



10-1982

## Marsh v. Chambers

Lewis F. Powell Jr.

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Inclined to Deny

9/21

Then extends the "religion clause" to rather absurd lengths: a state may not pay a chaplain from a particular denomination (rather than a non-denomination ~~paid~~ chaplain) to give opening prayer each legislative day.  
But no conflict.

PRELIMINARY MEMORANDUM

September 27, 1982 Conference  
Summer List 15, Sheet 3

No. 82-23-CFX

OK MARSH, et al.  
(state officials)  
v.

Cert to CA 8 (Heaney,  
Stephenson & Oliver [DJ])

CHAMBERS  
(state legislator) Federal/Civil Timely

1. SUMMARY: Petr challenges the Nebraska legislature's practice of opening each legislative day with a prayer by a paid chaplain.

2. FACTS and PROCEEDINGS BELOW: The rules of the Nebraska legislature provide that a chaplain shall be selected by the

Deny  
RK

This is NOT a good vehicle  
TO REVIEW THIS claim. It is



legislature to open each day's session with a prayer. The chaplain is to be compensated out of state funds. For the past sixteen years, the legislature has employed a single chaplain to give the daily prayers. The daily prayers have from time to time been published in books and distributed at state expense.

Resp, a member of the Nebraska legislature, brought this §1983 action claiming that the above practices violate the Establishment Clause of the 1st Amdt. Petrs, the legislative chaplain, state treasurer, and members of the legislature's Executive Board, moved to dismiss on the grounds of 10th Amdt immunity, common-law legislative immunity, and general principles of federalism. The DC (Urbom, CJ) denied the motion. On the merits, the DC held that the Establishment Clause was not violated by the practice of having daily prayers, but was violated by the compensation of the chaplain and the publication of the prayers at state expense.

Petrs appealed from the DC's rulings on immunity and compensation of the chaplain. They did not appeal the portion of the ruling prohibiting publication of the prayers. Resp cross-appealed from the DC's ruling permitting the daily prayers to continue.

The CA 8 agreed that resp's action was not barred by the 10th Amdt, by general federalism principles, or by legislative immunity. Nothing in National League of Cities v. Usury, 426 U.S. 833 (1976), suggests that the 10th Amdt immunizes states from challenges based on the Bill of Rights. Since there are no pending state proceedings regarding the prayer practices, general



principles of federalism do not bar intervention by the federal courts. State legislators are immune from §1983 suits to the extent that members of Congress are immune under the Speech and Debate Clause, Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), but the Speech and Debate Clause protects only "legislative acts." The prayers bear no relation to the process of enacting legislation, and judicial intervention would have no impact on the deliberative process of the legislature.

On the merits, the CA 8 followed its prior decision in Bogen v. Doty, 598 F.2d 1110 (1979), which held that not every legislative prayer policy violates the Establishment Clause. Here, however, the CA 8 found that Nebraska's prayer policy failed to satisfy the three-part test set forth in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). The daily prayers, publishing of the prayer books, and appointment and compensation of the same chaplain for sixteen years, all formed part of a single policy which must be viewed as a whole. As a whole, it serves no secular purpose, has a primary effect of advancing one religious view, and entangles the state with religion.

3. CONTENTIONS: Petrs renew the three immunity arguments they made before the DC and CA. They contend that the 10th Amdt should bar this suit, because the relief resp claims would interfere with the Nebraska legislature's power to structure its own internal affairs. Fundamental principles of federalism also require judicial restraint in suits dealing with a state legislature's internal affairs. Moreover, all of the acts of



which resp complains are "legislative acts" protected by common-law immunity.

On the merits, petrs contend that the CA 8's decision directly conflicts with Colo v. Treasurer & Receiver General, 392 N.E.2d 1195 (Mass. 1979). Colo upheld a statute authorizing a long-term, paid chaplain to open each day's legislative session with a prayer. Although Colo did not involve the publication of prayer books, that issue was not properly before the CA 8 in this case because petrs had not appealed the DC's ruling. Petrs discuss the importance of the issues raised, and refer this Court to a pending challenge to Congress' practice of employing a chaplain. See Murray v. Morton, 505 F.Supp. 144 (DDC 1981), rev'd sub nom. Murray v. Buchanan, 674 F.2d 14, petn for rehearing en banc granted, \_\_\_\_ F.2d \_\_\_\_ (CA DC 1982).<sup>1</sup>

Petrs also contend that the CA 8's decision was incorrect under the Nyquist test. In several prior decisions, members of this Court have suggested that employment of a legislative chaplain would not violate the Establishment Clause. E.g., School District of Abington v. Schempp, 374 U.S. 203, 213 (1963); id. at 299-300 (Brennan, J., concurring); Engel v. Vitale, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting); Zorach v. Clauson, 343 U.S. 306, 312 (1952); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 253-54 (1948) (Reed, J.,

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<sup>1</sup>The CA DC is scheduled to hear oral argument en banc in Murray on October 27, 1982. The DDC and the CA DC three-judge panel have addressed only issues of standing and justiciability, and not the merits of the Establishment Clause claim.



dissenting).

On the immunity issues, resp contends that the 10th Amdt has no application to suits involving the Bill of Rights, since the Bill of Rights places explicit limits on the states' powers. Neither general principles of federalism nor common-law immunity bars this suit, for the reasons given by the CA.

On the merits, resp contends that the CA's holding was a narrow one, applicable only to the facts before it. The CA did not rule on the constitutionality of legislative prayers generally, or even paid legislative chaplains generally. Petrs' arguments address broad issues which are simply not raised by this case. Colo can be distinguished on the ground that the state there had not printed any prayers at public expense. Even if Colo creates a conflict, it has not been followed by other courts. Finally, the CA 8 was correct in deciding that Nebraska's policy violates the Establishment Clause.

#### 4. DISCUSSION

(a) Immunity: Petrs' 10th Amdt argument goes far beyond Usury and subsequent 10th Amdt cases, which dealt only with limitations on Congress' Commerce Clause power. In City of Rome v. United States, 446 U.S. 156, 179-80 (1980), this Court held that the 10th Amdt placed no limits Congress' powers to enforce the 14th and 15th Amdts. Resp seems clearly right in arguing that the 1st Amdt, which explicitly limits state powers, cannot itself be limited by the 10th Amdt.

Petrs' general federalism argument lacks merit. Petrs do not explain how general federalism principles are affected by the



federal courts' exercise of jurisdiction in this case, nor do they cite any case even suggesting that federalism principles preclude jurisdiction.

State legislators are immune from suit under §1983 in situations where the Speech and Debate Clause would immunize members of Congress. Consumers Union, 446 U.S. at 732-33; Tenney v. Brandhove, 341 U.S. 367 (1951). This immunity extends to acts performed in the process of enacting legislation, or acts which form part of the deliberative and communicative processes of the legislature. Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972). The CA's conclusion that the hiring of a chaplain to give daily prayers is not such an act seems entirely correct. It does not conflict with decisions of any other courts.

(b) Establishment Clause: The CA 8's decision does conflict with that of the Mass. S.J.C. in Colo. The issue seems important enough to merit review by this Court, since all fifty states as well as Congress apparently provide for some sort of legislative prayer. However, resp is correct in pointing out that the CA 8 reached its decision on the narrowest possible grounds. In effect, the CA 8 said that the specific Nebraska policy before it was unconstitutional, but a different result might be reached under any other combination of circumstances. The issues addressed by petrs would more properly be resolved in a case that purports to announce a general rule.

5. RECOMMENDATION: The CA's rulings on petrs' claims of immunity appear to have been correct, and raise no conflict.



Although the Establishment Clause issues are important and there does appear to be a conflict, the CA's ruling may have been limited to its own facts. I therefore recommend denial.

There is a response.

August 6, 1982

Streisinger

Opns in petn



UNCLEAR the extent to which the CA 8  
relied on the fact THAT THE STATE  
published its the prayers offered  
by the chaplain.

The D.C. found the PUBLICATION  
UNCONSTITUTIONAL AND the state did  
NOT appeal that portion of the  
judgment. The only issue before the  
CA was whether paying a CHAPLAIN  
from one denomination was UNCONSTITUTIONAL.  
The CA improperly considered the  
totality of the CIRCUMSTANCES, including  
the publication of the PRAYERS, in  
reaching its holding.

MOREOVER, this case is particularly  
weak since the chaplain was NOT  
NON DENOMINATIONAL. They had a  
Presbyterian chaplain for the ~~past 16~~ last  
16 years.







*Court* .....  
*Argued* ....., 19...  
*Submitted* ....., 19...

*Voted on*....., 19...  
*Assigned* ..... , 19...  
*Announced* ..... , 19...

No. 82-23

MARSH

vs.

## CHAMBERS

Grant

Limited to  
 Q 4 -  
 Establishment  
 clause.

[illegible]



I agree with Mike that this is a silly issue - in the real world.

I am glad he does it "feel strongly" either way. Neither do I in one sense. It would be wiser not to offend Mr. Chambers. But it is silly for him to be offended.

And the Establishment Clause concerns "Establishments" of Religion - not the sensativity of ~~an~~ an adult individual, esp. one in a position to speak out. (as

BENCH MEMORANDUM

No. 82-23

Marsh v. Chambers

Michael F. Sturley

Mike suggests, unlike kids in a classroom,

April 18, 1983

Question Presented

May the Nebraska Legislature, consistent with the Establishment Clause, retain and compensate a single Presbyterian minister as its chaplain for sixteen years?



Outline of Memorandum

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## I. Background

### A. Statutory Background

Under Rule 1, §2, of the Rules of the Nebraska Unicameral, the Legislature shall advise and consent to its Executive Board's recommendation on the appointment of a chaplain, who is designated as one of the Legislature's officers. His duties are defined as follows:

The Chaplain shall attend and shall open with prayer each day's sitting of the Legislature.

Nebraska Unicameral Rule 1, §21. Rule 7(A), §1(b) also provides that the "order of business of the Legislature" shall begin with a "Prayer by the Chaplain."

### B. Facts

Petr Palmer is a Presbyterian minister in Lincoln, Nebraska. In 1965, he was selected as the chaplain of the Nebraska Legislature. He has served in that capacity ever since, having been re-elected to the position at the beginning of each session.<sup>1</sup> The State (through petr Marsh, the State Treasurer) compensates Palmer at the rate of \$320.00 per month.

Resp Chambers has been a member of the Nebraska Legislature since 1970. He is not a Christian, and he objects to the prayers that Palmer delivers at the opening of each sitting.

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<sup>1</sup>Only the 1979 election, between Palmer and a Lutheran clergyman, was contested.



When he wishes to avoid being subjected to these prayers, he must leave the legislative chamber when they are being delivered. He claims that this interferes with his legislative duties, since much legislative business is conducted immediately before the sitting begins.

The parties have included samples of Palmer's prayers in the Joint Appendix at pp. 92-108. The earlier ones are nondenominational in the narrow sense. Although they are unmistakably Christian (with a definite Protestant tone), they are not identifiably Presbyterian. The later ones seem nondenominational in a slightly broader sense. Explicit Christian references are less common (even though the tone remains distinctly Christian), and Judaism is recognized. Nevertheless, the prayers remain clearly within the Judeo-Christian framework. They are implicitly inconsistent with the religious beliefs of Moslems, Hindus, Buddhists, etc., and explicitly inconsistent with the principles of atheism and agnosticism.<sup>2</sup>

#### C. Decisions Below

Chambers challenged the legislative prayer practices in DC (D.Neb.; Urbom). The DC concluded that the practice of holding prayers at the beginning of each day did not violate the Establishment Clause. It reasoned that "what a legislature does

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<sup>2</sup>In 1975, 1978, and 1979, several hundred copies of the prayers were printed and distributed at state expense. The State no longer defends the constitutionality of that practice, so it appears that it is not an issue before this Court.



for and by itself with no significant impact on anyone else" is not law-making within the scope of the Establishment Clause. The fact that there had been a single chaplain of a single faith for sixteen years did not alter this conclusion. The DC held that the publication of the prayers and the paying of the chaplain, however, did violate the Establishment Clause. Here the legislature was expending public funds on a religious purpose--the very activity that the Establishment Clause was intended to prevent.

The State did not appeal the DC's ruling prohibiting the publication of the prayers. It did appeal the compensation issue. Chambers cross-appealed that portion of the judgment that permitted Palmer to continue as the chaplain. CA8 (Heaney, Stephenson, Oliver [Sr DJ; WD Mo]) affirmed in part and reversed in part. It declared that not every legislative prayer practice violates the Establishment Clause. But on the facts of this case, Nebraska had gone too far in retaining and compensating a single Presbyterian minister as its chaplain for sixteen years. This practice, viewed as a whole, failed to satisfy the three-part test of your opinion in Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973) (citing Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971)). It serves no secular purpose, has a primary effect of advancing one religious view, and entangles the State with religion.



## II. Discussion

### A. General Observations and Disclaimer

I must confess that I have some trouble seeing why the parties are so excited about this case. Even if Chambers is a non-Christian, Palmer's prayers do not seem so offensive that it is worth the effort of bringing a lawsuit to the Supreme Court. This is not a case in which impressionable young children are being forced against their will to attend proselytizing prayer sessions as part of their public school classes. Cf. Abington School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Jaffree v. Board of School Commissioners, \_\_\_\_ U.S. \_\_\_\_ (1983) (POWELL, J., in chambers). I assume that the Nebraska senators are all mature adults who are perfectly capable of deciding their religious beliefs for themselves. Anyone who does not share Palmer's beliefs is unlikely to be convinced by his two-minute prayers. Even if the prayers are unconstitutional, I would think it would be easier to ignore them than to bring this lawsuit.<sup>3</sup> But it appears that Chambers is offended by the prayers, and believes very strongly that he should not be subjected to them in the legislative chamber.

I find it harder to apologize for the State's actions. Even if the Nebraska Legislature were entitled to begin each sitting with a prayer, why does it insist on asserting this right

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<sup>3</sup>Perhaps this is merely an indication of my non-litigious nature. I probably would not think it worth the effort of bringing a lawsuit if the Nebraska Legislature began each day with two minutes of pornographic films.



when it knows that at least one<sup>4</sup> of its members is deeply offended by the practice? It strikes me as a matter of common courtesy, entirely independent of constitutional law, that those senators who wish to pray together should do so at a time and place that will not offend Chambers. I cannot believe that the purported secular purpose is the real reason for defending this lawsuit, let alone for petitioning this Court for cert. If all the Legislature wanted were "a brief, solemn and thoughtful act in a traditional manner" to bring the assembly to order, Petrs' Brief 27, it easily could provide for a secular ceremony, such as reciting the "Pledge of Allegiance." I am convinced that petrs' motives in this suit are closely related to their belief that prayer and religion are good things that should form a part of all of our activities. While I am sure that these beliefs are just as firmly and genuinely held as Chambers's beliefs, they are also clearly religious. It is ironic, but the best proof that petrs have a weak defense is their vigorous action in defending the suit.

As the heading suggests, I write this section for two reasons. First, I do not think this case is important enough to be worth the Court's time. Given the vocal complaints about the Court's docket from some of the Justices who voted to grant, I think a DIG would be the best course. But you voted to deny, so my complaints are directed to the wrong quarter. Second, you

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<sup>4</sup>There is some suggestion that a Jewish senator also has objected to Palmer's prayers.



50 20

should know that I do not feel strongly about this case one way or the other. Although I recommend affirming, I think both sides are being pretty silly. Reversal would be inconsistent with the prior cases, but it would be an inconsistency that the Court could tolerate.

B. The Historical Argument

As in United States v. Villamonte-Marquez, No. 81-1350, the Government argues that questionable official actions are consistent with the Bill of Rights because the First Congress accepted them. We agreed in Villamonte-Marquez that the First Congress's practice was strong evidence, but it could not be dispositive. The same Congress, after all, explicitly authorized punishments that today would violate the Eighth Amendment, and the same Congress recognized slavery. Even the statute at issue in Villamonte-Marquez, while constitutional in its application to ocean-going vessels near the coast, is probably inconsistent with the Fourth Amendment to the extent it purports to authorize suspicionless searches of pleasure boats on inland rivers. Furthermore, the type of analysis urged by the Government was rejected by the Court in Brown v. Board of Education, 347 U.S. 483, 489 (1954). The Congress that proposed the Fourteenth Amendment had specifically provided for segregated schools in the District of Columbia.

The Establishment Clause in general, and legislative prayer in particular, is an area where very little weight can be placed on the eighteenth-century historical practice. On the

True,  
but  
this  
is  
different

Why



general point, eighteenth-century society was very different from today's society. Virtually everyone then was a Christian,<sup>?</sup> and most were Protestants. So long as a legislative chaplain did not espouse views of one sect that were inconsistent with views of another sect, there was no minority whose rights were being abridged by the majority. Today's society is much more pluralistic. There are significant numbers of atheists, agnostics, and members of non-Christian religions. It is probably impossible to have a chaplain who could deliver prayers, as we generally understand the term, that are not inconsistent with the views of at least the atheists and agnostics. Thus the overwhelming changes in social conditions make the eighteenth-century practice of little direct relevance in this area. True

On the specific point, eighteenth-century beliefs are again not very helpful. Madison himself, who drafted the First Amendment, believed that legislative chaplaincies were inconsistent with the Establishment Clause. In his "Detached Memoranda," he described the practice as "a palpable violation of equal rights, as well as of Constitutional principles."<sup>5</sup> One cannot say that there was a clear recognition by the relevant Framers that the First Amendment would allow legislative chaplains, even in the eighteenth century. ?

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<sup>5</sup>This document is reprinted as an appendix to the amicus brief of Murray, et al. This brief also discusses the historical arguments in some detail at pp. 5-16. If you find these arguments significant, you should certainly read it.



C. The Purpose-Effect-Entanglement Test

Over the years, the Court has developed a "well-defined three-part test," Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973), to judge laws under the Establishment Clause. As you explained in Nyquist:

[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion.

Id., at 773 (citations and footnote omitted); see also Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). The Lemon Court also identified "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Id., at 612 (quoting Walz v. Tax Commission, 397 U.S. 664, 668 (1970)).

The first step is to identify the practices that must be judged against these criteria. I agree with CA8 that it is necessary to examine the Nebraska scheme as a whole. Although the compensation is a factor weighing against the system, it makes little sense for this Court to say that everything except the compensation can continue. In any event, the DC's rationale for excluding the prayers themselves from the scope of the Establishment Clause is specious. The DC reasoned that the Legislature was not making a law in having the prayers, for the prayers did not affect anyone outside the Legislature. But Rule 1, §§2, 21, and Rule 7(A), §1(b), are clearly legislative enactments that

lys



require compliance. Even if they did not affect anyone outside of the Legislature (a questionable assumption, in view of their symbolic effect), they affect Chambers--and he strenuously objects to them.<sup>6</sup> The First Amendment was designed to protect minorities from the improper power of the majority. In treating the results of a non-unanimous majority vote as the voluntary act of a group of individuals, the DC misses this fundamental principle.

Looking at the Nebraska prayer practice as a whole, my inclination is to agree with Madison. It is "a palpable violation of equal rights, as well as of Constitutional principles." Chambers sincerely believes, as a religious matter, that Palmer's prayers are wrong. The First Amendment prohibits the State from forcing the majority's inconsistent religious views upon him. By making the prayers an integral part of the legislative process, and by holding them at a key time in the day, the State is presenting Chambers with an impermissible choice: stay in the chamber and be subjected to religious statements by a state officer, or leave the chamber and be a less effective representative. It does not matter that Chambers is a member of a small minority, or that the majority not only tolerate but applaud the prayers. It is minorities such as this that the First Amendment was designed

<sup>6</sup>Under the DC's reasoning, the population as a whole could decree by referendum that no Republican newspapers may be published. The DC's rationale would say that this is not subject to the First Amendment because it is not a law, and it is not a law because it does not affect anyone other than the body who passed it by a majority vote.



to protect. The majority are free, of course, to meet together and pray, but they must do so at a time that does not burden Chamber's First Amendment rights.

In my view, the State's prayer practices violate all three prongs of the purpose-effect-entanglement test and suffer from all of the evils identified in Lemon. Holding prayers is inherently religious. Palmer's prayers in particular are indisputably religious. The State's purported secular purpose could be achieved just as easily by reciting the "Pledge of Allegiance" or hearing a lay person's two-minute philosophical talk that made no meaningful reference to God. The effect of the Nebraska policy is also religious. The passions that this case inflames are clearly religious on both sides. The vocal opponents of state-sponsored prayers do not object to "brief, solemn and thoughtful act[s]"; they object to the religious aspects of the prayers. And the vocal supporters of state-sponsored prayers are motivated by their sincere religious beliefs. They are convinced that belief in God and support of religious activities are among the pillars of America's greatness,<sup>7</sup> and that we should all conduct ourselves accordingly. Finally, a long-term relationship between the Legislature and a paid clergyman has the effect of entangling the government in religion. Every day a "religious ceremony" is an inherent part of the legislative program.

*- Restatement*

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<sup>7</sup>These views are probably right, but respect for dissenting minorities is another pillar of America's greatness. Thus the First Amendment prohibits the religious majority from imposing its views on people like Chambers.



In sum, I find it very difficult to reconcile a legislative chaplain with the Establishment Clause in today's pluralistic society. If Palmer could compose "prayers" in such a way that they do not express meaningful<sup>8</sup> religious views inconsistent with Chambers's, there would be no problem. But that would have the effect of making Palmer something other than a chaplain, and his daily speeches something other than "prayers."

D. The Procedural Posture of the Case

I can understand why the Court would prefer, on political grounds, to avoid ruling on legislative prayer as a general matter. A vocal portion of the population would like to impose its religious views on the country as a whole, and this group is well represented in the other two branches of the government. Fortunately the present case does not require such a broad ruling. CA8 held that legislative prayers are not per se violations of the Establishment Clause, but that Nebraska had gone too far in its practices here. CA8's judgment left Nebraska free to formulate some other plan that would continue to incorporate prayer

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<sup>8</sup>I do not think that a reference to God necessarily leads to an Establishment Clause violation. Many references have become so commonplace that they have lost any real religious meaning. If Nebraska were to adopt my suggestion, for example, and recite the "Pledge of Allegiance" each morning, it would not violate the Establishment Clause to include the phrase "under God" that is part of the pledge. Similarly, I see no problem with this Court's Marshal declaring "God save the United States and this honorable Court" at the beginning of each session. The phrase "In God we trust" on our money is in the same category. The problem in Nebraska is that Palmer's prayers are designed to be meaningful, religious statements.

why  
not



into its legislative program. Chambers did not cross-petn for review of that judgment. The Court could thus affirm the judgment without expressing a view on legislative prayer as a general matter, but concluding that there was an Establishment Clause violation on the facts of this case.

### III. Conclusion

The decision below should be affirmed. Prayer is an inherently religious activity, and the prayers here were clearly religious. When a State conducts meaningful prayers as part of its official governmental functions, it violates the Establishment Clause. The Court may wish to hold, however, merely that Nebraska violated the Establishment Clause on the extreme facts of this case.



Opening of session ~~at~~ of Neb. Leg.  
with a prayer.

(School prayer ~~diff~~ is different:  
children impressionable ages;  
teacher is supposed to "teach" -  
children so may not distinguish  
bet. "ceremonial" & "instruction";  
also children can't leave  
& ~~unlike~~ unlike a legislature  
can't debate issue & discontinue  
practice)



Cronk (Sp Asst AG of Mel) (Good lawyer)

Per se challenge not adapted  
by CA8. 9+ limited its ruling to  
paying salary & retaining same chaplain  
too long.

First complaint ever made <sup>in the legislature</sup>  
to the Chaplain or to prayer was  
when Resp. came to Senate in 1979.  
Practice began in 1955.

~~Person~~ Ministers from other  
~~chaplain~~ churches often invited.

② A "tradition" of Legislature  
- more form than substance.

Rich history in our Country  
- see McGowan v Mel & Walz.

Framework practiced the opening  
of ~~session~~ sessions with prayer  
First Continental Congress  
& subsequent to 1st Amend the  
practice was continued.

heqs. of all (?) other states also.

Appointed every two yrs at beginning  
of Session - by Executive Bd.

Chaplain is one of officers.

Has no office.



Cronk (cont)

Publication of prayer book: DC held expenditure of state funds was improper. Not appealed here

Only small no. of copies - ca 50 cc.

Friedman (Resp)

Compensation is part of this case, but compensation makes no difference.

Also it would be invalid to have any prayer in Leg. - whether same minister or different every day.

Also invalid for def. member of Leg. opens w/prayer every day.

Cronk,

Resp's argument has reduced to a "symbolic" one - but no ev. in record to support this argument. Record addressed def. Q



The Chief Justice ~~Chapman~~ Rev.

'Temper in a sauce' case

Immaterial whether Chaplin is paid or not paid.

Case pending in CRDC - same issue

Prayers do have religious purpose on their face but not in fact.

No ev. of entanglement.

History is important as it was in Waltz. ~~Free~~

Justice Brennan

Aff'mo

Govt must be neutral. Prayers in a ~~govt~~ governmental body directly conflicts with 1<sup>st</sup> Amend.

Pay of Chaplin is immaterial.

Case is silly

Facially ~~immaterial~~ invalid.

Clear entanglement.

Justice White

Rev.

Agrees with ~~Justice~~ C. J.

History of our country supports this position - two centuries.



Justice Marshall

Off in

Agree with W & B

Justice Blackmun

Rev.

Publication of prayer books is not before.

A principled op. can be written on either side of this case.

Lemon points one way. Waltz <sup>+ Allen</sup> the other.

There is a formality

A "page of history" is worth a ~~poor~~ <sup>volume</sup> of logic.

If we reverse, who should emphasize the "neutrality" of prayer vs. C.C. not one denomination

Justice Powell

Rev.

Quite dif. between "school" prayer & legislature. (In prior case we have recognized dif. bet. college & schools). Legislators are not captive audience - as school kids are.

We would trivialize the Est. Clause to ~~extend~~

I would trust a legislative body to determine its own ~~own~~ ceremonial procedure.

History of our country is certainly relevant.

I agree with this caution

All other states do this.



Justice Rehnquist *Rev.*

*History is almost controlling.*

Justice Stevens *Affirm*

*Significant that there was same minister for 16 yrs.*

*Hist. is persuasive but at least on facts here hist. doesn't control*

Justice O'Connor *Affirm*

*Framers clearly thought ~~the~~ <sup>OK,</sup> leg. prayer*

*Lemon facts do not fit*



Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **The Chief Justice**

Circulated: **MAY 26 1983**

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-23

**FRANK MARSH, STATE TREASURER, ET AL.,  
PETITIONER v. ERNEST CHAMBERS**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT**

[May —, 1983]

CHIEF JUSTICE BURGER delivered the opinion of the  
Court.

The question presented is whether the Nebraska Legisla-  
ture's practice of opening each legislative day with a prayer  
by a chaplain paid by the State violates the Establishment  
Clause.

**I**

The Nebraska 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 and paid out of  
public funds.<sup>1</sup> Robert E. Palmer, a Presbyterian minister,  
has served as chaplain since 1965 at a salary of \$319.75 per  
month for each month the legislature is in session.

Ernest Chambers is a member of the Nebraska Legislature  
and a taxpayer of Nebraska. Claiming that the Nebraska  
Legislature's chaplaincy practice violates the Establishment  
Clause of the First Amendment, he brought this action under  
42 U. S. C. § 1983, seeking to enjoin enforcement of the prac-

<sup>1</sup> Rules of the Nebraska Unicameral, Rules 1, 2, and 21. These prayers  
are recorded in the Legislative Journal and, upon the vote of the Legisla-  
ture, collected from time to time into prayerbooks, which are published at  
the public expense. In 1975, 200 copies were printed, in 1978 (200 copies),  
and 1979 (100 copies). In total, publication costs amounted to \$458.56.

p 6  
8

Join  
but see  
my  
letter  
to the  
C.J.



tice.<sup>2</sup> After denying a motion to dismiss on the ground of legislative immunity, the District Court held that the Establishment Clause was not breached by the prayers, but was violated by paying the chaplain from public funds. It therefore enjoined the the Legislature from using public funds to pay the chaplain, but declined to enjoin the policy of beginning sessions with prayers. Cross-appeals were taken.<sup>3</sup>

The Court of Appeals for the Eighth Circuit rejected arguments that the case should be dismissed on Tenth Amendment, legislative immunity, standing or federalism grounds. On the merits of the chaplaincy issue, the court refused to treat respondent's challenges as separable issues in the manner of the District Court. Instead, the Court of Appeals assessed the practice as a whole because "[p]arsing out [the] elements" would lead to "an incongruous result." 675 F. 2d 228, 233 (CA8 1982). Applying the three-part test of *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971), as set out in *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U. S. 756, 773 (1973), the court held that the chaplaincy practice violated all three elements of the test: the purpose and primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression; use of state money for compensation and publication led to entanglement. 675 F. 2d, at 234-235. Accordingly, the Court of Appeals modified the District Court's injunction and prohibited the State from engaging in any aspect of its established chaplaincy practice.

We granted certiorari limited to the challenge to the prac-

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<sup>2</sup> Respondent named as defendants State Treasurer Frank Marsh, Chaplain Palmer, and the members of the Executive Board of the Legislative Council in their official capacity. All appear as petitioners before us.

<sup>3</sup> The District Court also enjoined the State from using public funds to publish the prayers holding that this practice violated the Establishment Clause. Petitioners have represented to us that they did not challenge this facet of the District Court's decision, Tr. of Oral Arg. 19-20. Accordingly, no issue as to publishing these prayers is before us.



tice of opening sessions with prayers by a State-employed clergyman, — U. S. — (1982), and we reverse.<sup>4</sup>

## II

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with a court attendant's announcement that concluded, "God save the United States and this Honorable Court."

The tradition in many of the colonies was, of course, linked to an established church,<sup>5</sup> but the Continental Congress

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<sup>4</sup>Petitioners also sought review of their Tenth Amendment, federalism and immunity claims. They did not, however, challenge the Court of Appeals' decision as to standing and we agree that Chambers, as a member of the Legislature and as a taxpayer whose taxes are used to fund the chaplaincy, has standing to assert this claim.

<sup>5</sup>The practice in colonies with established churches is, of course, not dispositive of the legislative prayer question. The history of Virginia is instructive, however, because that colony took the lead in defining religious rights. In 1776, the Virginia Convention adopted a Declaration of Rights that included, as Article 16, a guarantee of religious liberty that is considered the precursor of both the Free Exercise and Establishment Clauses. 1 B. Schwartz, *The Bill of Rights, A Documentary History* 231-236 (1971); S. Cobb, *The Rise of Religious Liberty in America*, 491-492 (1970) (hereinafter Cobb). Virginia was also among the first to disestablish its church. Both before and after disestablishment, however, Virginia followed the practice of opening legislative sessions with prayer. See *e. g.*, J. of the House of Burgesses 34 (Nov. 20, 1712); Debates in the Convention of the Commonwealth of Va. 470 (June 2, 1788) (ratification convention); J. of the House of Delegates of Va. 3 (June 24, 1788) (state legislature).

Rhode Island's experience mirrored that of Virginia. That colony was founded by Roger Williams, who was among the first of his era to espouse the principle of religious freedom. Cobb, at 426. As early as 1641, its



adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain, see *e. g.*, 1 J. of the Continental Cong. 26 (1774); 2 J. of the Continental Cong. 12 (1775); 5 J. of the Continental Cong. 530 (1776); 6 J. of the Continental Cong. 887 (1776); 27 J. of the Continental Cong. 683 (1784). See also 1 A. Stokes, *Church and State in the United States* 448-450 (1950) (hereinafter Stokes). Although invocations were not offered during the Constitutional Convention,<sup>6</sup> the First Congress, as one of its early items of business, also adopted the policy of selecting a chaplain to open each session with prayer. Thus, on April 7, 1789, the Senate appointed a committee "to take under consideration the manner of electing Chaplains." J. of the Sen. 10. On April 9, 1789, a similar committee was appointed by the House of Representatives. On April 25, 1789, the Senate elected its first chaplain, J. of the Sen. 16; the House followed suit on May 1, 1789, J. of the H. R. 26. A statute providing for the payment of these chaplains was enacted into law on Sept. 22, 1789. 2 Annals of Cong. 2180; 1 Stat. 71.<sup>7</sup>

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Legislature provided for liberty of conscience. *Id.*, at 430. Yet the sessions of its ratification convention, like Virginia's, began with prayers, see W. Staples, *Rhode Island in the Continental Congress, 1765-1790* 668 (1971) (reprinting May 26, 1790 minutes of the convention).

<sup>6</sup>History suggests that this may simply have been an oversight. At one point, Benjamin Franklin suggested "that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business." 1 M. Farrand, *Records of the Federal Convention of 1787* 452 (1911). His proposal was rejected not because the Convention was opposed to prayer, but because it was thought that a mid-stream adoption of the policy would highlight prior omissions and because "[t]he Convention had no funds." *Ibid.*; see also Stokes, at 455-456.

<sup>7</sup>It bears note that James Madison, one of the principal advocates of religious freedom in the colonies and a drafter of the Establishment Clause, see, *e. g.*, Cobb, *supra*, at 495-497; Stokes, *supra*, at 537-552, was one of those appointed to undertake this task by the House of Representatives, J. of the H. R. 11-12; Stokes, at 541-549, and voted for the bill authorizing



It is significant that on Sept. 25, 1789, three days after Congress authorized the appointment of a paid chaplain, final agreement was reached on the language of the Bill of Rights, J. of the Sen. 88; J. of the H. R. 121.<sup>8</sup> The practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.<sup>9</sup> The practice has also been followed consistently in a great many states,<sup>10</sup> in-

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payment of the chaplains, 1 Annals of Cong. 891.

<sup>8</sup> Interestingly, Sept. 25, 1789 was also the day that the House resolved to request the President to set aside a Thanksgiving Day to acknowledge "the many signal favors of Almighty God," J. of the H. R. 123. See also J. of the Sen. 88.

<sup>9</sup> The chaplaincy was challenged in the 1850's by "sundry petitions praying Congress to abolish the office of chaplain," S. Rep. No. 376, 32d Cong., 2d Sess. 1 (1853). After consideration by the Senate Committee on the Judiciary, the Senate decided that the practice did not violate the Establishment Clause, reasoning that a rule permitting Congress to elect chaplains is not a law establishing a national church and that the chaplaincy was no different from Sunday Closing Laws, which the Senate thought clearly constitutional. In addition, the Senate reasoned, since prayer was said by the very Congress that adopted the Bill of Rights, the Founding Fathers could not have intended the First Amendment to forbid legislative prayer or viewed prayer as a step toward an established church. *Id.*, at 2-4. In any event, the 35th Congress abandoned the practice of electing chaplains in favor of inviting local clergy to officiate, see Cong. Globe, 35th Cong., 1st Sess. 14, 27-28 (1857). Elected chaplains were reinstituted by the 36th Congress, Cong. Globe, 36th Cong., 1st Sess. 162 (1859); *id.*, at 1016 (1860).

<sup>10</sup> See Brief of the Nat'l Conference of State Legislatures as *Amicus Curiae*. Although most state legislatures begin their sessions with prayer, most do not have a formal rule requiring this procedure. But see, e. g., Alaska State Leg. Uniform Rule 11 and 17 (19??) (providing for opening invocation); Ark. Rules of Sen 18 (1983); Colo. Legislator's Handbook, House of Rep. Rule 44 (1982); Idaho Rules of the H. R. and Joint Rules 2 and 4 (1982); Ind. H. R. Rule 10 (1983); Idaho, Standing Rules and Order for the Gov't of the Sen Rule 4(a); Kan., Rules of the Sen. 4 (1983); Kan., Rules of the H. R. 103 (1983); Ky. Gen'l Ass. H. Res. 2 (1982); La. Rules of Order, Sen. Rule 10.1 (1983); La. Rules of Order, House Rule 8.1 (1982); Me. Sen. and House Register, Rules of the House 4 (1983); Md., Sen. and House of Delegates Rules 1 (19??); N. H. Manual for the Use of the Gen'l



cluding Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood, Nebraska Journal of the Council at the First Regular Session of the General Assembly 16 (Jan. 22, 1855).

Historical patterns alone, of course, <sup>do not invariably</sup> afford ~~no~~ basis for contemporary violations of constitutional limits, but there is far more here than simply a pattern of over two centuries. The intent of the draftsmen and of the First Congress is far weightier evidence of the accepted meaning of the Establishment Clause than the views of those who came thereafter.

In *Walz v. Tax Comm'r*, 397 U. S. 664, 678 (1970), we considered the weight to be accorded to history:

"It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside."

No more is Nebraska's practice of more than a century, consistent with Congressional practice, to be cast aside. It cannot be that in the same week that Members of Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for sub-

Court of N. H., Rules of the House 52 (a) (1981); N. D. Sen. and House Rules 101 and 310 (1977); Ore. Rules of Sen 4.01 (1983); Ore. Rules of H. R. 401 (1983) (opening session only); Pa. H. R. Rule 17 (1977); Pa. Sen. Rule XI (1) (1977); S. D. Official Directory and Rules of the Sen. and H. R. Joint Rules of the Sen. and House 4-1 (1983); Tenn. Permanent Rules of Order of the Sen. 6 (1981-1982) (provides for admission into Sen. chamber of the "Chaplain of the Day"); Tex. Rules of the H. R. 6 (1983); Utah Rules of the State Sen. and H. R. 4.04 (1983); Va. Manual of the Sen. and House of Delegates, Rules of the Sen. 21(a) (1982) (session opens with "period of devotions"); Wash. Permanent Rules of the H. R. 15 (1983); Wyo. Rules of the Sen. 4-1 (1983); Wyo. Rules of the H. R. 2-1 (1983). See also, Mason's Manual of Legislative Procedure § 586(2) (1979).



mission to the States, that they meant one Clause of that Amendment to forbid that which they had just declared acceptable. In applying the First Amendment to the states through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U. S. 296 (1940), it would be incongruous to interpret its provisions as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government. It is this unique history which led the District Judge in this case to hold that the entanglement test of *Lemon v. Kurtzman*, *surpra*, was not violated by legislative prayer.

Respondents argue that we should not rely too heavily on "the advice of the Founding Fathers," *Abington School Dist. v. Schempp*, 374 U. S. 203, 237 (1963) (BRENNAN, J., concurring), because the messages of history often tend to be ambiguous and not relevant to a society far more heterogeneous than that of the Framers, *id.*, at 240. On this score, respondent points out that John Jay and John Rutledge opposed the motion to begin the first session of the Continental Congress with prayer. Brief for Respondent 60.<sup>11</sup> We do not agree that evidence of opposition to a measure weakens the historical argument; indeed it strengthens it by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society. Jay and Rutledge specifically grounded their objection on the fact that the delegates "were so divided in religious sentiments . . . that [they] could not join in the same act of worship." Their objection was overcome by Samuel Adams,

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<sup>11</sup> It also could be noted that objections to prayer were raised, apparently successfully, in Pennsylvania while ratification of the Constitution was debated, Penn. Herald, Nov. 24, 1787, and that in the 1820s, Madison expressed doubts concerning the chaplaincy practice. See, L. Pfeffer, *Church State and Freedom* 248-249 (rev. ed. 1967), quoting E. Fleet, Madison's "Detached Memoranda," III William and Mary Quarterly 558-559 (1946).



who stated 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." C. Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams*, during the Revolution 37-38, reprinted in Stokes, at 449. This interchange emphasizes that the early legislators did not consider opening prayers as a proselytizing activity or as symbolically placing the government's "official seal of approval on one religious view" cf. 675 F. 2d, at 234. Rather, the Founding Fathers looked at invocations merely as "conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions." *McGowan v. Maryland*, 366 U. S. 420, 442 (1961).

The Establishment Clause does not always bar a state from regulating conduct simply because it "harmonizes with religious canons." *Id.*, at 462 (Frankfurter, J., concurring). And this is especially true where, as here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to "religious indoctrination," see *Tilton v. Richardson*, 403 U. S. 672, 686 (1971); *Colo. v. Treasurer & Receiver Gen'l*, 392 N. E. 2d 1195, 1200 (Mass. 1979), or peer pressure, compare, *Abington*, *supra*, 374 U. S., at 290 (BRENNAN, J., concurring).

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has, like the Sunday Closing Laws upheld in *McGowan*, become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not an "establishment" of religion, but a tolerable acknowledgment of beliefs widely held in this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U. S. 306, 313 (1952).

### III

We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause.

my op

cf p 6

Sunday  
Closing  
Laws



Beyond the bare fact that a prayer is offered, three points have been made: first, that a clergyman of only one denomination—Presbyterian—has been selected for 16 years;<sup>12</sup> second, that the chaplain is paid at public expense; and third, that the prayers are in the Judeo-Christian tradition.<sup>13</sup> Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice.<sup>14</sup>

The Court of Appeals was concerned that Palmer's long tenure has the effect of giving preference to his religious views. We, no more than Members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church.<sup>15</sup> To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him.<sup>16</sup>

<sup>12</sup> In comparison, the First Congress provided for the appointment of two chaplains of different denominations who would alternate between the two chambers on a weekly basis, J. of the Sen. 12; J. of the H. R. 16.

<sup>13</sup> Palmer characterizes his prayers as "nonsectarian," "Judeo Christian," and with "elements of the American civil religion." App. 75 and 87. (Deposition of Robert E. Palmer). Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator. *Id.*, at 49.

<sup>14</sup> It is also claimed that Nebraska's practice of collecting the prayers into books violates the First Amendment. Because the State did not appeal the District Court order enjoining further publications, see n. 3, *supra*, this issue is not before us and we express no opinion on it.

<sup>15</sup> We note that Dr. Edward L.R. Elson, served as Chaplain of the Senate of the United States from January 1969 to February 1981, a period of 12 years; Dr. Frederick Brown Harris served from February 1949 to January 1969, a period of 20 years. Senate Library, Chaplains of the Federal Government (rev. 1982).

<sup>16</sup> Nebraska's practice is consistent with the manner in which the First Congress viewed its chaplains. Reports contemporaneous with the elections reported only the chaplains' names, and not their religions or church affiliations, see, e. g., II Gazette of the U. S. 18 (April 25, 1789); V Gazette of the U. S. 18 (April 27, 1789) (listing nominees for chaplain of the House); VI Gazette of the U. S. 23 (May 1, 1789). See also S. Rep. 376, *supra*, at



Palmer was not the only clergyman heard by the Legislature; several guest chaplains have officiated at the request of various legislators and as substitutes during Palmer's absences. Tr. of Oral Arg. 10. Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself violate the Establishment Clause.

Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature's chaplaincy; remuneration is grounded in historic practice initiated, as we noted earlier, *ante*, at —, by the same Congress that adopted the Establishment Clause of the First Amendment. The Continental Congress paid its chaplain, see *e. g.*, 6 J. of the Continental Cong. 887 (1776), as did some of the states, see *e. g.*, Debates and other Proceedings of the Convention of Va. 470 (June 26, 1788). Currently, many state legislatures and the United States Congress provide for the compensation of their chaplains, Brief for Nat'l Conference of State Legislatures as *Amicus Curiae* 3; 2 U. S. C. §§61d and 84-2; H. R. Res. 7, 96th Cong., 1st Sess. (1979).<sup>17</sup> Nebraska has paid its chaplain for well over a century, see 1867 Neb. Laws §§2-4 (June 21, 1867), reprinted in, Neb. Gen'l Stat. 459 (1873). The content of the Nebraska prayers is not, and can-

3.

<sup>17</sup>The states' practices differ widely. Like Nebraska, several states choose a chaplain who serves for the entire legislative session. In other states, the prayer is offered by a different clergyman each day. Under either system, some states pay their chaplains and others do not. For states providing for compensation statutorily or by resolution, see, *e. g.*, Cal. Gov't Code Ann. §§ 9170, 9171, 9320 and Sen. Res. No. 6 (1983); Colo. House J., 54th Gen. Ass. 17-19 (Jan. 5, 1983); Conn. Gen. Stat. § 2-9 (1982); Geo. H. R. Res. No. 3(1)(e) (1983); Geo. S. Res. No. 3(1)(r) (1983); Iowa Code § 2.11 (1983); Mo. Rev. Stat. § 21.150 (1969) (West); Nev. Rev. Stat. § 218.200 (1979); N. J. Stat. Ann. § 52:11-2 (1970) (West); N. M. Stat. Ann. Const. Art. IV § 9 (1978); Okla. Stat. Tit. 74, §§ 291.12 and 292.1 (West Supp. 1982); Vt. Stat. Ann., Tit. 2, § 19 (1982 Supp.); Wisc. Stat. § 13.125 (1982 Supp.).



not be, of concern to us. ¶ The sincerity of those who, like respondent, entertain concerns such as those raised here cannot be doubted; the concern is that if prayer in this context is permitted, it can be the beginning of the establishment the Founding Fathers feared. But Justice Goldberg, concurring in *Abington*, 374 U. S., at 308, aptly disposed of this fear:

“It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.”

The unbroken practice in the National Congress and Nebraska gives abundant assurance that there is no “real threat” here, at least not “while this Court sits,” *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928) (Holmes, J., dissenting).

The judgment of the Court of Appeals is

*Reversed.*



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 27, 1983

✓

Re: No. 82-23

Marsh v. Chambers

Dear Chief,

I shall be circulating in due  
course a dissent in the above.

Sincerely,

Bu'l

The Chief Justice

Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

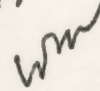
May 27, 1983

Re: No. 82-23 Marsh v. Chambers

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

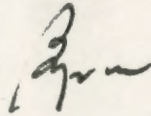
CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 27, 1983

Re: 82-23 - Marsh v. Chambers

Dear Chief,  
I agree.

Sincerely,



The Chief Justice  
cc: The Conference  
cpm



May 29, 1983

82-23 Marsh v. Chambers

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference



May 30, 1983

82-23 Marsh v. Chambers

Dear Chief:

I have written a separate join note. This letter is to call your attention to what seems me to be a somewhat inconsistent statement in your otherwise fine opinion.

On page 6, the first sentence in the first full paragraph reads as follows:

"Historical patterns alone, of course, afford no basis for contemporary violations of constitutional limits, but there is far more here than simply a pattern of over two centuries."

The opinion then proceeds to emphasize the relevant history, and on p. 8 it says:

"In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has, like the Sunday Closing Laws upheld in McGowan, become part of the fabric of our society."

I would not suggest that "historical patterns alone" afford no basis for rejecting a constitutional challenge. This depends, as in this case, on how consistently the "patterns" have been practiced, and on other relevant factors.

My guess also is that you may receive some adverse reaction to equating this case with Sunday Closing Laws, as - perhaps unhappily - there have been dramatic changes in the mores and habits of people even since McGowan. I am not at all sure that there would be five votes today to sustain the validity of what inaccurately are called "Blue Laws".

My join is not conditioned upon your making the changes. I merely bring these suggestions to your attention.

Sincerely,

The Chief Justice

lfp/ss



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 28, 1983

Re: No. 82-23-Marsh v. Chambers

Dear Bill:

Please join me in your dissent.

Sincerely,

*J.M.*  
T.M.

Justice Brennan

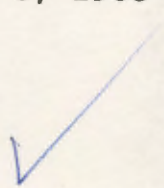
cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 3, 1983

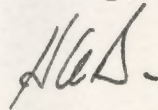


Re: No. 82-23 - Marsh v. Chambers

Dear Chief:

Please join me in your third draft circulated today.

Sincerely,



The Chief Justice

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 3, 1983

No. 82-23 Marsh v. Chambers

Dear Chief,

Please join me.

Sincerely,

*Sandra*

The Chief Justice

Copies to the Conference



Purpose of Est. Claim never embraced  
this type.

Decided 7/5/83



82-23 Marsh v. Chambers (Mike)

CJ for the Court  
1st draft 5/26/83  
3rd draft 6/3/83  
4th draft 6/29/83  
Joined by BRW, HAB, LFP, WHR, SOC

JPS dissent  
1st draft 6/8/83

WJB dissent  
Typed draft 6/28/83  
1st draft 6/29/83  
Joined by TM