus held that Nebraska could not engage or pay a single minister to offer legislative prayers, nor could it publish prayer books.\(^{42}\) The Supreme Court granted certiorari on the question of whether the Nebraska legislature's compensation and retention of a single individual as chaplain for an extended period of time rendered its legislative prayer practice violative of the Establishment Clause.\(^{43}\)

**BACKGROUND**

**Threshold Issues**

Justiciability is the term of art employed to give expression to the limitation placed upon federal courts by the "case and controversy doctrine"\(^{44}\) as derived from article III of the Constitution.\(^{45}\)

\(^{37}\) Chambers v. Marsh, 675 F.2d at 234-35.

\(^{38}\) *Id.* at 234.

\(^{39}\) *Id.* at 235.

\(^{40}\) *Id.*

\(^{41}\) *Id.* Cf. Bogen v. Doty, 598 F.2d at 1114 (a county board's prayer practice was upheld on the entanglement analysis because no monies were paid to the chaplains.).

\(^{42}\) Chambers v. Marsh, 675 F.2d at 235.

\(^{43}\) See 51 U.S.L.W. 3329, 3339 (Nov. 2, 1982).

\(^{44}\) U.S. CONST. art. III, § 2, cl. 1 reads:

>The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls,—to all Cases of admiralty and maritime Jurisdiction,—to Controversies to which the United States shall be a Party,—to Controversies between two or more States,—between a State and Citizens of another State,—between Citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

\(^{45}\) See Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) (the Court must adjudge the legal rights of litigants in actual controversies); Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 345 (1892) (the power to declare rights of individuals and to measure the authority of
The United States Supreme Court has instructed that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" The injury must be peculiar to the petitioner, or a distinct group, rather than one shared in substantially equal measure by all citizens, or by a large class thereof.

The Eighth Circuit found that Ernest Chambers had, in fact, asserted a particularized injury. As a member of the legislature, he had squarely confronted the prayer practice on a daily basis. The court observed that Chambers, a non-Christian, "vigorously objected to commencing his legislative business with allegedly 'official prayers.'" The court went on to note that although the rules of the Nebraska Unicameral require attendance at the daily sessions, Chambers had found some prayers so insulting to his value system as legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.


The Court admits that Congress may by legislation, expand standing to the full extent permitted by article III, thus permitting standing by one who otherwise be barred by traditional rules of standing, but "(n)ever event may Congress abrogate the art. III minima." Gladstone Realtors v. Village of Bellwood, 441 U.S. at 100. "A plaintiff must always have suffered a distinct and palpable injury to himself that is likely to be redressed . . . ." Id. (quoting Warth v. Seldin, 422 U.S. at 501) (citation omitted). Without the injury-in-fact requirement, any exercise of jurisdiction would be gratuitous and outside the parameters of article III. Gladstone Realtors v. Village of Bellwood, 441 U.S. at 99 (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)). See also United States v. SCRAP, 412 U.S. 669, 687 (1973) (the requirement of injury-in-fact assures that the judicial process is not converted into "a vehicle for the vindication of the value interests of concerned bystanders.").

47. Warth v. Seldin, 422 U.S. 490, 499 (1974). See also Baker v. Carr, 369 U.S. at 204 (The jist of the inquiry must be whether the complaining party has "alleged such a personal stake . . . ."); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 164 (1914) (complaint must show that his individual need requires the remedy for which he asks). See generally Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 223 (1974); O'Shea v. Littleton, 414 U.S.488, 494 (1974); Laird v. Tatum 408 U.S. 1, 13 n.7 (1972).

The Court has rejected standing predicates on "the right, possessed by every citizen, to require that the Government be administered according to law . . . ." Fairchild v. Hughes, 258 U.S. 126, 129-30 (1922).

49. Id.
50. Id. at 231 n.5.
ues that he had been forced to leave during their recitation. In light of these facts, the Eighth Circuit found that Chambers' injury was individualized and distinguishable from "the general grievance which any Nebraska citizen might assert." The court held that Chambers, along with the other members of the Unicameral, was in the rare position of being able to assert standing predicated on injury-in-fact. The Eighth Circuit also found that Chambers had standing, as would a substantial number of individuals, based on his status as a taxpayer.

The Establishment Clause

A review of the history and development of the Supreme Court's method of analysis in Establishment Clause cases will aid the inquiry into the substantive issues presented in Marsh. This review will document the development of the Lemon analysis, and discuss the incorporation therein of the various standards of review used by the Court in preceding Establishment Clause cases.

The Establishment Clause was applied to the states via the Fourteenth Amendment in Everson v. Board of Education. In Everson, a township's board of education, acting pursuant to a

51. Id. The district court determined that Chambers having to absent himself was only a minor inconvenience and he had suffered no significant injury as a result of non-attendance. Chambers v. Marsh, 504 F. Supp. at 591.
52. Id. at 231.
53. Plaintiffs have tried to gain standing in Establishment Clause cases by asserting that the fundamental rights guaranteed in the first amendment require a broader reading of the standing requirement. The Court has not been persuaded by this analysis. Note, Taxpayer's Standing Limited to Congressional Actions Authorized by the Taxing and Spending Power, 12 SETON HALL 865, 875 (1982) ("the Establishment Clause has no talismanic effect over the requirement of personal injury"); See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 102 S. Ct. 752, 765 (1982) (to suggest that the Establishment Clause is somehow more fundamental and that a person claiming under the Clause should be allowed the jurisdiction of the federal court would create a "heirarchy of constitutional values" or a complimentary "sliding scale" of standing).
54. Chambers v. Marsh, 675 F.2d at 231. See also Flast v. Cohen, 392 U.S. 83, 102-103 (1968). In Flast, the appellants were granted standing to challenge funds disbursed under the Elementary and Secondary Education Act to finance instruction and the purchase of educational materials. Id. at 85. Appellants asserted that this was violative of the Establishment and Free Exercise Clauses. Id. The Court developed a two-part test to determine whether plaintiffs, as taxpayers, have standing to sue: First, the plaintiff must demonstrate a logical link between the personal status as a taxpayer and the legislation challenged. Second, there must be a nexus between the taxpayer "status and the precise nature of the constitutional infringement alleged." This allegation must be specific. A mere assertion that Congress has acted outside the scope of delegated power is insufficient. Id. at 102-03.
55. 330 U.S. 1, 15 (1947). Commentators have argued that the Establishment Clause was not intended by the framers to delimit the rights of state governments. See generally W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 33-34 (1964); M.
state statute, had authorized reimbursement to parents for the bus transportation of their children to and from school. Part of this money was for transportation to Catholic schools. A taxpayer filed suit challenging the right of the school board to reimburse the parents of parochial school students. The Supreme Court upheld the statute, viewing the reimbursement for transportation to private schools as an example of public welfare legislation, similar to police and fire protection. The Court reached this result while admitting the possibility that some children might not attend church schools if their parents were compelled to bear the transportation expense.

Everson purportedly adopted Thomas Jefferson's view that there should be strict separation between church and state. The Court, using Jefferson's metaphor, stated that the "First Amendment has erected a wall between church and state" which must be "high and impregnable," and that neither a state nor the federal government could enact laws which aid one religion over another. It should be noted, however, that the strong language used

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Whether or not such was the understanding of the Framers and whether such a purpose would have inhibited the absorption of the Establishment Clause at the threshold of the Nineteenth Century are questions not dispositive of our present inquiry. For it is clear on the record of history that the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments. Any such objective of the First Amendment, having become historical anachronism by 1868, cannot be thought to have deterred the absorption of the Establishment Clause to any greater degree than it would, for example, have deterred the absorption of the Free Exercise Clause. That no organ of the Federal Government possessed in 1791 any power to restrain the interference of the States in religious matters is indisputable. It is equally plain, on the other hand, that the Fourteenth Amendment created a panoply of new federal rights for the protection of citizens of the various States. And among those rights was freedom from such state governmental involvement in the affairs of religion as the Establishment Clause had originally foreclosed on the part of Congress.

(citation omitted).

56. 330 U.S. at 3.
57. Id.
58. Id.
59. Id. at 16-18.
60. Id. at 17.
61. See L. Tribe, American Constitutional Law § 14-3, at 817 (19—).
63. Id.
64. Id. at 15-16. The Court described the Jeffersonian position further: 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
in describing the first amendment's prohibition was apparently compromised by the Court's upholding of the statute; the Court's metaphor of the wall was arguably reduced to hyperbole.65

This apparent incongruity—between the hard language and the de facto aid to the parents of parochial school children that the Everson Court permitted—has been criticized as undermining the strict separation of church and state.66 If the Everson Court had in fact adhered to its tough language, it would have required that no aid whatsoever flow from the state to religion—except when embodied in a general welfare grant designed to benefit society as a whole.67 Such a standard, had it been adopted, would have prohibited not just financial support of religion by the state, but also any involvement which tended to promote or discourage religion.68 The Court, however, has not adopted this view;69 instead, in Zorach v. Clauson,70 the Court began to apply what has been termed the doctrine of "benevolent,"71 or "wholesome neutrality."72

In Zorach, the Court upheld a New York statute that permitted public schools to release students during school hours, on written request from their parents, so they could attend religious centers for instruction or devotional exercises.73 The Court found dispositive the fact that the specific programs at issue involved neither religious instruction in public schools, nor the expenditure

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65. See generally L. Tribe, supra note 59, § 14-4, at 820. See also notes 64-65 and accompanying text infra.
67. Id. at 1475 n.81.
68. Id. at 1475.
69. Id. at 1468. See Hunt v. McNair, 413 U.S. 734, 742 (1973).
70. 343 U.S. 306 (1952). Cf. McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (following Everson and before Zorach, the Court in McCollum maintained a separationist view in striking a state statute which sanctions compensation of religious instructors of various faiths who were allowed to instruct in public schools).
71. "Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (citing Zorach).
73. Zorach v. Clauson, 343 U.S. at 315.
of public funds. The Court found that the Establishment Clause:

[D]oes not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency, one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.

The Court in Zorach thus suggested that some establishment of religion was permissible. By this admission, the Court was confronted with the difficult task of delineating the line between state neutrality and state support of religion: "[T]he constitutional standard is the separation of church and state. The problem, like many problems in constitutional law, is one of degree."

In Abington School District v. Schempp, the Court found that the required reading of the Bible in public schools violated the Establishment Clause. In so holding, the Abington Court fashioned a test, subscribed to by eight justices, for distinguishing between forbidden involvements of the state with religion and those contacts which the Establishment Clause permits:

What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope or legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits

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74. Id. at 308.
75. Id. at 312. See McGowan v. Maryland, 366 U.S. 420, 450 (1961) (Sunday "blue laws" were upheld for the reason that in addition to being a day of significance to Christians, required closing served the secular purpose of providing a uniform day of rest.). In McGowan, the Court stated:

"[I]t is equally true that the Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery or polygamy.

Id. at 442 (citations omitted).
76. See Board of Educ. v. Allen, 392 U.S. 236, 242 (1968) (upholding a New York Education Law requiring the loan of texts to all children free of charge in grades seven to twelve, including those in religious schools).
77. Zorach v. Clauson, 343 U.S. at 314.
79. Id. at 224.
Walz v. Tax Comm'n\textsuperscript{81} changed the Abington test by adding a third factor to be considered in analyzing establishment clause questions.\textsuperscript{82} In Walz, property owners sought to prevent the New York City Tax Commission for granting tax exemptions to religious organizations for properties used for religious worship.\textsuperscript{83} The property owners contended that the practice violated the Establishment Clause.\textsuperscript{84} In upholding the exemptions, the Court stated: “[T]he legislative purpose of the tax exemption is not aimed at establishing, sponsoring, or supporting religion . . . . We must also be sure that the end result—the effect is not an excessive government entanglement with religion.”\textsuperscript{85} The Walz Court concluded that although the property tax exemptions gave rise to some state involvement, taxing church property would have required more.\textsuperscript{86} It can be inferred from the analysis employed in Walz that, in addition to the “purpose” and “effect” standards set forth in Abington, excessive government entanglement was also to be avoided. Thus, within the addition of the entanglement element, the foundation of the Lemon analysis was complete.

The Lemon Analysis

In Lemon v. Kurtzman\textsuperscript{87} the Court combined the criteria from Abington and Walz to create an analysis to be used in Establishment Clause cases: “the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’ ”\textsuperscript{88} In Lemon, plaintiffs challenged statutes in Rhode Island and Pennsylvania as violating the Establishment Clause.\textsuperscript{89} The Rhode Island statute in question provided a salary supplement for teachers in non-public schools,\textsuperscript{90} so long as the courses taught were also offered in public schools, and the teachers agreed not to teach religion.\textsuperscript{91} In Pennsylvania, the superintendent of schools was

\textsuperscript{80.} Id. at 222 (emphasis added).
\textsuperscript{82.} See notes 81-83 and accompanying text infra.
\textsuperscript{83.} Walz v. Tax Comm'n, 397 U.S. at 666.
\textsuperscript{84.} Id. at 667.
\textsuperscript{85.} Id. at 674.
\textsuperscript{86.} Id. at 674-75.
\textsuperscript{87.} 403 U.S. 602 (1971).
\textsuperscript{88.} Id. at 612-13 (1970) (citations omitted) (emphasis added).
\textsuperscript{89.} Id. at 606.
\textsuperscript{90.} Id. at 607.
\textsuperscript{91.} Id. at 608. The recipient had to teach in a non-public school at which the
authorized to purchase certain secular educational services from non-public schools, directly reimbursing those schools for teacher's salaries, textbooks and instructional materials. Reimbursement was restricted to courses in specific secular subjects, and the textbooks and materials required prior approval.

In applying the three-part analysis, the Lemon Court found both state practices unconstitutional. Under the first part of the analysis, the Court determined that the legislative purposes of both statutes were secular. The Court noted that since the statutes were "intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws," they did not violate the "secular purpose" requirement. The second part of the analysis, the "effect" element, was not applied in Lemon because certain restrictions contained within the statutes at issue guaranteed that state financial aid could only be used to support secular functions. However, under the third part of the analysis, the Court held that it was these very restrictions that caused excessive government entanglement with religion. In reaching this result, the Lemon Court enhanced the "excessive entanglement" element of the analysis by incorporating therein the political divisiveness considerations that had been articulated by Justice Harlan in his separate opinion in Walz. Justice Harlan had observed:

[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against. Although the very fact of neutrality may limit the intensity of involvement, government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation.

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average per-pupil expenditure on secular education was less than the average in the state's public schools during a specific period. Id. at 607. 92. Id. at 609. If the information indicated a per-pupil expenditure in excess of the limit, the records of the school in question had to be examined in order to assess how much of the expenditure was attributable to secular education and how much to religious activity. Id. at 609-10.

93. Id. at 610.
94. Id. at 611.
95. Id. at 613.
96. Id.
97. Id.
98. Id. at 614.
99. Id. at 615.
100. Walz v. Tax Comm'n, 397 U.S. at 695; see also Board of Educ. v. Allen, 392
The *Lemon* Court envisioned that the entanglement of government with religion, through state aid to parochial schools, would lead to feuding between partisans of those schools and their opponents.\(^{101}\) The Court noted that although ordinary political debate, however vigorous is a usual manifestation of a healthy democratic system, “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”\(^{102}\) The potential for political divisiveness thus became an additional element of consideration under the entanglement element of the purpose-effect-entanglement test.\(^{103}\)

Subsequent applications of the *Lemon* analysis have lent substance to the form. On the first level of the *Lemon* analysis, the Supreme Court has rarely found that a state act had the impermissible purpose of advancing religion.\(^{104}\) In fact, it has been suggested that if the state action is even *arguably* non-religious, it is sufficiently secular\(^{105}\) to pass the “secular purpose” element.

One year after *Lemon*, the Court revised and clarified the “effect” element of the analysis in *Committee for Public Education & Religious Liberty v. Nyquist*.\(^{106}\) In striking amendments to a New York statute which established financial aid for non-public schools,\(^{107}\) the Court asked not whether the law had the principal

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\(^{101}\) *Lemon v. Kurtzman*, 403 U.S. at 622 (“Candidates will be forced to declare and voters to choose.”).

\(^{102}\) *Id.*

\(^{103}\) See *Committee for Pub. Educ. v. Nyquist*, 413 U.S. at 795-97 (a tuition-voucher plan was stricken in part because of the belief that any significant aid to students in sectarian schools caused political division); *Meek v. Pittenger*, 421 U.S. at 365 & n.15, 372 (the problem of political division was invoked to invalidate the furnishing of auxiliary educational aids to students); *Larkin v. Grendel's Den*, Inc., 103 S. Ct. 505, 512 (1983) (political divisiveness was a factor in striking a zoning ordinance granting certain police powers to churches). See note 117-118 and accompanying text infra.

\(^{104}\) See, e.g., *Stone v. Graham*, 449 U.S. 39, 41 (1980) (posting of the Decalogue in public schools was found to have only an “avowed” secular purpose). Prior to *Lemon*, another practice failed the purpose analysis. See *Epperson v. Arkansas*, 393 U.S. 97, 107-08 (1968) (the sole purpose for an Arkansas “anti-evolution” statute was to preserve from conflict the account of the origin of man set forth in the Book of Genesis).

\(^{105}\) L. Tribe, *supra* note 61, § 14-8, at 835 (what is secular is interpreted broadly, if not “laws against murder . . . would be forbidden because they overlapped the fifth commandment . . . ”).

\(^{106}\) 413 U.S. 756 (1973).

\(^{107}\) Id. at 783. Three financial aid programs were involved: the first provided direct money grants to non-public schools for maintenance and repair of school facilities; the second involved a tuition reimbursement plan for parents; and third, tax relief was given to parents via deductions of sums unrelated to amounts of actual tuition paid. *Id.* at 762-65.
and primary effect of advancing religion, but whether the law had
"the direct and immediate effect of advancing religion," as con-
trasted with "only a remote and incidental effect advantageous to
religious institutions." To make this determination, the Court
considered whether the secular impact was sufficiently separable
from the religious, and whether the class benefitted was suffi-
ciently broad. The Court thus held that a law having a primary
effect of promoting a legitimate purpose under the state's police
power would, nevertheless, not be immune from further examina-
tion to ascertain whether it also had the direct and immediate ef-
fect of advancing religion.

The third level of the Lemon analysis, which prohibits exces-
sive entanglement between church and state, has been criticized
as a superfluous restatement of the secular effect rule. The
Court's use of this analysis has led to apparent inconsistency. In
Meek v. Pittenger, for example, the loan of textbooks by the
state was upheld because their contents could be policed to ensure
that they were secular in nature. By contrast, the loan of teach-
ers and teaching materials, also at issue in Meek, was struck be-
cause "the prophylactic contacts required to insure that teachers
play a strictly nonideological role . . . necessarily give rise to a
constitutionally intolerable degree of entanglement between
church and state." In general, in order to avoid a finding of ex-
cessive government entanglement the Court has required that
state aid be used exclusively for "secular, neutral, and nonideologi-
cal purposes," and that the secular nature of such purposes be ca-
ble of preservation without excessive state involvement.

108. Id. at 783 n.39 (1973) (emphasis added).  
109. L. Tribe, supra note 59, § 14-9, at 840. For example, government composed
prayers and non-sectarian readings from the Bible, although they may be for a sec-
ular purpose, are "direct sponsorship of indisputably religious activities" and are
violaive of the "primary effect standard". Id. § 14-9, at 841.  
n.39.  
111. See also Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 755 (1976) (in
upholding a Maryland statute for aid to private colleges, the Court stated that
"while entanglement is essentially a procedural problem, the primary-effect ques-
tion is the substantive one . . .").  
113. Id. at 361-62.  
114. Id. at 370. But see Wolman v. Walter, 433 U.S. 229, 255 (1977) (upholding an
Ohio statutory scheme that authorized the expenditure of state funds to supply
students at non-public schools with standardized tests and therapeutic and psycho-
logical services). See also Committee for Pub. Educ. & Religious Liberty v. Regan,
444 U.S. 646, 657 (1980) (no finding of excessive entanglement in aid for administra-
tion of standardized tests).  
Thus the areas of aid which do not involve excessive entanglement are limited.\footnote{116. Upon reviewing these cases, one commentator has suggested that the following forms of aid would be allowed: (1) general governmental services such as police protection, fire protection, water service, etc.; (2) reimbursement for student transportation costs where no preference is given to students attending religious schools; (3) furnishing textbooks to students where the books are of a purely secular nature and where public school students also receive textbooks; (4) property tax exemptions for the school and church property as part of a general exemption for many kinds of nonprofit activities; (5) releasing the students from public school for a limited time so that they can attend religious instruction away from the public school's (6) the provision of limited health and remedial education services. As these rules are the product of a series of decisions on very specific points, we must review the cases to explain the issues and the correct rules. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 851 (1978) [hereinafter cited as J. NOWAK].}

The political divisiveness analysis, with which the entanglement element was enhanced in \textit{Lemon}, has been described by one commentator as developing a life of its own which may be contrary to Justice Harlan's original design.\footnote{117. J. NOWAK, supra note 116, at 866-67.} In fact, the Court may be using the political divisiveness analysis to strike what are arguably neutral forms of aid.\footnote{118. The question of political division was meant to reinforce the Court's conclusions about excessive entanglement, and was not intended to be a strict test of constitutionality. The test took on a life of its own in \textit{Nyquist} when it was used to strike a completely neutral form of aid because of the belief that any significant aid to students in sectarian schools caused political division. \textit{Id}.}

The Supreme Court has rarely heard Establishment Clause cases which did not involve the clash of government and religion in schools,\footnote{119. In this century, all but a few Establishment Clause cases have been concerned with religion in schools. \textit{See}, \textit{e.g.}, Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 512 (1982) (the grant of veto power to churches over liquor licenses given to businesses located within 500 feet of a church was found violative of the Establishment Clause); Larson v. Valente, 102 S. Ct. 1673, 1685-86 (1982) (striking Minnesota's requirement that certain religious organizations register and report to the state); Walz v. Tax Comm'n, 397 U.S. at 680 (the court declared tax exemption for religious institutions constitutional); McGowan v. Maryland, 366 U.S. at 453 (approved state Sunday closing laws).} and in only a few of those cases has the \textit{Lemon} analysis been employed.\footnote{120. \textit{See} Larkin v. Grendel's Den, Inc., 103 S. Ct. at 511-12; Larson v. Valente, 102 S. Ct. at 1687.} Of those few, the recent case of \textit{Larkin v. Grendel's Den, Inc.},\footnote{121. 103 S. Ct. 505 (1982).} best represents the application of the \textit{Lemon} analysis outside the context of establishment of religion in public schools.\footnote{122. \textit{Larkin} is best suited for our purposes for the reason that \textit{Larson}'s application of the \textit{Lemon} analysis emphasizes the third element whereas \textit{Larkin} contains
setts statute which vested in the governing bodies of schools and churches the power to prevent the issuance of liquor licenses to premises within a 500-foot radius of a church or school. In applying the first part of the Lemon analysis, the Court held that the valid secular purpose of the statute in protecting schools and churches from the commotion associated with liquor outlets could have been accomplished by other means. On the second level of analysis, the Court noted that the churches' power was not subject to reasonable standards or limits. The Court noted that rather than insulating the church from an undesirable element, the power could be used to further the economic interests of church members. The Court also found that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reasons of the power conferred." Finally, under the third level of analysis, the Court viewed the grant of power as entangling the church and government to such a degree that the danger of political fragmentation along religious lines was present.

In conclusion, the Court began its treatment of Establishment Clause issues with tough language that seemingly mandated the strict separation of church and state; notwithstanding this language, the Court permitted state financial aid to the parents of children attending religious schools. The Court subsequently tempered its rhetoric, openly recognizing that some aid to, or establishment of, religion could be tolerated. The Court was resultantly required to fashion a test to determine exactly what types of aid, or involvement, would be tolerated. The Lemon analysis was thus developed, and provides the means for making such a determination.


124. Id. at 510. For example, the state could place an absolute ban on liquor outlets within reasonably prescribed distances from churches and schools. Id. at 510-11.
125. Id. at 511.
126. Id.
127. Id.
128. Id. at 512.
129. See notes 53-63 and accompanying text supra.
130. See notes 68-75 and accompanying text supra.
131. See notes 76-85 and accompanying text supra.
132. See notes 86-102 and accompanying text supra.
HOLDING AND ANALYSIS

In *Marsh v. Chambers*, the Court, in a 6-3 opinion, determined that Nebraska's practice of paying a chaplain to open legislative sessions with prayer did not violate the Establishment Clause. The opinion of the Court was delivered by Chief Justice Burger, who had also written the opinion in *Lemon*. Significantly, Chief Justice Burger's opinion in *Marsh* contains no reference to the *Lemon* analysis, nor any substantial reference to those cases which provide *Lemon*’s foundation. The opinion of the majority instead relies on an analysis which is unique to the Establishment Clause area.

The Majority Opinion

The majority found legislative prayers permissible under the Establishment Clause based on the view that this practice was "deeply embedded in the history and tradition of this country." The Court saw nothing so threatening about Nebraska's prayer practice to warrant ignoring history. Further, the Court concluded that the potential for establishing religion through legislative prayer was no greater than the potential for establishing religion through the provisions for school transportation, the beneficial grants for higher education, or the tax exemptions for religious organizations that had been sustained in earlier cases. In sup-

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134. *Id.* at 3336.
136. The majority did cite *Walz v. Tax Comm'n*, 397 U.S. 664 (1969), as authority for its proposition that when a practice covers the span of time of our entire national existence, it is not something lightly cast aside. *Marsh*, 103 S. Ct. at 3344-45. The reluctance of the Court in *Walz* to overturn the established practice of not taxing religion was more centrally founded in its fear of excessive entanglement with religion. *See Walz*, 397 U.S. at 675. *See also* notes 81-85 and accompanying text *supra*.
137. The court upholds the prayer practice as part of the history and tradition of our country. *See* note 139 and accompanying text *infra*. Aside from the majority's authority as contained in *Walz*, the Court has rarely invoked history or tradition in dealing with governmental acts challenged as violations of the Establishment Clause. *But see* *Zorach v. Clausen*, 343 U.S. 306, 315 (1952) (the Court acknowledged that we are a traditionally religious nation; in keeping with that tradition children in public schools should be allowed time off from school to pray). *Abington School Dist. v. Schemp*, 374 U.S. 203, 213 (1963).
139. *Id.* at 3335 (citing *Everson v. Board of Educ.*, 330 U.S. 1 (1946)).
140. *Id.* (citing *Tilton v. Richardson*, 403 U.S. 672 (1971)).
141. *Id.* (citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).
port of its historical analysis, the majority looked to the Continental Congress and the first Congress, and observed that prayers had been offered before both of these bodies.\textsuperscript{142} In addition, the Court noted that the appointment of paid legislative chaplains had been approved by the first Congress a mere three days before agreement on the final language of the Bill of Rights.\textsuperscript{143} From these historical facts, the Court concluded: "[C]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment."\textsuperscript{144} Thus, in upholding the Nebraska prayer practice, the majority disregarded the long established \textit{Lemon} analysis, and instead based its conclusion on history and tradition.\textsuperscript{145}

The majority's analysis, however, is subject to criticism. Beginning with the proposition that legislative prayer must be accorded deference because it is part of our national history, it must be noted that the history of legislative prayer, at least in the United States Congress, has not been without controversy.\textsuperscript{146} The majority recognized that John Jay and John Rutledge had objected to the practice because the members of Congress held diverse religious views and could not join together in worship.\textsuperscript{147} Further objection to the practice was noted by the majority in a footnote, but the discussion there was not inclusive of other struggles and disputes over legislative prayer.\textsuperscript{148}

The \textit{Marsh} Court asserted that the drafters of the Establish-
ment Clause "clearly" did not view paid legislative chaplains as unconstitutional. In reaching this conclusion, the majority apparently minimized the fact that James Madison, the framer of the First Amendment, had "expressed doubts concerning the chaplaincy practice." In fact, Madison had been emphatic in his opposition to the practice: "The establishment of the Chaplainship to Congress is a palpable violation of equal rights, as well as of constitutional principles . . . ." Justice Brennan, in his dissent, argued that Madison's remarks were the remarks of a "detached observer engaged in unpressured reflection." This, he suggested, was precisely the role with which the Court was charged. Justice Brennan went on to contrast the Court's "detached" role with that of the legislators, who were forced to operate under intense political pressures; he reasoned that a detached view compelled the conclusion that the Nebraska practice was unconstitutional.

The majority also argued that the first Congress would not have authorized the prayer practice if it had thought it inconsistent with the language of the Bill of Rights. Justice Brennan responded that this did not give adequate consideration to the

149. Marsh, 103 S. Ct. at 3334.
150. Id.
151. A. Stokes & L. Pfeffer, supra note 148, at 481. Madison concluded:

Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?

In strictness the answer on both points must be in the negative. The Constitution of the United States forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, an conducted by Ministers of religion paid by the entire nation.

The establishment of the Chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles: The tenets of the chaplains elected [by the majority] shut the door of worship against the members whose creeds and consciences forbid a participation in that of the majority. To say nothing of other sects, this is the case with that of Roman Catholics and Quakers who have always had members in one or both of the Legislative branches. Could a Catholic clergyman ever hope to be appointed a Chaplain? To say that his religious principles are obnoxious or that his sect is small, is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers, or that the major sects have a right to govern minor.

152. Marsh, 103 S. Ct. at 3347.
153. Id.
154. Id. at 3334.
circumstances under which the Bill of Rights had been adopted.\footnote{155} He pointed out that the enactment of the Bill of Rights had been "forced upon Congress by a number of the States as a condition for their ratification of the original Constitution."\footnote{156} With ratification in the balance, it can be concluded that it was unlikely that the constitutionality of legislative chaplains was foremost in the minds of the members of Congress.

In addition, the Marsh majority relied on what is arguably dicta, from a single case, to support the idea that tradition should be included in an Establishment Clause analysis. The majority cited Walz, which involved the tax exempt status of certain church property, to support of its "historical" analysis. The majority pointed out that the Walz Court had reasoned that the granting of tax exemptions to churches had had a long history, and that this history should be given deference when considering Establishment Clause cases.\footnote{157} This historical justification was dicta; this is demonstrated by the act that the Walz Court, before discussing the historical weight to be given the practice of granting tax exemptions, had first scrutinized and approved the practice under the entanglement analysis which was later integrated into Lemon.\footnote{158}

Besides using an historical analysis, the Marsh court reasoned that the Nebraska prayer practice prevented no more potential for the establishment of religion than did the situations presented in Everson, Tilton, and Walz.\footnote{159} Yet, as demonstrated below, if the analysis used by the Supreme Court in upholding the practices at issue in these cases had been applied to Marsh, a finding of unconstitutionality would have been required.

In Everson, state provided bus transportation for school children was included in the category of social welfare programs, similar to police and fire protection.\footnote{160} Although the Marsh majority drew on Everson for support, it failed to demonstrate how prayer before a legislative body benefitted the general social welfare in the same sense as police or fire protection. Although the Everson Court had breached the "wall of separation" to serve the general welfare,\footnote{161} it is unlikely that the "welfare" served in Marsh is broad enough to require a compromise of the Establishment

\footnotesize{\begin{itemize}
  \item \footnote{155} Id. at 3348.
  \item \footnote{156} Id.
  \item \footnote{157} Id. at 3334-35.
  \item \footnote{158} Walz, 397 U.S. at 674. \textit{See} notes 81-85 and accompanying text \textit{supra}.
  \item \footnote{159} Id. at 3335. \textit{See} notes 140-142 and accompanying text \textit{supra}.
  \item \footnote{160} Everson, 330 U.S. at 18. \textit{See} notes 53-58 and accompanying text \textit{supra}.
  \item \footnote{161} \textit{See} notes 59-63 and accompanying text \textit{supra}.
\end{itemize}}
Clause prohibition.\textsuperscript{162}

In \textit{Tilton},\textsuperscript{163} the Court upheld the grant of construction funds to sectarian schools because the monies were authorized exclusively for facilities that were to be used for non-religious purposes.\textsuperscript{164} The \textit{Tilton} Court applied the \textit{Lemon} entanglement analysis, finding a permissible level of entanglement in that the governmental act was a one-time, single-purpose construction grant which did not require continuing "\textit{regulation and surveillance}."\textsuperscript{165} In \textit{Marsh}, however, the Court failed to demonstrate the secular purpose of legislative prayer.\textsuperscript{166} The practice, according to the majority, served "\textit{[t]o invoke Divine guidance on a public body . . . .}"\textsuperscript{167} In addition, consideration must also be given to the fact that the chaplain of the Nebraska Unicameral prays before that body on a \textit{daily} basis;\textsuperscript{168} therefore, under the entanglement analysis used in \textit{Tilton}, the "\textit{regulation and surveillance}"\textsuperscript{169} necessary to ensure that this activity does not entangle the state with religion is arguably more excessive than that of \textit{Tilton}.\textsuperscript{170}

The same conclusion can be reached by examining the Establishment Clause analysis used in \textit{Walz}. In \textit{Walz}, the Court feared that taxing churches, rather than leaving them tax exempt, would create a higher level of entanglement between church and state; therefore, the degree of establishment caused by the tax exemptions was viewed as tolerable.\textsuperscript{171} In \textit{Walz}, the Court was thus faced with balancing \textit{degrees} of entanglement. In upholding the tax exemptions, the Court chose the lesser degree of entanglement. In \textit{Marsh}, the Court faced no such dilemma. Although the abolishment of tax exemptions for churches could create excessive entanglement, it is unlikely that any entanglement would be created by removing chaplains from legislatures.

Although the \textit{Marsh} majority determined that legislative

\begin{itemize}
\item \textsuperscript{162} The majority opinion in \textit{Marsh} does not claim a benefit in the legislative prayer practice. Whatever benefit is inferred from the practice, it is ephemeral in comparison to the concrete aid to children provided in bus transportation to schools. In the latter situation, public interest and welfare is more readily apparent.
\item \textsuperscript{163} 403 U.S. 672, 689 (1971).
\item \textsuperscript{164} \textit{Tilton}, 403 U.S. at 679-80. See note 110 and accompanying text supra.
\item \textsuperscript{165} \textit{Id.} at 687 (emphasis added).
\item \textsuperscript{166} See generally \textit{Marsh}, 103 S. Ct. at 3331-37.
\item \textsuperscript{167} \textit{Id.} at 3336.
\item \textsuperscript{168} \textit{Id.} at 3331.
\item \textsuperscript{169} \textit{Tilton}, 403 U.S. at 688.
\item \textsuperscript{170} The Court neither acknowledged the logistical problem of policing the content of prayer before fifty state legislators, nor the abuse of prayer practice which has occurred in the United States Congress. See note 150 and accompanying text supra.
\item \textsuperscript{171} \textit{Walz}, 397 U.S. at 676. See note 84 and accompanying text supra.
\end{itemize}
prayer was not an intrusion upon the Establishment Clause, the Court reasoned that even if there was an intrusion, it could be tolerated as an "acknowledgement of beliefs widely held among the people of this country." In support of his proposition, the Court suggested that the Founding Fathers considered invocations as "'conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions.'" It is curious to note that the Court borrowed this language from Maryland v. McGowan, a case that arguably does not support the Marsh result.

In McGowan, the Court turned aside an Establishment Clause challenge to the Maryland practice of requiring businesses to close on Sundays. It is interesting to note the reasoning of the McGowan Court: if the Marsh Court's ellipses are replaced, it becomes obvious that the McGowan Court upheld the Sunday closing laws as, "conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." Unlike Sunday closing laws, there is nothing insignificant or coincidental about the harmony that exists between prayer and religious tenets. As Justice Brennan argued in his dissent in Marsh, it is prayer that distinguishes religious phenomena from all others.

Additionally the Marsh majority failed to consider that language in McGowan which emphasized how rarely a constitutionally permissible overlapping of the secular and the religious occurs: "In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands . . . regulation." In Marsh, the Court made no suggestion that legislative prayers have any significance to the general welfare of society wholly apart from a religious significance.

The Marsh Court also dismissed the Eighth Circuit's concern that the chaplain's sixteen year tenure might give preference to his Presbyterian views. The Court concluded that there could be no preference since the Chaplain was reappointed due to his perform-

172. See Marsh, 103 S. Ct. at 3336. See also notes 69-70 and accompanying text supra.
175. Id. at 422.
176. Id. at 442 (emphasis added).
177. Marsh, 103 S. Ct. at 3345.
179. Marsh, 103 S. Ct. at 3336.
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ance and personality, not on the basis of his faith. Justice Stevens, in a separate dissent, argued that the sixteen year tenure constituted a preference of one faith. Justice Stevens “would not expect a Jehovah’s Witness or a disciple of Mary Baker Eddy or Reverend Moon” to serve as chaplain of the Nebraska legislature. Justice Stevens’ view is supported by a review of the prayers used by the Nebraska Legislature. Such a review indicates that the panoply of religious views is not, in fact, represented: the prayers espouse predominately Christian views.

In its conclusion, the Marsh majority suggested that there was no real or present constitutional threat in the practice of retaining and paying legislative chaplains—only the shadow of a threat. The Court contended this “shadow” would not become a reality so long as “this Court sits.” Yet, certainly the Court cannot review the daily prayers offered by the Nebraska chaplain, nor those of the legislative chaplains of the forty-nine other states and the Congress. In addition, the fact that the potential for conflict with the Establishment Clause is inherent in the legislative prayer practice is demonstrated by Marsh itself, in that the issue would not have been before the Court unless some conflict had in fact occurred.

The Marsh Dissent

In his dissenting opinion in Marsh, Justice Brennan asserted that if the majority had looked at legislative prayers with the “unsentimental eye” of settled doctrine, the unconstitutionality of the

180. Id.
181. Id. at 3352.
182. Id. at 3352 (Stevens, J., dissenting).

Our Father in heaven, give us the long view of our work and our world. Help us to see that it is better to fail in a cause that will ultimately succeed than to succeed in a cause that will ultimately fail. Guide us how to work and then teach us how to wait. O Lord, we pray in the name of Jesus, who was never in a hurry. Amen.


Teach us, O Lord, the disciplines of patience, for we find that to wait is often harder than to work. When we wait upon thee, we shall not be ashamed, but shall renew our strength. May we be willing to stop our feverish activities and listen to what thou hast to say, that our prayers shall not be the sending of night letters, but conversations with God. This we ask in Jesus’ name. Amen.

184. Marsh, 103 S. Ct. at 3337.
185. Id.
187. Chambers alleged real injury to satisfy the art. III case and controversy requirement. See notes 47-52 and accompanying text supra.
practice would have been obvious.\textsuperscript{188} The \textit{settled doctrine} referred to is the \textit{Lemon} purpose-effect-entanglement analysis which, as discussed earlier, had been applied consistently by the Court for twelve years.\textsuperscript{189} Including those cases which underpin the first two parts of the \textit{Lemon} analysis, its coverage extends to nearly 20 years of Establishment Clause litigation.\textsuperscript{190} Since \textit{Abington School District v. Schempp},\textsuperscript{191} some form of the purpose-effect-entanglement analysis has been applied to the Establishment Clause cases.\textsuperscript{192} In view of this fact, the minority properly asserted that application of the analysis was warranted in \textit{Marsh}.\textsuperscript{193}

Justice Brennan began his application of the \textit{Lemon} analysis by inquiring whether the practice of paying chaplains to say prayers before legislative sessions had any secular purpose.\textsuperscript{194} He concluded that the purpose of legislative prayer was primarily religious:

\begin{quote}
"'To invoke Divine guidance on a public body entrusted with making the laws is nothing but a religious act.'"
\end{quote}

Justice Brennan's conclusion thus represents one of the few instances where the "purpose" element of the \textit{Lemon} analysis would be used to strike a governmental practice.\textsuperscript{195}

Proponents of the prayer practice had urged that the secular purpose of legislative prayer was to call the session to order, and to bring solemnity to the body.\textsuperscript{196} Justice Brennan argued in response that this purpose could have been accomplished by means posing no threat to the Establishment Clause and its prohibitions.\textsuperscript{197} Justice Brennan, and at least one commentator,\textsuperscript{200} espoused the view that "to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and

\begin{itemize}
  \item 188. 103 S. Ct. at 3338.
  \item 189. \textit{See} notes 103-120 and accompanying text supra for the \textit{Lemon} analysis and its subsequent application.
  \item 190. \textit{See} notes 76-85 and accompanying text supra.
  \item 192. \textit{See} notes 86-128 and accompanying text supra.
  \item 193. \textit{See} 103 S. Ct. at 3338-40.
  \item 194. \textit{Id.} at 3338.
  \item 195. \textit{Id.}
  \item 196. \textit{Id.} (citation omitted).
  \item 197. \textit{See} notes 103-104 and accompanying text supra.
  \item 199. \textit{Marsh}, 103 S. Ct. at 3338. Certainly the legislature could be brought to order by those means which are also traditional, namely a gavel or bell. Taxpayers and citizens of the state could exhort the legislators to recall the solemn nature of their tasks.
\end{itemize}
continue the practice."\(^{201}\)

Considering the "effect" element of the *Lemon* analysis, Justice Brennan analogized the legislative prayer practice to officially sponsored prayers in public schools.\(^{202}\) In Justice Brennan's opinion, the unconstitutional effect was identical: "[P]rescribing a particular form of religious worship', even if the individuals involved have the choice not to participate, places 'indirect coercive pressure upon the religious minorities to conform to the prevailing officially approved religion."\(^{203}\)

The majority had addressed the question of "effect," not as framed in the *Lemon* analysis, but by suggesting that legislators were adults, and not susceptible to peer pressure.\(^{204}\) Justice Brennan argued to the contrary that legislators, because of their political instincts, were under pressure to conform to "official" religious practices.\(^{205}\) Perhaps the question of susceptibility to peer pressure need not have been raised. The Court could have applied its holding in *Abington* that no one should ever be inconvenienced by having to remove him or herself from state sponsored prayer.\(^{206}\) In addition, the Court might have reconsidered its warning in *Larkin* that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."\(^{207}\) The prohibition inherent in the *Lemon* "effect" analysis is more importantly concerned with state acts that create advantage to religious institutions, not merely the religious conversion of individuals.\(^{208}\) Thus this portion of the *Lemon* analysis seems peculiarly applicable to *Marsh*.

In addressing the question of whether the Nebraska prayer practice caused "excessive entanglement," Justice Brennan set out the two forms of entanglement recognized in earlier decisions.\(^{209}\) The first form of entanglement was found where the act in question required the state to monitor and oversee religious af-

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\(^{201}\) *Marsh*, 103 S. Ct. at 3338 ("This hardly does justice to what the chaplain intended, it even suggests that the legislative body is 'using' religion for an objective which surely can be achieved by other means.").

\(^{202}\) 103 S. Ct. at 3338-39.

\(^{203}\) Id.

\(^{204}\) Id. at 3335-36.

\(^{205}\) Id. at 3339 n.5.

\(^{206}\) *Abington*, 374 U.S. at 224-25.

\(^{207}\) *Larkin*, 103 S. Ct. at 511 (emphasis added).

\(^{208}\) The conversion of legislators may advance religion but not to the degree that alignment with the state would. See note 127 and accompanying text *supra*. See *also* *Larkin* v. Grendel's Den, Inc., 103 S. Ct. at 511.

\(^{209}\) *Marsh*, 103 S. Ct. at 3339-40 (Brennan, J., dissenting).
Justice Brennan noted that the process of choosing a suitable chaplain and ensuring that he or she selected suitable prayers involved the exact type of "regulation and surveillance" that the government should avoid. Illustrative of this point is the case of *Meek v. Pettinger*, where the Court feared that the prophylactic contacts that would have been required to insure that sectarian teachers used state-provided school supplies in a nonideological manner would have given rise to a constitutionally intolerable degree of entanglement between church and state. Justice Brennan went on to point out that, by the State's own admission, certain procedures were, in fact, used in the Nebraska legislature to determine the suitability of legislative prayers. In Justice Brennan's view, such procedures were, in and of themselves, offensive to the Establishment Clause: not only did they create entanglement, but they required the state to insure that prayers, by their nature ideological, remained nonideological.

The second concern identified by Justice Brennan under the entanglement element was the fear that the state act might create political divisiveness or political fragmentation along religious lines:

"Ordinarily, political debate division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process."

Justice Brennan went on to point out that the facts in *Marsh* indicated the existence of just this type of religiously motivated political division in the Nebraska Unicameral. Putting aside the question of the existence or nonexistence of political division in *Marsh*, it can be argued that since the Court has recently warned that even the potential danger of political fragmentation along religi-

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210. *Id.*
212. *Id.*
216. *Id.*
217. *Id.* at 3339 (quoting *Lemon v. Kurtzman*, 403 U.S. at 622). See notes 100-102 and accompanying text *supra*.
218. *Marsh*, 103 S. Ct. at 3339-40 ("The controversy between Senator Chambers and his colleagues, which had reached the stage of difficulty and rancor long before this lawsuit was brought, has split the Nebraska legislature precisely on issues of religion and religious conformity.").
igious lines must be avoided, the result in *Marsh* should have been different.\textsuperscript{219}

\textbf{CONCLUSION}

The Supreme Court was presented in *Marsh* with the difficult task of circumscribing the Establishment Clause prohibition. Having faced this endeavor before, the Court had but to rely on the approach it developed in *Lemon* for direction. The Court, however, ignored the traditional analysis—which undoubtedly would have required that the Nebraska legislative prayer practice be struck—and instead, exempted the practice from the Establishment Clause prohibition because of its status in the history and tradition of this country. By so doing, the Court has created an exception to the Establishment Clause which is unwarranted.

\textit{Robert M. Slopek—'84}

\textsuperscript{219} Larkin v. Grendel's Den, Inc., 103 S. Ct. at 512.