CONSTITUTIONAL LAW — THE PRACTICE BY THE NEBRASKA LEGISLATURE OF USING PUBLIC FUNDS TO PAY A CHAPLAIN TO PRESENT AN INVOCATION AT THE OPENING OF EACH LEGISLATIVE SESSION DOES NOT VIOLATE THE FIRST AMENDMENT ESTABLISHMENT CLAUSE — *Marsh v. Chambers* (U.S. Sup. Ct. 1983).

Frank Marsh, a Nebraska state legislator and taxpayer, brought an action in the United States District Court for Nebraska challenging the constitutionality of the practice by the Nebraska legislature[1] of paying a chaplain to present an invocation at the beginning of each legislative session.[2] Marsh, emphasizing that the same chaplain of a single religious affiliation[3] had been the legislature's chaplain for fifteen years, and that public funds were used to pay the chaplain's salary,[4] claimed that the practice violated the first amendment establishment clause[5] which prohibits a government from making laws respecting the establishment of religion.[6]

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1. Chambers v. Marsh, 504 F. Supp. 585 (D. Neb. 1980). The Nebraska practice was provided for by the Rules of the Nebraska Unicameral as follows:

> The order of business of the Legislature shall be as follows; except as otherwise provided by the Speaker.
>
> a. Prayer by the Chaplain
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> . . . .
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> In addition, the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council for the following officers:
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> . . . .
>
> Chaplain
>
> . . . .
>
> The Chaplain shall attend and shall open with prayer each day's sitting of the Legislature.

RULES OF THE NEBRASKA UNICAMERAL, Rule 1, §§ 2, 21; Rule 7(A), § 1(b).

2. Chambers v. Marsh, 504 F. Supp. at 586. At the district court level, Marsh also challenged the constitutionality of the preparation, at the taxpayer's expense, of a prayer book containing prayers given by the chaplain at the legislative sessions. *Id.* The publication of such prayer books was made possible by motions made and passed by the Nebraska legislature. *Id.* The district court held that the publications were in violation of the establishment clause, *id.*, and the decision was affirmed by the circuit court. Chambers v. Marsh, 675 F.2d 228, 231 (8th Cir. 1982). This portion of the district court's decision was not challenged at the Supreme Court level. Transcript of Oral Argument at 19-20, Marsh v. Chambers, 103 S. Ct. 3330 (1983).

3. Chambers v. Marsh, 504 F. Supp. at 586. The chaplain was an ordained clergyman of the Christian faith and affiliated with the Presbyterian Church. *Id.*

4. *Id.* The chaplain received $319.75 for each month the legislature was in session. *Id.*

5. Marsh v. Chambers, 103 S. Ct. at 3332 (Marsh brought an action pursuant to 42 U.S.C. § 1983 seeking to enjoin Nebraska's practice).

6. U.S. CONST. amend. I. In full, the religion clauses of the first amendment read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In *Cantwell v. Connecticut*, 310 U.S. 296 (1940) the first amendment was held to be applicable to state governments. *Id.* at 303.

The district court separated the question into two separate issues:[7] whether the practice of opening legislative sessions with prayer violated the establishment clause[8] and whether the use of public funds to compensate a chaplain presenting such prayers was a violation of the establishment clause.[9] Addressing the first issue, the district court held that the opening prayer practice did not violate the establishment clause[10] on the grounds that: (1) a rule promulgated in furtherance of a legislative body's administrative practices is not a "law" within the meaning of the first amendment;[11] (2) the prayers had the secular purpose of bringing the session to order;[12] (3) the prayers did not have the primary effect of inhibiting or advancing religion;[13] and (4) the state entanglement with religion resulting from the practice was nominal and not excessive.[14]

Considering the second issue, however, the district court held that compensating the chaplain from public funds violated the establishment clause because "[t]he 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 . . . ."[15]

On appeal, the Eighth Circuit Court of Appeals, asserting that the practice of the legislature "must be viewed as a whole,"[16] affirmed in part and reversed in part.[17] The circuit court held that the entire practice of the Nebraska legislature violated the establishment clause[18] because the purpose and effect of the practice was to advance and prefer one religion over others,[19] and the use of public funds to perpetuate such a practice would result in excessive entanglement of the state with religion.[20] On writ of certiorari, the Supreme Court of the United States *held*, reversed.[21] The prac-

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7. Chambers v. Marsh, 675 F.2d at 233. The district court distinguished three issues. *Id.* The third, not mentioned in the text, was the constitutionality of the publication of prayer books using public funds. *Id. See supra* note 2 and accompanying text.

8. Chambers v. Marsh, 504 F. Supp. at 588.

9. *Id.* at 591.

10. *Id.* at 588.

11. *Id.* The district court asserted that this proposition alone provided a sound basis for finding that the practice of saying prayers in legislative halls would not violate the establishment clause. *Id.* It appears, however, that lack of authority for this proposition moved the district court to validate the practice on other grounds as well.

12. *Id.* at 589.

13. *Id.*

14. *Id.* at 591.

15. *Id.* at 592.

16. Chambers v. Marsh, 675 F.2d at 233.

17. *Id.* at 235.

18. *Id.*

19. *Id.* at 234.

20. *Id.* at 235.

21. Marsh v. Chambers, 103 S. Ct. at 3332.

tice by the Nebraska legislature of using public funds to pay a chaplain to present an invocation at the opening of each legislative session does not violate the first amendment establishment clause. *Marsh v. Chambers*, 103 S. Ct. 3330 (1983).

The *Marsh* case is significant for several reasons. First, the Supreme Court did not apply the traditional test[22] that had been developed through its past determinations of the scope of the establishment clause, and thus, reached a rather "exceptional" result in direct conflict with a result that would have been reached by applying that test. Somewhat inexplicably, the Supreme Court used an inappropriate standard to reach its result.[23] In fact, while the Court implied that this was an exception to the traditional type of cases involving an alleged violation of the establishment clause, it failed to establish a viable standard by which to define such exceptions. The result of the Court's analysis creates several problems for lower courts: (1) in certain "exceptional" cases a traditional analysis will not mesh with the *Marsh* precedent; (2) the "exceptional" cases are not easily identifiable because the Court failed to establish a definitional standard; and (3) since the traditional test apparently will not be required in the "exceptional" case, it is unclear what standards the lower courts should apply in reaching decisions in those "exceptional" cases.

In *Marsh*, the Supreme Court began its analysis by noting that the practice of opening legislative sessions with prayer has been a long-standing tradition in the history of the United States.[24] To support this assertion the Court noted that from its outset in 1774 the Continental Congress began each session with a prayer given by a paid chaplain.[25] In addition, the language of the Bill of Rights was agreed upon three days after the First Congress authorized the payment of congressional chaplains.[26] From these historical facts the Supreme Court concluded that the Framers of the Constitution did not view the practice of paying chaplains to present prayers at the opening of legislative sessions as violative of the first amendment.[27] The Supreme Court also noted that the Nebraska practice has been a long-standing practice for over a century.[28]

The Supreme Court recognized that "standing alone, historical patterns

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22. The traditional test was formalized in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See infra* text accompanying notes 47-51.

23. The Court relied upon historical patterns to establish the validity of the legislative prayer. Marsh v. Chambers, 103 S. Ct. at 3337 (Brennan, J., dissenting). However, the *Marsh* Court itself stated that "standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Id.* at 3334.

24. Marsh v. Chambers, 103 S. Ct. at 3332-33.

25. *Id.* at 3333.

26. *Id.* at 3333-34.

27. *Id.* at 3334.

28. *Id.*

cannot justify contemporary violations of constitutional guarantees."[29] The Court stated, however, that here the historical evidence demonstrated not only what the Framers intended the establishment clause to mean, but also how it was to be applied to the congressional practice of hiring chaplains to present invocations at legislative sessions.[30] The Court reiterated the fact that during the same week that the First Congress voted to pay a legislative chaplain and also voted upon the language of the first amendment,[31] and interpreted this coincidence to mean that the Framers did not perceive the chaplaincy practice as a violation of the first amendment.[32] The Court concluded that the chaplaincy practice posed "no real threat" of an establishment of religion.[33]

In a collateral argument, the Court considered whether the historical opposition to the motion to begin the Continental Congress with prayer weakened the Court's analysis.[34] The Court met this argument by reasoning that the opposition actually strengthened the force of the historical argument because it demonstrated that the decision to begin the Continental Congress with prayer was made only after careful consideration.[35] The Court asserted that "the delegates did not consider opening prayer as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.' "[36] The Court cited *McGowan v. Maryland*[37] for the proposition that the establishment clause does not bar action merely because it is in harmony with religious canons,[38] and asserted that the Nebraska chaplaincy practice is of such a harmonious nature.[39] To bolster its argument the Court stated: "Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination.' "[40] The Court thus concluded that as a general matter the practice is not an "establishment" of religion.[41]

The Court next turned to the Nebraska practice specifically and considered three aspects of the Nebraska practice: (1) that a clergyman of a single denomination had held the chaplaincy position for sixteen years; (2) that the chaplain was paid from public funds; and (3) that the prayers were of a

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29. *Id.*
30. *Id.*
31. *Id.* at 3335.
32. *Id.*
33. *Id.*
34. *Id.* History records that John Jay and John Rutledge opposed beginning the first session of each Continental Congress with prayer. *Id.*
35. *Id.*
36. *Id.* (quoting Chambers v. Marsh, 675 F.2d at 234).
37. 366 U.S. 420, 442 (1961) (Sunday blue laws not a violation of the establishment clause).
38. Marsh v. Chambers, 103 S. Ct. at 3335.
39. *Id.* at 3335-36.
40. *Id.* at 3335.
41. *Id.* at 3336.

Judeo-Christian nature.[42] On the first issue the Court held that "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the [e]stablishment [c]lause."[43] On the second issue, the Court held that such remuneration did not violate the establishment clause because it was grounded in historic practice.[44] As to the third issue, the Court held:

> 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. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.[45]

The Supreme Court in *Marsh*, therefore, found no violation of the establishment clause, either in the general practice of paying chaplains from public funds to present an opening prayer at each legislative session, or in the Nebraska practice specifically.[46]

In *Lemon v. Kurtzman*,[47] the Court set up a test that was a compilation of the various standards which had evolved from the Court's review of cases dealing with the prohibition of governmental establishment of religion.[48] The three-prong test requires that the legislative act have a secular purpose,[49] that its primary effect must neither advance nor inhibit religion,[50] and that it must not involve an excessive entanglement of state government in religion.[51] In its analysis of *Marsh*, the Supreme Court failed to acknowledge the existence of the *Lemon* test,[52] although it had consistently applied

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 3337.
46. *Id.*
47. 403 U.S. 602 (1971).
48. *Id.* at 612-13. *See generally* Walz v. Tax Comm'n, 397 U.S. 664 (1970)(tax exemption for religious property held not violative of establishment clause on basis that legislative purpose was not aimed at sponsoring or supporting religion and because there was only a minimal involvement between state and religion); Epperson v. Arkansas, 393 U.S. 97 (1968) (purpose and effect of anti-evolution statute was to aid and advance religion in violation of the establishment clause); School Dist. v. Schempp, 374 U.S. 203 (1963) (state-mandated Bible reading and recitation of Lord's Prayer in public schools had religious character and were violative of the establishment clause); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws had secular purpose and were held not to be a violation of the establishment clause); McCollum v. Board of Educ., 333 U.S. 203 (1948) (religious classes held in public schools during school hours were held to be an aid to religion and violative of the establishment clause); Everson v. Board of Educ., 330 U.S. 1 (1947)(state reimbursement of cost of bus fares to parents whose children attended religious schools held to have a public purpose and valid within the establishment clause).
49. Lemon v. Kurtzman, 403 U.S. at 612.
50. *Id.*
51. *Id.* at 613.
52. The Court merely mentioned *Lemon* once in a recitation of the circuit court proce-

that test since the *Lemon* decision, including in one case decided just seven months prior to *Marsh*.[53] A *Lemon* analysis of *Marsh* will serve to illustrate that the Court reached a result that could not have been reached by application of the *Lemon* test. This direct conflict with a *Lemon* analysis, combined with the Court's failure to overrule *Lemon*, implies that the *Marsh* case is an exception to the traditional cases decided under the *Lemon* test.

A *Lemon* analysis would begin by inquiring into whether the Nebraska legislature's practice had a secular purpose,[54] keeping in mind prior cases from which the *Lemon* test evolved. In *Engel v. Vitale*,[55] the Court held that state-required prayer at the opening of each school day was a state-mandated religious activity and, therefore, violative of the establishment clause.[56] In *School District v. Schempp*,[57] the Court held that the reading of Bible verses and the recitation of the Lord's Prayer required by the state at the beginning of each school day were religious in character and prohibited by the establishment clause.[58] These two cases were decided prior to the formalization of the *Lemon* test,[59] but the import of their holdings is that the nature, character, or purpose of prayer is inherently religious.[60] It would follow that the purpose of legislative prayer is inherently religious and not secular.

However, reliance need not be placed upon the result of *Schempp* and *Engel*. The facts of *Marsh* further evidence a lack of secular purpose in the Nebraska legislative prayer practice. The language in the majority opinion in *Marsh* refers to the activity as a process "[t]o invoke Divine guidance on

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dural facts. Marsh v. Chambers, 103 S. Ct. at 3332.

53. *See generally* Larkin v. Grendel's Den, 103 S. Ct. 505 (1982)(secular purpose of a Massachusetts statute giving the governing bodies of churches the power to veto applications for liquor licenses did not save statute because it was held to have the primary effect of advancing religion and involved an impermissible state entanglement with religion); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976)(a Maryland statute authorizing payment of state funds to private institutions of higher learning, but forbidding the use of such funds for sectarian purposes, was held valid by applying the *Lemon* test); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973)(applying the purpose, effect, entanglement test, maintenance grants to religious schools, as well as tuition reimbursements and tax breaks for parents whose children attended religious schools, held violative of the establishment clause); Hunt v. McNair, 413 U.S. 734 (1973) (a state program providing bonds to aid private colleges, but which excluded the use of bonds for sectarian purposes, upheld under an application of the *Lemon* test).

54. Lemon v. Kurtzman, 403 U.S. at 612.

55. 370 U.S. 421 (1962).

56. *Id.* at 424.

57. 374 U.S. 203 (1963).

58. *Id.* at 223.

59. Note, however, that in the *Schempp* case the Court acknowledged the first two prongs of the *Lemon* test — purpose and effect. *Id.* at 222. This fact strengthens the textual argument that the *Schempp* case stands for the proposition that prayer has a religious purpose. *See id.* at 222-24.

60. "[Prayer] is a solemn avowal of divine faith and supplication for the blessings of the Almighty." Engel v. Vitale, 370 U.S. at 424.

a public body."[61] The statement implies the directly religious purpose of the Nebraska practice. In addition, the Nebraska chaplain testified that his purpose was to help legislators realize that they are "instruments of the Divine."[62] Such a purpose cannot, by any stretch of the imagination, be deemed to be secular. Therefore, had the Court applied the *Lemon* test, it would have found a lack of secular purpose.

Following the traditional *Lemon* mode of analysis, a determination of whether the Nebraska practice has a primary effect of advancing or inhibiting religion would be in order.[63] A state cannot act so as to "aid one religion, aid all religions, or prefer one religion over another."[64] The effect of state action must be neutral and cannot prefer religion over non-religion.[65] Therefore, in order to avoid a primary effect of advancing religion, a legislative action may not even favor generic or non-denominational religion. In *McCollum v. Board of Education*,[66] the Court held that the state could not allow the tax-supported public school buildings to be used as a vehicle for the dissemination of religious doctrine, even though such use was not restricted to certain denominations.[67] The Court viewed this as an aid to religion.[68] Similarly, the use of tax-supported government buildings, such as legislative halls, should not be used as a vehicle for the dissemination of religious doctrine through prayer. Regardless of whether such prayers are considered to be non-denominational,[69] the effect would be to aid or advance religion.

The Court, in earlier decisions, has also warned that the direct payment of public funds for religious activities has a primary effect of advancing religion.[70] The use of public funds to compensate the Nebraska chaplain for his religious invocations falls squarely within that caveat. In *Hunt v. McNair*,[71] the Court set forth the proposition that "[a]id normally may be thought to have a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise substantially secular setting."[72] The Ne-

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61. Marsh v. Chambers, 103 S. Ct. at 3336.
62. Respondent's Brief at 35, n. 11, 103 S. Ct. 3330.
63. Lemon v. Kurtzman, 403 U.S. at 612.
64. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).
65. *Id.* at 18.
66. 333 U.S. 203 (1948).
67. *Id.* at 211.
68. *Id.* at 209.
69. Ignoring this tenet in *Marsh*, the Supreme Court asserted that the contents of the Nebraska prayers were of no concern to judges where the effect was not to prefer one religion over another. Marsh v. Chambers, 103 S. Ct. at 3337. *See supra* text accompanying note 45.
70. Hunt v. McNair, 413 U.S. 734, 743 (1973). The Supreme Court held that State issued revenue bonds to finance private universities were not violative of the establishment clause because the State did not become liable on the bonds and the bonds could not be used for sectarian purposes.
71. 413 U.S. 734 (1973).
72. *Id.* at 743.

braska prayer practice, a specifically religious activity, occurs in the legislative halls, a substantially secular setting, and is publicly funded. Had the Court followed the *Hunt* interpretation of the *Lemon* test it would have found that the Nebraska practice has a primary effect of advancing religion.

Finally, a *Lemon* analysis would address the issue of excessive government entanglement in religion.[73] Excessive government entanglement exists at two levels. One level is aptly illustrated by the term surveillance-entanglement.[74] This occurs when a state becomes excessively involved in the day to day monitoring of religion.[75] Allegedly the Nebraska chaplain offers only non-denominational invocations.[76] To assure compliance with this requirement it would be necessary for the legislature to continually monitor the content of the chaplain's prayers. This day to day surveillance involves an impermissible state entanglement in religion.

However, the second level of entanglement presents a much more forceful issue in the *Marsh* case. This level of excessive entanglement is evidenced by the "divisive political potential of [religious] state programs."[77] Political division along religious lines has been cited as one of the principal evils meant to be prevented by the first amendment.[78] The potential for such political division is clearly evidenced by the facts in the *Marsh* case. In 1979, some members of the Nebraska legislature attempted to replace the legislative chaplain, then of fourteen years tenure, with a chaplain of a different faith.[79] The battle that ensued progressed to a vote and an election on the legislative floor, splitting the legislature along religious lines.[80] In addition, there is evidence that Jewish members of the legislature complained when a guest chaplain made reference to the divinity of Jesus.[81] Such an alienation of members of the legislature creates an atmosphere in which political division is more apt to develop along religious lines. The crux of the test is not actual division but "potential" division.[82] The continuation of the Nebraska practice serves only to emphasize the religious differences of the legislators, thus creating a situation ripe for political division along religious lines. A *Lemon* analysis of the *Marsh* case would necessarily have resulted in a finding of excessive government entanglement with religion.

In comparing the Court's review of *Marsh* with a traditional *Lemon* review of that case, it is apparent that the Supreme Court reached a decision directly opposed to a decision that would have been reached by applying the

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73. Lemon v. Kurtzman, 403 U.S. at 613.
74. Walz v. Tax Comm'n, 397 U.S. at 675.
75. Marsh v. Chambers, 103 S. Ct. at 3339 (Brennan, J., dissenting).
76. *See* Marsh v. Chambers, 103 S. Ct. at 3337.
77. Lemon v. Kurtzman, 403 U.S. at 622.
78. *Id.*
79. Respondent's Brief at 52, Marsh v. Chambers, 103 S. Ct. 3330 (1983).
80. *Id.*, 103 S. Ct. 3330.
81. *Id.* at 52-53, 103 S. Ct. 3330.
82. *See* Lemon v. Kurtzman, 403 U.S. 622-23.

Lemon test.[83] The Court replaced the purpose, effect, entanglement test with a review based upon historical patterns. Admittedly, in past cases the court has often employed the history of a particular practice, in reference to the first amendment, to bolster an establishment clause analysis.[84] It has not, however, used history as the sole standard of the validity of state action when an alleged violation of the establishment clause was at issue. In fact, the Court has held that history alone cannot satisfy an establishment clause analysis of a case.[85]

By using this historical standard in the *Marsh* case to validate the Nebraska practice, the Court has transformed a supplementary factor into the primary factor which has, in substance, replaced the entire *Lemon* analysis. The implication to be derived from the Court's method, its result, and its failure to overrule *Lemon*, is that the Court was setting up an exception to the typical case decided by applying the *Lemon* test. The analysis by which the Court reached this exception is inadequate. The Court inappropriately used historical pattern as the standard to reach its result.[86]

The historical pattern standard is inappropriate for several reasons. First, as Justice Brennan points out in his dissent, the Court did not rely on the establishment clause legislative history, but instead relied on what the Framers of the establishment clause practiced.[87] The assumption is that the Framers and other legislators will not maintain a practice that is violative of constitutional guarantees.[88] This is an assumption that cannot be accepted. It cannot be assumed that legislators, pressured by the business of the moment and the influence of their fellow legislators and constituents, will always make a rational analysis of the constitutional implications of their practices and decisions.[89] Justice Brennan's dissent noted that James Madison, a legislator of the First Congress, voted in favor of authorizing compensation of a chaplain to present invocations at the legislative sessions.[90] Following Madison's legislative career, when he had time for rational, unpressured reflection, Madison denounced the practice as unconstitutional.[91] This should reflect the fact that the constitutionality of a practice or law cannot be assumed from legislative endorsement. Indeed, it is one of

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83. Applying the *Lemon* test, the Eighth Circuit held that the Nebraska practice violated the establishment clause. Chambers v. Marsh, 675 F.2d at 228.

84. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970)(history of tax exemption granted for church property used to support establishment clause analysis); Engel v. Vitale, 370 U.S. 421 (1962)(history of establishment clause used to support finding that recitation of state composed prayer in public schools is violative of the first amendment).

85. Walz v. Tax Comm'n, 397 U.S. at 678.

86. Marsh v. Chambers, 103 S. Ct. at 3347 (Brennan, J., dissenting).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

the duties of the Supreme Court to probe the constitutionality of laws and practices that legislators may have assumed to be valid.[92]

Justice Brennan's second point is that the historic intent of federal legislators, especially in reference to the Bill of Rights, cannot provide the sole basis for an understanding of constitutional guarantees.[93] Constitutional amendments become the supreme law only upon ratification by the States;[94] therefore, the legislative intent of federal legislators is a too narrow path of interpretation. Additionally, the amendments contained in the Bill of Rights were not composed by the First Congress upon its own initiative.[95] The amendments were concessions imposed by the States in exchange for their ratification of the Constitution.[96] In the light of this history, Justice Brennan found that the Court's reliance upon the federal legislative intent, as expressed through the practice of the First Congress, was sorely misplaced.

The dissent also indicated that the Court failed to recognize the nature of the Constitution when it placed its sole reliance on the historic intent of the Framers in finding the Nebraska practice to be valid. The Constitution, as evidenced by its nature and by the Court's ever-changing interpretations of its content, "is not a static document."[97] In *Schempp*, the Supreme Court reviewed an alleged violation of the establishment clause. There, the Court set forth the proposition that the "use of the history of [the Framers'] time must limit itself to broad purposes, not specific practices."[98] The purpose of the establishment clause at its birth was to avoid the establishment, through official government endorsement, of a state religion or church as had existed in the history of England and in the history of the early American states.[99] However, over time the purpose of the establishment clause has been expanded by case law to preclude excessive entanglement of the states in religion.[100] This development illustrates Justice Brennan's opinion that historical interpretation is not a sound basis for a contemporary analysis. Had the Court relied on historical interpretation in past cases, state mandated prayer in public schools might continue to flourish to this day.[101]

Assuming that lower courts can identify the "exceptional" case, the Supreme Court's application of the inappropriate historical standard leaves lower courts without a viable standard by which to decide whether a given exceptional case is violative of the establishment clause. The assumption demonstrates the inadequacy of the Court's analysis not only in its applica-

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92. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).
93. Marsh v. Chambers, 103 S. Ct. at 3347, n.32 (Brennan, J., dissenting).
94. *Id.* at 3347.
95. *Id.* at 3348.
96. *Id.*
97. *Id.*
98. School Dist. v. Schempp, 374 U.S. at 241.
99. *See* Everson v. Board of Educ., 330 U.S. at 8-15.
100. Lemon v. Kurtzman, 403 U.S. at 612-13.
101. *See generally* School Dist. v. Schempp, 374 U.S. 203.

tion of an inappropriate standard, but also in its failure to formulate a standard to define that exception. The Supreme Court did not establish whether the *Marsh* exception was restricted specifically to the practice of paying chaplains from public funds to present invocations, or whether the basis of the exception had greater breadth.

The Supreme Court's failure to set up a class of exceptional cases was not a result of a lack of viable suggestions. When the *Marsh* case was before the district court, that court attempted to define a class of cases which it perceived as being outside of the prohibitions of the establishment clause.[102] The district court set forth the proposition that a practice or rule set up by a legislature to regulate only the activities of the legislative body itself would not be a "law" within the meaning of the establishment clause.[103] The district court limited "laws" to the mandates of a legislature as to what others must do.[104] The district court asserted that "[n]either what legislators do for and by themselves nor what a legislature does for and by itself with no significant impact on anyone else is the making of laws."[105] The test set up by the district court is especially attractive because it not only cures the definitional problem but also suggests a standard by which to test exceptional cases which could replace the historical pattern test employed by the Supreme Court.

According to the district court's proposition, a case involving an act or rule by which a legislature governs itself would fall within the exception and would not be susceptible to the *Lemon* test.[106] The constitutional standard that would be applied to a case falling within the exception would be whether the legislative law or rule has a "significant impact" on those outside of the legislature.[107] Admittedly, the "significant impact" standard lacks specificity, but it is not totally without merit.[108] The Supreme Court could have avoided the application of the historical standard and the definitional problem by following the approach taken by the district court.

The petitioner in *Marsh* presented the Court with another definitional option similar to that presented by the district court.[109] The petitioner's assertion was that "establishment clause cases typically fall into two categories: (1) those involving governmentally supported or financed programs or activities undertaken outside of the halls of government; and (2) those involving activities or conduct having religious connotations undertaken

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102. Chambers v. Marsh, 504 F. Supp. at 588.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. On review, the Eighth Circuit Court of Appeals expressed the opinion that rules of a legislative body "reflect sufficient law making." Chambers v. Marsh, 675 F.2d at 233. The Supreme Court expressed no opinion on the viability of the definition.
109. Petition for Writ of Certiorari at 20, 103 S. Ct. 3330.

within the operation or halls of government."[110] The first class of cases is typical of those cases to which the Court has applied the *Lemon* test.[111] However, the second class, the petitioner argued, was to be excepted from the traditional *Lemon* analysis and subjected to a different standard.[112] Although this proposition does not present a standard by which to test the exceptional cases, it is a starting point in that it suggests a definitional standard by which to identify cases falling within the exception.

When *Marsh* came before the Supreme Court, there were two alternatives. The Court could have applied the *Lemon* test to reach a result that would be in line with its past establishment clause interpretations, or it could have clearly distinguished this case and created a standard by which to test similar cases. However, the Supreme Court chose an approach that makes the precedential value of *Marsh* ambiguous. Instead of clearly defining the factor or factors which distinguish this case from previous establishment clause cases, the Court applied a new standard to achieve a result in direct conflict with a *Lemon* analysis, thus leading to a vague implication that this case is different and therefore an exception. The Court, however, by the inherent nature of an implication, failed to establish what class of cases should fall within the *Marsh* exception. The Court's approach provides no guidance to lower courts when they are faced with future establishment clause cases. Clearly, they must recognize the exception, but the Supreme Court did not establish a definitional standard for such recognition. Finally, even if the lower courts were able to recognize the exception, the Supreme Court's application of an inappropriate historical standard leaves lower courts without a standard to apply to the exceptional case.

Lisa A. Penland

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110. *Id.*, 103 S. Ct. 3330.

111. *Id.*

112. *Id.*, 103 S. Ct. 3330. Petitioner did not suggest that the excepted class should be entirely exempted from establishment clause analysis, but rather that the Supreme Court should erect a new standard for such cases. *Id.* at 20-21, 103 S. Ct. 3330.