PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 11 | Issue 3 Article 6

3-15-1984

Marsh v. Chambers: The Supreme Court Takes a New Look at the Establishment Clause

Diane L. Walker

Marsh v. Chambers: The Supreme Court Takes a New Look at the Establishment Clause

In Marsh v. Chambers, the United States Supreme Court held that, in

This note will examine the ideas and arguments stated above in order to provide a greater insight into the Court's interpretation of the establishment clause of the first amendment.

II. HISTORICAL BACKGROUND

"On Sept. 25, 1789 . . . final agreement was reached on the language of the Bill of Rights,"[9] where the first amendment to the United States Constitution[10] is found. It provides that "Congress shall make no law respecting an establishment of religion,[11] or prohibiting the free exercise thereof;[12] 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."[13] It is well-known throughout American history that the colonials came to the "New World" in order to escape religious persecution in England under King George III.[14] It was for this reason that the establishment and free exercise clauses were considered to be such a necessity in the Bill of Rights.[15]

A lengthy, but fairly modern line of Supreme Court decisions has defined the relationship between government and religion in terms of the first amendment.[16] A number of these have been connected in various ways to education, but that is certainly not the exclusive situation. The first pivotal case in this line was *Everson v. Board of Education.*[17] In *Everson,* the Court articulated the need to perform a delicate balancing act between the precepts of the establishment and free exercise clauses.[18] As Justice Black

9. 103 S. Ct. at 3333 (citing J. of the Sen. 88; J. of the H.R. 121).

10. U.S. CONST. amend. I.

11. This is what has been called the "establishment clause" by the Supreme Court. *See, e.g.,* McGowan v. Maryland, 366 U.S. 420, 442 (1961); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

12. This provision is known as the "free exercise clause." *See, e.g.,* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1972); Engel v. Vitale, 370 U.S. 421, 430 (1962). As can be seen by comparing this clause with the establishment clause, a basic tension exists. The first clause limits the practice of religion as it relates to a formal relationship with the government. Yet seemingly in direct contrast, the second clause requires government to provide positive opportunities for the practice of religious beliefs. It is this tension which added to the problem faced by the Court in *Marsh.*

13. U.S. CONST. amend. I.

14. *See generally* RUTLAND, BILL OF RIGHTS, 4 COLLIER'S ENCYCLOPEDIA 156-61; VOLWILER, THE UNITED STATES OF AMERICA, 22 COLLIER'S ENCYCLOPEDIA 709-17 (1963). *See also, Everson,* 330 U.S. 1, 8-9.

15. *See supra* note 14.

16. *See infra* notes 18-35 and accompanying text.

17. 330 U.S. 1 (1947). The Court upheld a New Jersey statute allowing the parents of parochial school children to be reimbursed for the costs of public transportation to the schools, even though the majority of the schools were Roman Catholic.

18. *Id.* at 14-16; *see supra* note 12.

stated in the majority opinion: "[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."[19]

In *Zorach v. Clauson,*[20] the Court continued the balancing test begun in *Everson*[21] by indicating that government must steer a course of neutrality between religious and non-religious activities.[22] This line of reasoning continued through a number of other decisions.[23] But in *School District v. Schempp,*[24] the Court began to expand its consideration of governmental neutrality by looking at several factors, namely "the purpose and the primary effect" of the practice under question, and its "secular legislative purpose."[25] *Walz v. Tax Commission of New York*[26] brought to the forefront a third consideration—that of the "degree of entanglement"[27] which the practice has with government.

These considerations were integrated into a three-part test in *Lemon v. Kurtzman.*[28] The Court in *Lemon* also suggested that "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and

19. 330 U.S. at 16.

20. 343 U.S. 306 (1952). The Court determined that allowing public school children to be released from classes to attend off-campus religious instruction did not violate the establishment clause. *Cf.* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (on-campus religious instruction by a private religious group found to be unconstitutional).

21. 330 U.S. 1.

22. 343 U.S. at 314. "The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory." *Id.; see also Everson,* 330 U.S. at 18. The first amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Id.*

23. *See generally* Engel v. Vitale, 370 U.S. 421 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

24. 374 U.S. 203 (1963) (daily reading of Bible verses or recitation of the Lord's Prayer by school children violated establishment clause).

25. *Id.* at 222 (citing *Everson,* 330 U.S. at 14-15, and *McGowan*, 366 U.S. at 442).

26. 397 U.S. 664 (1970). The Court upheld the practice of allowing tax exemptions to religious organizations for property used exclusively for religious, educational, or charitable purposes.

27. *Id.* at 674-75.

28. 403 U.S. 602, 612 (1971). The Supreme Court found that paying a subsidy to parochial school teachers, and reimbursing nonpublic schools for "contract" use of teachers and study materials was unconstitutional.

purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[29] The Court in *Tilton v. Richardson*[30] emphasized the need to avoid "sponsorship, financial support, and active involvement of the sovereign in religious activity," as well as the need to be sensitive to the precepts of the free exercise clause.[31]

This finely-balanced analysis has remained the same throughout successive Court decisions involving the establishment clause.[32] Justice Brennan did add, in *Larson v. Valente,*[33] that "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."[34]

This continuum of precedents provides the backdrop against which the *Marsh*[35] decision was rendered—the history behind the establishment and free exercise clauses, the reasoning behind the theory that government and religion are both best protected by being separated from each other, and the types of practices considered to be violations of the first amendment, all of which were considered in *Marsh.*

III. Statement of the Case

The Nebraska Unicameral Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council. The chaplain is paid out of general state funds. Reverend Robert E. Palmer, a Presbyterian minister, has held the position since 1965 at a salary of $319.75 for each month that the legislature is in session.[36]

29. *Id.* at 615.

30. 403 U.S. 672, 677 (1971) (quoting Walz v. Tax Comm'n of New York, 397 U.S. at 664). The Court held that providing federal construction grants to sectarian colleges was allowable as long as the buildings were used for solely secular purposes.

31. 403 U.S. at 678.

32. *See generally* Larkin v. Grendel's Den, Inc., 103 S. Ct. 505 (1982). The Court found that a Massachusetts law vesting power in churches and schools to effectively veto applications for those who sought liquor licenses within a 500 foot radius of church or school premises was a violation of the first amendment. *See, e.g.,* Stone v. Graham, 449 U.S. 39 (1980); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

33. 456 U.S. 228 (1982). It was found that exempting religious institutions which received over fifty percent of their total contributions from members or affiliated organizations violated the establishment clause.

34. *Id.* at 246. By this it appears that the Court would require a greater justification, perhaps a legitimate or compelling state interest, in order to allow the preferential and/or discriminatory statute to stand.

35. 103 S. Ct. at 3330.

36. *Id.* at 3332.

Guest chaplains are also occasionally heard, either at the request of a particular legislator, or in Reverend Palmer's absence. At one point, upon the objections of a Jewish legislator, Reverend Palmer removed references to Christ from his prayers. It is admitted that the content of Chaplain Palmer's prayers are, therefore, probably less sectarian than those of other legislative chaplains.[37] The prayers were recorded in the Legislative Journal and, upon the vote of the legislature, were occasionally collected and printed into prayer books at public expense.[38]

Ernest Chambers, a taxpayer and member of the Nebraska Legislature, brought suit under 42 U.S.C. § 1983[39] claiming that the chaplaincy program violated the establishment clause of the first amendment. He sought a court order enjoining the practice.[40] The first named defendant in the action was Frank Marsh, the Nebraska State Treasurer who paid Chaplain Palmer out of state funds; Reverend Palmer was also a named defendant.

The district court held that the establishment clause was not violated by the recitation of prayers;[41] it was violated, however, by paying the chaplain from state funds.[42] The Court of Appeals for the Eighth Circuit, applying the three-part *Lemon* test[43] and the rule of its earlier decision, *Committee for Public Education and Religious Liberty v. Nyquist,*[44] found that the entire chaplaincy

37. *See generally id.* at 3336, 3349 n.38. By thus removing references to Jesus Christ from Chaplain Palmer's prayers, the invocations became less oriented to the Christian tradition, and thereby more non-sectarian. Other chaplains have not done so and, as a result, their prayers remain more rooted in traditional denominationalism.

38. *Id.* at 3332 n.1. The district court found that this practice violated the establishment clause. Chambers v. Marsh, 504 F. Supp. 585, 591 (D. Neb. 1980). Petitioners did not bring this issue before the Supreme Court. 103 S. Ct. at 3332 n.3.

39. 42 U.S.C. § 1983 (1976 & Supp. IV 1980) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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.

Id.

40. 103 S. Ct. at 3332.

41. 504 F. Supp. at 588. "I doubt that allowing prayer for or by its own members is 'making a law' [establishing religion] in any sense." *Id.*

42. *Id.* at 588, 591.

43. 403 U.S. at 612-13. *See also supra* note 28 and accompanying text.

44. 413 U.S. at 773. *See supra* note 28 and accompanying text. *See also infra* note 95. The test has been articulated in the following way: "First, the statute

program promoted a particular religious expression and led to government entanglement in religious affairs, thus violating the establishment clause.[45] The defendants sought relief in the United States Supreme Court, which granted their writ of certiorari.

IV. Analysis of the Case

A. *Majority Opinion*

The Court considered two major issues in *Marsh:*[46] first, whether opening a legislative session with prayer violates the establishment clause;[47] and second, whether any specific features of the Nebraska chaplaincy program violate the establishment clause.[48] In considering the first of the two questions before the Court, Chief Justice Burger opened the majority opinion with a fairly lengthy historical account which gave credence to the practice of legislative prayer in both the federal and state governments. The Chief Justice also mentioned the use of a brief daily invocation by the federal judicial system.[49] He referred to a voluminous amount of historical material[50] in order to aid his interpretation of the religion clauses.

Among this body of information, he noted several facts. First, since Congress authorized the appointment of paid chaplains three days prior to the approval of the Bill of Rights,[51] it did not appear likely that Congress felt that a chaplaincy program vio-

---

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.' " 403 U.S. at 612-13 (citations omitted). Further, the Court stated in *Lemon* that "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615.

45. Chambers v. Marsh, 675 F.2d 228, 235 (8th Cir. 1982). "We therefore hold that Nebraska's legislative prayer practice, taken as a whole, is unconstitutional as a violation of the Establishment Clause of the First Amendment." *Id.*

46. 103 S. Ct. at 3331-32, 3336.

47. *Id.* at 3331-32.

48. *Id.* at 3336.

49. *Id.* at 3332-35. The phrase used daily at the beginning of Court sessions is "God Save the United States and this Honorable Court." *Id.* at 3333. *See supra* notes 9-15 and accompanying text; *see also infra* note 140 and accompanying text.

50. *See, e.g.,* J. of the Continental Cong. (1774-1776, 1784); S. Cobb, The Rise of Religious Liberty in America (1970); Stokes, Church and State in the United States (1950); Pfeffer, *The Deity in American Constitutional History,* 23 J. Church & State 215 (1981). *See also* 103 S. Ct. at 3332-35 (listing additional sources therein).

51. 103 S. Ct. at 3333. Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71, authorized the congressional chaplains to be paid $500.00 per year. *See* 103 S. Ct. at 3333 n.7.

lated the establishment clause.[52] Second, the practice of choosing and paying legislative chaplains had continued even in state governments, for over a century in many cases, implying that there was no constitutional problem.[53] Based on this information, the Court extrapolated that since the first amendment had been made applicable to the states through its incorporation by the fourteenth amendment,[54] "it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government."[55]

The majority argued that even though there was some opposition to the idea of legislative prayer both before and after the initial congressional program began, and later during the 1850's, such opposition did not weaken the validity of the practice.[56] Indeed, the Court felt that this disagreement may have instigated a debate on the policy, resulting in the conclusion that there was no establishment of religion.[57] "Rather, the Founding Fathers looked at invocations as 'conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions.' "[58]

Chief Justice Burger, adopting the language of Justice Frankfurter's concurring opinion in *McGowan v. Maryland*,[59] acknowledged that even though the government regulates or is involved with conduct which may be religious in nature, such involvement does not automatically result in an establish-

52. 103 S. Ct. at 3333-35.

53. *Id.* at 3334.

54. Cantwell v. Connecticut, 310 U.S. 296 (1940). U.S. CONST. amend. XIV, § 1, provides, in pertinent part, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." It is through the use of this provision that the Court in *Cantwell* found that the tenets of the first amendment were also applicable to the individual states. It declared that "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." 310 U.S. at 303.

55. 103 S. Ct. at 3335.

56. *Id.* at 3334-36. The Court points out that both John Jay and John Rutledge were in disagreement with the idea of starting the sessions of the First Continental Congress with prayer. James Madison also suggested that the practice might violate the principles against the establishment of religion. Likewise, some opposition was evidenced during the 1850's when the practice was discontinued, but later renewed. *Id.* at 3334 n.10, 3335. *See also id.* at 3343-44 (Brennan, J., dissenting); *infra* note 116 and accompanying text.

57. 103 S. Ct. at 3335.

58. *Id.* (quoting *McGowan*, 366 U.S. at 442).

59. 366 U.S. at 442.

ment of religion.[60] As Justice Douglas noted in *Zorach,* if the state and the church were completely separated from each other, "[c]hurches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups."[61] Such a result could not, therefore, have been within the Framers' contemplation.

Finally, the majority noted that the use of a legislative invocation is merely "a tolerable acknowledgment of beliefs widely held among the people of this country."[62] This idea was based primarily on Justice Douglas' observation that "[w]e are a religious people whose institutions presuppose a Supreme Being."[63]

It must be noted that even though the majority acknowledged that historical precedent alone could not validate a violation of constitutional rights,[64] this historical background was one of the primary tools which the Court used to reach its decision. To be fair, however, it also appears that the use of such historical discourse did not begin with this case.[65] It is certainly true that the judicious use of historical documents can prove enlightening with respect to the intent of the writers of the Constitution and how that intent may be applicable to modern-day situations. At one point in the opinion, the majority quoted Samuel Adams as saying that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country."[66] It is likely that such a sentiment could be expressed today as easily as it was some 200 years ago. Additionally, some contemplation should be given to the fact that the content of prayers can be kept to a fairly non-sectarian level,[67] allowing each person to interpret the thoughts expressed as he chooses and, thereby, minimize offense.[68]

The primary argument against the *Marsh* opinion is the fact that the majority did not use the three-part test used in *Lemon*[69]

60. 103 S. Ct. at 3335.

61. 343 U.S. at 312.

62. 103 S. Ct. at 3336.

63. *Id.* (quoting Zorach v. Clauson, 343 U.S. at 313).

64. 103 S. Ct. at 3334. Certainly the abolition of slavery and the later advancement of civil rights for black Americans is an example of how a viewpoint held at the time of the Framers was invalidated, despite its long practice.

65. *See, e.g., Engel,* 370 U.S. at 425-35; *McGowan,* 366 U.S. at 440-42; *Everson,* 330 U.S. at 8-11; *see generally Walz,* 397 U.S. 665-68. Each decision gives a fairly detailed historical background of the situation and circumstances surrounding the first amendment.

66. 103 S. Ct. at 3335 (quoting C. ADAMS, FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE, ABIGAIL ADAMS, DURING THE REVOLUTION 37-38).

67. *See supra* note 37.

68. *Contra* 103 S. Ct. at 3349-50 (Brennan, J., dissenting).

69. 403 U.S. at 612, 615.

or *Nyquist,*[70] both establishment clause cases.[71] A different result might have been reached had this test been used. However, it is equally arguable that the same result could, in fact, have been reached.[72]

The second issue discussed by the Court concerned the validity of the specific features of the Nebraska legislative chaplaincy program. The court considered various facets of that scheme, including: (1) the selection of the same chaplain since 1965; (2) the payment of the chaplain from public funds; and (3) the allegedly traditional, Judeo-Christian content of the prayers.

Addressing the first of these points, the Court concluded that rather than showing preference for one religious sect the choice of one chaplain over a long period of time was proof that Reverend Palmer's style was amenable to the forum in which he was working.[73] From this conclusion, the majority articulated the "impermissible motive" analysis: that is, absent proof of an impermissible motive on the part of those selecting the chaplain, the mere fact that one person holds the position for some time will not be found to conflict with the establishment clause.[74]

The Court then returned to its historical rationale in considering the legislature's payment of the chaplain from public funds. It found that the practice of paying chaplains "is grounded in historic[al] practice," not only with respect to Congress, but also with respect to state legislatures.[75]

In addressing the third point, the majority decided that the content of prayers need not be analyzed where, as in *Marsh,* the time was not being used for proselytizing, or the advancement or denigration of any particular religious denomination.[76]

Finally, the Court denied the validity of the concern that the practice of legislative prayer "risks the beginning of . . . estab-

70. 413 U.S. at 772-73.

71. 103 S. Ct. at 3338 (Brennan, J., dissenting). *See supra* notes 28, 43-44 and accompanying text; *see also infra* notes 93-107.

72. See *infra* notes 78-96 and accompanying text, where Justice Brennan's argument that the Court could not have reached its present result had the traditional test been used is discussed. 103 S. Ct. at 3338-40 (Brennan, J., dissenting).

73. 103 S. Ct. at 3336.

74. *Id.* Therefore, rather than really reaching the issue of Chaplain Palmer's length of tenure, except to compare it to that of other chaplains in the Congress (*Id.* at 3336 & n.17), the Court appeared to skirt the problem by noting that no evidence of an impermissible motive existed.

75. *Id.* at 3336-37. *See also supra* note 51 (Congress pays its chaplains).

76. 103 S. Ct. at 3337.

lishment" by relying on the distinction "between real threat and mere shadow,"[77] concluding that the latter was applicable in this situation.

The Court's application of an "impermissible motive" analysis to the determination of whether the legislature's employment of a Presbyterian minister for sixteen consecutive years violated the establishment clause, is an indication that one would need to establish an obvious trend of favoritism toward one type of religion or clergyman. In addition, some evidence indicating the reasons behind the selecting committee's choice of a particular chaplain would be needed in order to prevail in an establishment clause case.[78] This could be difficult to prove. Legislative bodies may then be permitted a greater degree of freedom in choosing their chaplains.[79]

Using this mode of analysis as a background, the majority stated that when none of the above can be proven, the courts will not have to reach the issue of the content of the prayer.[80] This reasoning is a bit circular because if the Court finds evidence of an impermissible motive in selecting the chaplain, it still would not need "to parse the content of a particular prayer."[81] The practice would be stricken down on the first ground in every case.

The most persuasive and sensible argument made by the majority was that given the long-standing tradition of legislative prayer, if the practice has not yet resulted in the establishment of religion, it is unlikely that it poses any threat to ever do so.[82] It would not seem to be an event of great religious significance. While Justice Brennan argued that "the Court seems to regard legislative prayer as at most a *de minimus* violation"[83] based on its use of the "real threat and mere shadow"[84] comparison, the Court appeared to say that there was *no* violation, rather than a *minor* violation. As Justice Clark stated in *Schempp:*

---

77. *Id.* (quoting School Dist. v. Schempp, 374 U.S. at 308 (Goldberg, J., concurring)).

78. Another example of the use of a type of "impermissible motive" test, albeit in the context of alleged racial discrimination, can be seen in the case of Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977).

79. That is, if no discernible discriminatory method of choosing legislative chaplains can be found, the Court seems to be saying that it will give deference to the legislatures by respecting their choices, in the absence of other constitutional violations.

80. 103 S. Ct. at 3337 ("The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other faith or belief.") *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 3349 (Brennan, J., dissenting).

84. *Id.* at 3337 (quoting *Schempp,* 374 U.S. at 308 (Goldberg, J., concurring)).

> [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties."[85]

It seems fair to assume that if the Court had found a violation, it would have had no more problem prohibiting the practice of legislative prayer than it had prohibiting school prayer, or the other practices found to violate the establishment clause in previous cases.[86] In a similar vein, Justice Stevens pointed out in his dissent that the legislative prayer could have a tendency to be quite sectarian;[87] however, since it continued without widespread objection there seemed to be no real problem with this practice.[88]

B. Justice Brennan's Dissent

Justice Brennan began his dissenting opinion[89] by noting that the majority carefully limited its decision in a manner justified by dicta in earlier cases, thus offering "little threat to the overall fate of the Establishment Clause."[90] He admitted that he previously expressed a similar position in his concurring opinion in *Schempp*.[91] Recanting his earlier beliefs, he now realized that this position of tolerance for legislative prayer was misguided.[92]

Justice Brennan first took issue with the Court's refusal to apply the three-part test articulated in *Lemon*.[93] He believed that it would have dictated a contrary result.[94] The test is: (1) "the statute must have a secular legislative purpose;" (2) "its principle or

85. 374 U.S. at 225 (quoting *Memorial and Remonstrance Against Religious Assessments,* II WRITINGS OF MADISON 184 (1910)).

86. *See, e.g.,* 374 U.S. at 203.

87. 103 S. Ct. at 3352 & n.2 (Stevens, J., dissenting). Justice Stevens chose, as an example, a prayer used by Reverend Palmer two years prior to the time he removed references to Christ from his prayers at the request of a legislator. *See also id.* at 3336 n.14.

88. The dissent did note that sporadic objections have been made to the appearance of individual clergymen at particular legislatures. *Id.* at 3340 n.10 (Brennan, J., dissenting). One example chosen—that of a particular Indian guru's follower in Oregon—may be somewhat unillustrative, as that person is controversial for political reasons as well. *See Shortcut to Nirvana,* Life Mag., Nov. 1981 at 73-80. *See infra* note 107 and accompanying text.

89. 103 S. Ct. at 3337 (Brennan, J., dissenting).

90. *Id.*

91. 374 U.S. at 299-300 (Brennan, J., dissenting).

92. 103 S. Ct. at 3337-38 (Brennan, J., dissenting).

93. 403 U.S. at 612-13. *See supra* notes 28, 43-44, 71-72 and accompanying text.

94. 103 S. Ct. at 3338-39 (Brennan, J., dissenting).

primary effect must be one that neither advances nor inhibits religion;" and (3) "the statute must not foster 'an excessive government entanglement with religion.' "[95]

Justice Brennan argued first that a legislative session could be opened in a different way, maintaining the same formal tone, but without the "preeminently religious" purpose of legislative prayer.[96] Thus, he felt that the first prong of the test was clearly not met. It is arguable, however, that the mere fact that other methods exist, does not necessarily implicate the method used. Further, while invoking divine guidance is arguably a religious act, if the act does not promote a particular denomination, but merely *recognizes* the widespread national belief in religion, it may not be a violation of the establishment clause.[97] Rather, it may merely represent an accomodation of religion possibly mandated by the free exercise clause.

Secondly, Justice Brennan found that "[t]he 'primary effect' of legislative prayer is also [a] clearly religious" one which may operate coercively upon those present who may not wish to participate, and which may confer prestige on religion by its involvement with government.[98] Admittedly, to the extent it may be said that the mere *presence* of prayer "advances" religion, this is a weak point in the majority opinion.[99] However, it is also possible that Justice Brennan's fear of coercion of the legislators who hear the prayer may be a bit unfounded. Disregarding the fact that many legislators may not even be present, it seems that those who do attend are more likely to view the invocation in the light of a formality rather than an attempt by the chaplain to convert them.[100]

In addition, it does not appear to be necessary to completely abolish the practice of legislative prayer in order to maintain the mandated neutral course between religion and non-religion.[101] Even if Nebraska's present course is found to be unacceptable, the alternatives of rotating chaplains of various denominations

95. *Id.* (quoting *Lemon*, 403 U.S. at 612-13).

96. 103 S. Ct. at 3338 (Brennan, J., dissenting). This theme can also be seen in Justice Brennan's concurring opinion in *Schempp*, 374 U.S. at 265, where he states that "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." If the practice of legislative prayer can be seen as an opportunity for the free exercise of religion, certainly no other means would suffice. *See infra* note 128.

97. *See supra* notes 62-63 and accompanying text.

98. 103 S. Ct. at 3338-39 (Brennan, J., dissenting) (citing *Engel*, 370 U.S. at 431).

99. 103 S. Ct. at 3335-36.

100. *See id.* at 3336.

101. *Zorach*, 343 U.S. at 314, sets out this requirement. *See also Everson*, 330 U.S. at 18 (earlier expression of the same).

and paying them a per diem fee, rather than a monthly salary, or instituting a moment of quiet resolution led by such a chaplain, could provide a workable solution without resorting to a complete abolition.[102] But, in this case, the fact that guest chaplains were heard at the request of legislators, or in Reverend Palmer's absence, tends to show that no single religious view was impermissibly favored.

Third, Justice Brennan concluded that the legislative chaplaincy program resulted in excessive government entanglement with religion because of the legislature's supervision of the choice of the chaplain and its assurance that "suitable" prayers would be used, as well as by its division of the legislature "on issues of religion and religious conformity."[103] However, he admitted that having one chaplain since 1965 might minimize the effects of the former.[104]

While to a certain extent it is true that by selecting chaplains the government does become "involved" with "supervising" religion, it does not seem likely that this was the kind of involvement feared by the Framers. They were probably more concerned that government not become involved in religious instruction, management, persecution, or the like, rather than the mere acknowledgment of the presence and importance of religion in its various forms.[105] Likewise, the actual "supervision" involved in a legislative chaplaincy program is probably minimal: an initial admonishment and a periodic administrative review.[106]

As for Justice Brennan's second objection, he seemed to bypass the fact that Reverend Palmer removed references to Christ from his prayers upon request, thus negating further sectarian preference. Further, while division based upon religious lines is not un-

102. *Cf.* 103 S. Ct. at 3349 n.39 (Brennan, J., dissenting) (citing N.Y. Times, Sept. 4, 1982, at 8) (statement of Jerry Falwell).

103. 103 S. Ct. at 3339-40 (Brennan, J., dissenting) (citing *Lemon*, 403 U.S. at 614-22).

104. 103 S. Ct. at 3344 n.21 (Brennan, J., dissenting).

105. *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.

Id.

106. *Contra* 103 S. Ct. at 3339 n.8 (Brennan, J., dissenting).

known even in the modern world,[107] it must be noted that there are also general, underlying political rifts in such situations. Thus, while the *potential* for such divisiveness exists in today's America, the practice of legislative prayer does not promote such schisms[108] and need not be abolished. The state's provision of a forum to a church indicates a mere openness to ideas rather than direct aid and encouragement.

Justice Brennan's next point was that "[t]he principles of 'separation' and 'neutrality' implicit in the Establishment Clause serve many purposes," four of which are applicable in this case.[109] "The first . . . is to guarantee the individual right to conscience" which Justice Brennan felt was contravened when individuals are required "to support the practices of a faith with which they do not agree."[110] However, the mere fact that legislators may listen to an invocation does not indicate that they are being coerced into support of such belief.[111]

"The second purpose . . . is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials."[112] While Justice Brennan did not elaborate on this point, there appeared to be little if any interference of this kind in *Marsh.*[113]

"The third purpose . . . is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government."[114] Again Justice Brennan did not make a direct application of this principle, contradicting his earlier point that by associating with government, religion may receive impermissible prestige.[115] This points up the difficulty of resolving a question such as this, fraught as it is with the problems of preferring neither sectarianism nor secularism.[116] "Finally, the principles of separation and neutrality help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena."[117]

---

107. This is evidenced by the ongoing tension between Catholics and Protestants in Northern Ireland.

108. *Contra* 103 S. Ct. at 3339 (Brennan, J., dissenting).

109. *See generally* 103 S. Ct. at 3341-43 (Brennan, J., dissenting).

110. *Id.* at 3341 (Brennan, J., dissenting).

111. 103 S. Ct. at 3335 (citing *Tilton*, 403 U.S. at 686; Colo v. Treasurer & Receiver Gen'l, 392 N.E.2d 1195, 1200 (Mass. 1979)).

112. 103 S. Ct. at 3342 (Brennan, J., dissenting) (footnotes omitted).

113. *See supra* notes 59-72.

114. 103 S. Ct. at 3342 (Brennan, J., dissenting).

115. *Id.* at 3339 (Brennan, J., dissenting). Justice Brennan also acknowledged this apparent contradiction. *Id.* at 3339 n.6 (Brennan, J., dissenting).

116. *See supra* note 22 and accompanying text.

117. 103 S. Ct. at 3342 (Brennan, J., dissenting) (citations omitted).

While this appears to be the primary motivation of the Framers in creating the establishment clause, the practice of legislative prayer does not really establish a national religion; it only gives credence to the pervasiveness of religion in American society.[118] Thus, it does not fall within the purview of the establishment clause.

Justice Brennan's concern for the potential isolation or alienation of citizens from the nation due to government action upon an "authorized" religion is a valid one. Yet such an occurrence appears equally unlikely, even to nonbelievers. Indeed, one might argue that if the government continues to show sensitivity toward the subject of religion, the fears of some that the country could abolish religion entirely or persecute believers might be allayed. The complete abolition of such a connection between church and state does not appear to be necessary in order to bring about neutrality.

Justice Brennan also resorted to the use of history to discredit the policy of legislative prayer.[119] He noted that at one point, James Madison felt that the practice of paying legislative chaplains was unconstitutional as it was akin to instituting a prescribed act of worship upon the people through their representatives and requiring them to pay for it.[120]

As the majority pointed out, however, the expression of opposition to an idea does not necessarily make the idea wrong,[121] although neither does overcoming the objection necessarily make the idea right. It is equally possible that once the disagreement was discussed, the objection was found not to be a problem. Justice Brennan, himself, stated in *Walz*[122] that it appears that Madison may have only come to this "extreme" view of church-state relations late in life, as neither he nor many other Framers[123] expressed such a concern at the time of the drafting. These men would not let such a violation go unnoticed.

Justice Brennan expressed the opinion that while the tension between the establishment and free exercise clauses creates the

118. *See supra* text accompanying notes 58, 62-63.

119. 103 S. Ct. at 3342-44 (Brennan, J., dissenting).

120. *Id.* at 3343-44 (Brennan, J., dissenting) (quoting Fleet, *Madison's "Detached Memoranda"*, 3 WM. & MARY Q. 534, 558 (1946)).

121. 103 S. Ct. at 3335. *See supra* note 56.

122. 397 U.S. at 684-85 n.5 (Brennan, J., concurring).

123. *See supra* note 56.

need to "deviate from an absolute adherence to separation and neutrality" in certain limited, specified situtations, this was not such a circumstance.[124]

It is arguable, however, that there are situations where religious institutions are singled out for certain benefits where other private secular bodies are not.[125] Since this is allowed, it seems no more intrusive to allow a chaplain to speak in front of the legislature for a moment, than it is to permit the expression of secular points of view, including those against religion.

Justice Brennan argued that while religious and secular concerns overlap permissibly in many instances, the sheer religiousness of prayer makes this instance impermissible.[126] Unfortunately, Justice Brennan offered no further justification for this position, giving it no more weight than an apparently emotional conclusion. As previously noted, the practice of legislative prayer is arguably a mere recognition of the importance of religious beliefs in this nation, rather than an attempt at an establishment.[127]

Justice Brennan was able to refute this argument even though he recognized the value of religion in the cultural and historical background of this country.[128] He believed that prayer is purely religious in nature. Supporters of legislative prayer would only achieve a Pyrrhic victory by denying that fact inasmuch as they would have to strip the prayer of any religious value.[129] This certainly could be true. But it seems that Justice Brennan discounted the fact that Chaplain Palmer willingly omitted references to Christ from his prayers; he did not make one religion preeminent. He therefore allowed the recognition of a variety of beliefs: "recognition" being permissible in Brennan's own words.[130]

Justice Brennan argued that the purposes of the establishment clause could best be achieved by abolishing legislative prayer because it would eliminate tension between church and state.[131]

---

124. 103 S. Ct. at 3344-46 (Brennan, J., dissenting).

125. See, *e.g., Walz,* 397 U.S. 664, where tax-exempt status was given to property where worship services were held.

126. 103 S. Ct. at 3345 (Brennan, J., dissenting).

127. *See supra* note 105 and accompanying text.

128. *See supra* notes 62, 105 and accompanying text.

129. 103 S. Ct. at 3345 (Brennan, J., dissenting).

130. "Government cannot . . . be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture." *Id.* (footnote omitted).

131. *Id.* at 3346 (Brennan, J., dissenting). A similar thought can be found in *Everson,* 330 U.S. at 59 (Rutledge, J., dissenting): "Complete separation between the state and religion is best for the state and best for religion." *Id. See also Zorach,* 343 U.S. at 319 (Black, J., dissenting).

However, an unavoidable tension exists between the precepts of the establishment clause and those of the free exercise clause.[132] A careful balance must be struck between the two or it is possible that a hostile attitude against religion could result, unwarranted by the mandates of the establishment clause.[133]

Justice Brennan further stated, however, that invocation of the free exercise clause was inappropriate because legislative prayer was not being used for the purpose of giving legislators the opportunity to worship. It was merely being used to open the legislative sessions.[134]

While it is true that the latter was the primary stated purpose for the legislative prayer, it cannot be gainsaid that the former is also the case. One cannot discount the effect of daily calling one's attention to the possibility that there is a Creator higher than one's self. It is an acknowledgment that the guidance and wisdom in the business at hand would be invaluable, especially as an aid to the "high purpose"[135] of the legislator's calling. Others could use that time to pray to their god.[136]

Claiming that the Court allowed its purely historical analysis to override other concerns, Justice Brennan made three arguments. First, the majority could have mistaken the Framers' intent in implementing the congressional chaplaincy program, as there may not have been as much consideration of the policy as the majority thought. Secondly, he pointed out that the Court looked only to the intent of Congress in drafting the first amendment and not to the intent of the states which ratified it. Finally, he argued that the majority treated the Constitution as a static rather than flexible document which would be able to deal with modern situations.[137]

While it is true that the majority could have made an incorrect assumption with regard to the Framers' intent, it is equally true

132. *See supra* note 12; *see also Schempp,* 374 U.S. at 309 (Stewart, J., dissenting). "[T]he fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause." *Id.*

133. *See, e.g., Engel,* 370 U.S. at 443 (Douglas, J., concurring); *Everson,* 330 U.S. at 18.

134. 103 S. Ct. at 3346 (Brennan, J., dissenting). *See also supra* note 96.

135. *Id.* at 3338 (Brennan, J., dissenting).

136. *Id.* at 3339.

137. *Id.* at 3347-49 (Brennan, J., dissenting).

that its informed and oft-exercised judgment may have reached the correct result. As noted earlier, the practice of legislative prayer in Congress was stopped for a period of time during the 1850's.[138] It therefore seems likely that even if the First Congress did not give the issue the time or consideration it deserved, Congress had an ample second opportunity to reconsider the practice. As the practice was reinstated, it appears to be a reasonable assumption that no difficulties were perceived.[139] In addition, if at any time after the Bill of Rights was ratified Congress felt that the legislative chaplaincy system was unconstitutional, it could have discontinued the program. In the absence of any such consideration, the legislation enjoys a presumption of constitutionality.

Further, even though ideals and mores can change, that does not mean that they have changed. While it is true that there are more religious denominations and viewpoints in America today than there were at the time of the Framers, religion as a whole is still abounding in modern American society; even so, it is not found to be pervasively offensive. Therefore, this rationale for eliminating legislative prayer was unwarranted.

Next, Justice Brennan contended with the majority's argument that the practice of legislative prayer can be equated to such "innocuous" expressions as "In God We Trust," "God Save the United States and the Honorable Court," and "One Nation Under God," which are no longer filled with religious connotations. He disagreed with this contention on three grounds:[140] (1) legislative prayers tend to be more actively sectarian than mottos, thus the former should be abolished;[141] (2) even though the practice might look non-sectarian to nine justices, prayer is serious theological business to the devout and not merely an acknowledgment of belief;[142] and (3) there would be too many problems involved in the practice of legislative prayer if everyone's beliefs were truly considered, and it is beyond the government's competence to act as an ecclesiastical arbiter.[143]

The third basis is Justice Brennan's most persuasive argument. The detailed list of variances in religious beliefs which he gave is certainly mind-boggling.[144] Yet even in light of these enormous

138. *Id.* at 3334 n.10. *Cf. Id.* at 3340 n.10 (Brennan, J., dissenting). *See supra* note 56 and accompanying text.

139. *Id.* at 3334 n.10.

140. *Id.* at 3349-51 (Brennan, J., dissenting). *See supra* note 49 and accompanying text.

141. 103 S. Ct. at 3349 (Brennan, J., dissenting).

142. *Id.*

143. *Id.* at 3349-51 (Brennan, J., dissenting).

144. For example, some faiths would object to interfaith group prayer, while others would find the attempt at nondenominational prayer distasteful. Likewise,

difficulties, it does not necessarily follow that legislative prayer must be abolished in order to rectify the problem. If one could equate this situation to other thorny problems which the Court has confronted—such as the abortion issue—it seems no more nor less emotionally charged. Both issues go to the root of one's beliefs, yet the Court did not decline to be the arbiter there, nor did it indicate that the practice must be completely abolished so that the issue would not have to be faced by the Court. In reality, the majority was merely making a comparison to show that even the proceedings of the judiciary are imbued with some religious elements. It certainly did not appear to be a major point.[145]

The final point which Justice Brennan raised was that *complete* separation of church and state may actually promote a greater degree of religious freedom. Therefore, while abolition of legislative prayer might raise a furor, it should ultimately result in more freedom for all.[146]

Such a conclusion, of course, is only speculation. However, it seems that a distinction can be made between freedom to allow religion's existence and freedom *from* religion. It is the former that is embodied in the first amendment, taking both the establishment and the free exercise clauses into account. It is this type of practice which allows the appearance of neutrality for, without it, the "religion" of secularism may be preferred.[147]

C. Justice Stevens' Dissent

Justice Stevens raised two major points in his dissenting opinion.[148] The first of these was that "[r]egardless of the motivation" of the legislators who appoint the legislative chaplain, the re-appointment of one clergyman for over sixteen years shows an implicit "preference of one faith over another in violation of the Establishment Clause."[149] While this argument is persuasive, the better view seems to be that sectarian views could only be impermissibly favored if the chaplain utilized them. Absent such a showing, the issue is not ripe for adjudication.

---

some might object to petitionary prayer, while others would feel that any prayer made must be petitionary. *Id.* at 3349-50 (Brennan, J., dissenting).

145. The majority gave the point only short shrift. *Id.* at 3333.

146. *Id.* at 3351 (Brennan, J., dissenting).

147. *See Everson*, 330 U.S. at 18.

148. 103 S. Ct. at 3351-52 (Stevens, J., dissenting).

149. *Id.*

Secondly, Justice Stevens stated that despite the statements of the majority, the opinion did not evaluate the content of Reverend Palmer's prayers because their sectarianism could not have been explained away.[150] This argument is pertinent because it attacks a weak portion of the majority opinion.[151] However, it seems to ignore the fact that Reverend Palmer changed the content of his invocations at the request of a Jewish legislator in order to remove elements of sectarianism, thus pointing up the fact that such prayers can be neutral in content.[152]

V. IMPACT

As Justice Brennan pointed out in his dissenting opinion, the Court narrowed its holding to such a specific point that it may have carved out a new exception to existing law.[153] This is supported by the fact that the traditional *Lemon* test[154] has been used for a fairly long period of time. Until very recently, there has been no sign that the Court found the test inadequate. However, due to the strong majority opinion in *Marsh,* this exception might be seen as significant.[155]

One additional noteworthy aspect of this decision is the growing trend toward consideration of religious matters by various members of the government, notably President Reagan. The deci-

150. *Id.* at 3352 (Stevens, J., dissenting). *See supra* note 86 and accompanying text.

151. *See supra* note 98 and accompanying text.

152. *See supra* notes 37, 67 and accompanying text. As a sidelight, it is interesting to note that Justice Stevens states, "I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature." 103 S. Ct. at 3351 (Stevens, J., dissenting).

153. 103 S. Ct. at 3337 (Brennan, J., dissenting).

154. 403 U.S. at 612-13. *See supra* notes 29, 43-44, 69-71 and accompanying text.

155. Additional evidence that the Court may be moving away from the traditional establishment clause test came in Lynch v. Donnelly, 52 U.S.L.W. 4317 (U.S. Mar. 6, 1984) (No. 82-1256). It was held there that the town of Pawtucket, Rhode Island could display a creche on private property to commemorate the observance of the Christmas holiday.

The five to four majority opinion in the case was written by Chief Justice Burger, and was joined by Justices White, Powell, Rehnquist and O'Connor. Justice O'Connor also submitted a separate concurring opinion, advertising a cautious scrutiny of all religion clause issues.

The dissenting opinion, written by Justice Brennan, and joined by Justices Marshall, Stevens, and Blackmun, criticized the majority for relaxing constitutional standards with regard to the establishment clause. Justice Blackmun, joined by Justice Stevens, filed a separate dissent which also stated that the majority downplayed the significance of the display.

Dean Jesse Choper, however, has speculated that even this decision would not necessarily pave the way for more liberal treatment of establishment clause issues. *See generally* Low, *Cities May Display Nativity Scenes, High Court Says—'Religious' Test Eased,* L.A. Daily J., March 6, 1984, at 1, col. 2.

sion may create a deceptively hospitable environment for the reinstatement of voluntary school prayer. There may also have arisen the hope that the Court would reconsider its stance on the issue. It appears, however, at least for the present, that the status quo will continue with respect to cases involving the establishment clause.

DIANE L. WALKER