MARSH v. CHAMBERS

SUPREME COURT OF THE UNITED STATES
463 U.S. 783
July 5, 1983
[6 - 3]

Government sponsored prayer is not permitted in our schools. (*Engel v Vitale*). How about prayer said by a "state paid chaplain" to open a legislative session?

OPINION: Chief Justice Burger...The question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the 1st Amendment...The opening of sessions of legislative and other... public bodies with prayer is deeply embedded in the history and tradition of this country...

The tradition in many of the Colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. **Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, 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." On April 9, 1789, a similar committee was appointed by the House of Representatives. On April 25, 1789, the Senate elected its first chaplain; the House followed suit on May 1, 1789. A statute providing for the payment of these chaplains was enacted into law on September 22, 1789.

On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the 1st Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress...

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress

-- their actions reveal their intent. **An Act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument,...is contemporaneous and weighty evidence of its true meaning**."

In *Walz v. Tax Comm'n*[1], 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 over a century, consistent with two centuries of national practice, to be cast aside. It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the 1st Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. In applying the 1st Amendment to the states through the 14th Amendment, it would be incongruous to interpret that Clause as imposing more stringent 1st Amendment limits on the states than the draftsmen imposed on the Federal Government.

This unique history leads us to accept the interpretation of the 1st Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation (*Everson v. Board of Education*[2]*),* beneficial grants for higher education (*Tilton v. Richardson*[3]*),* or tax exemptions for religious organizations (*Walz).*

Respondent cites Justice Brennan's concurring opinion in *Abington*[4] and argues that we should not rely too heavily on "the advice of the Founding Fathers" because the messages of history often tend to be ambiguous and not relevant to a society far more heterogeneous than that of the Framers. Respondent also points out that John Jay and John Rutledge opposed the motion to begin the first session of the Continental Congress with prayer.

We do not agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power 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 to the Congress "were so divided in religious sentiments... that they could not join in the same act of worship." Their objection was met by Samuel Adams, 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."

This interchange emphasizes that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's "official seal of approval on

[1] Case 1A-R-039 on this website.
[2] Case 1A-R-022 on this website.
[3] Case 1A-R-043 on this website.
[4] Case 1A-R-034 on this website.

one religious view." Rather, the Founding Fathers looked at invocations as "conduct whose... effect...harmonized with the tenets of some or all religions." *McGowan v. Maryland.*[5] The Establishment Clause does not always bar a state from regulating conduct simply because it "harmonizes with religious canons." **Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to "religious indoctrination." In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.**

> The "actions of" and "legislation passed by" the Framers "at the time of the Framing" is extraordinarily important in the search for a proper interpretation. It is suggested, however, that Justice Burger confuses "more than 200 years of history" with the foregoing. In other words, in the absence of evidence of the Framers' intent on any topic, 200 years of tradition does not — does not — a correct Constitutional interpretation make! After all, we had prayer in public schools from their inception through the *Engel* case decided in 1962, but "unbroken history" did not save prayer, at least in a public school setting.

To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "we are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*.[6]

We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause. **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; second, that the chaplain is paid at public expense; and third, that the prayers are in the Judeo-Christian tradition. Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice…**

The Court of Appeals was concerned that [the Chaplain's] long tenure has the effect of giving preference to his religious views. We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that [the Chaplain] was reappointed because his performance and personal qualities were acceptable to the body appointing him. [He] was not the only clergyman heard by the legislature; guest chaplains have officiated at the request of various legislators and as substitutes during [his] absences...[W]e conclude that his long tenure does not in itself conflict with 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, by the same Congress that drafted the Establishment Clause of the 1st Amendment...**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**

[5] Case 1A-R-028 on this website.
[6] Case 1A-R-025 on this website.

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.

We do not doubt the sincerity of those, who like respondent, believe that to have prayer in this context risks the beginning of the establishment the Founding Fathers feared. But this concern is not well founded, for as Justice Goldberg aptly observed in his concurring opinion in *Abington:* "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 judgment of the Court of Appeals is *Reversed*.

DISSENT: Justice Brennan/Marshall...I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.

The most commonly cited formulation of prevailing Establishment Clause doctrine is found in *Lemon v. Kurtzman*[7]*:*

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute at issue must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"

That the "purpose" of legislative prayer is pre-eminently religious rather than secular seems to me to be self-evident. "To invoke Divine guidance on a public body entrusted with making the laws," is nothing but a religious act. Moreover, whatever secular functions legislative prayer might play -- formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose -- could so plainly be performed in a purely nonreligious fashion that **to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.**

The "primary effect" of legislative prayer is also clearly religious. As we said in the context of officially sponsored prayers in the public schools, "prescribing a particular form of religious worship," even if the individuals involved have the choice not to participate, places "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion..." *Engel v. Vitale*[8]. More importantly, invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. "The mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den, Inc.*[9]*; Abington School Dist*. v. *Schempp.*

[7] Case 1A-R-042 on this website.
[8] Case 1A-R-033 on this website.
[9] Case 1A-R-062 on this website.

Finally, there can be no doubt that the practice of legislative prayer leads to excessive "entanglement" between the State and religion. *Lemon* pointed out that "entanglement" can take two forms: First, a state statute or program might involve the state impermissibly in monitoring and overseeing religious affairs. **In the case of legislative prayer, the process of choosing a "suitable" chaplain, whether on a permanent or rotating basis, and insuring that the chaplain limits himself or herself to "suitable" prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid. Second, excessive "entanglement" might arise out of "the divisive political potential" of a state statute or program. "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the 1st Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process."**

In this case, this second aspect of entanglement is also clear. The controversy between Senator Chambers and his colleagues, which had reached the stage of difficulty and rancor long before this lawsuit was brought, has split the Nebraska Legislature precisely on issues of religion and religious conformity. The record in this case also reports a series of instances, involving legislators other than Senator Chambers, in which invocations by Reverend Palmer and others led to controversy along religious lines. And in general, the history of legislative prayer has been far more eventful -- and divisive -- than a hasty reading of the Court's opinion might indicate...

The principles of "separation" and "neutrality" implicit in the Establishment Clause serve many purposes. Four of these are particularly relevant here.

[1] To guarantee the individual right to conscience...

[2] To keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials.

[3] To prevent the trivialization and degradation of religion by too close an attachment to the organs of government...

[4] To help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena. With regard to most issues, the government may be influenced by partisan argument and may act as a partisan itself. In each case, there will be winners and losers in the political battle, and the losers' most common recourse is the right to dissent and the right to fight the battle again another day. **With regard to matters that are essentially religious, however, the Establishment Clause seeks that there should be no political battles, and that no American should at any point feel alienated from his government because that government has declared or acted upon some "official" or "authorized" point of view on a matter of religion…**

Nor should it be thought that this view of the Establishment Clause is a recent concoction of an overreaching judiciary. Even before the 1st Amendment was written, the Framers of the

Constitution broke with the practice of the Articles of Confederation and many state constitutions, and did not invoke the name of God in the document. This "omission of a reference to the Deity was not inadvertent; nor did it remain unnoticed." Moreover, Thomas Jefferson and Andrew Jackson, during their respective terms as President, both refused on Establishment Clause grounds to declare national days of thanksgiving or fasting. And **James Madison**, writing subsequent to his own Presidency on essentially the very issue we face today, stated:

> **"Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?**
>
> **"In strictness, the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation."**

Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause. It is contrary to the fundamental message of *Engel* and *Schempp*. It intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity" with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues. It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens...

We have also recognized that government cannot, without adopting a decidedly *anti*-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture. Certainly, bona fide classes in comparative religion can be offered in the public schools. And certainly, the text of Abraham Lincoln's Second Inaugural Address which is inscribed on a wall of the Lincoln Memorial need not be purged of its profound theological content. The practice of offering invocations at legislative sessions cannot, however, simply be dismissed as "a tolerable *acknowledgment of beliefs* widely held among the people of this country." "Prayer is religion *in act*."...Reverend Palmer and other members of the clergy...are engaged by the legislature to lead it -- as a body -- in an act of religious worship...

We are not faced here with the right of the legislature to allow its members to offer prayers during the course of general legislative debate. We are certainly not faced with the right of

legislators to form voluntary groups for prayer or worship. We are not even faced with the right of the State to employ members of the clergy to minister to the private religious needs of individual legislators.

Surely, Justice Brennan did not mean to go that far! Tax money going to pay ministers to attend to the private needs of legislators? I don't think so.

Rather, we are faced here with the regularized practice of conducting official prayers, on behalf of the entire legislature, as part of the order of business constituting the formal opening of every single session of the legislative term. If this is free exercise, the Establishment Clause has no meaning whatsoever...

There are at least three reasons why specific historical practice should not in this case override that clear constitutional imperative.

First, it is significant that the Court's historical argument does not rely on the legislative history of the Establishment Clause itself...

Second, the Court's analysis treats the 1st Amendment simply as an Act of Congress, as to whose meaning the intent of Congress is the single touchstone. Both the Constitution and its Amendments, however, became supreme law only by virtue of their ratification by the States, and **the understanding of the States should be as relevant to our analysis as the understanding of Congress**...

Finally, and most importantly, the argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee. To be truly faithful to the Framers, "our use of the history of their time must limit itself to broad purposes, not specific practices." *Abington*. Our primary task must be to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century..." *West Virginia Bd. of Education v. Barnette*[10] ...

An "originalist" might disagree.

The Court seems to regard legislative prayer as at most a *de minimis* violation, somehow unworthy of our attention. I frankly do not know what should be the proper disposition of features of our public life such as "God save the United States and this Honorable Court," "In God We Trust," "One Nation Under God," and the like. I might well adhere to the view expressed in *Schempp* that such mottos are consistent with the Establishment Clause, **not because their import is *de minimis*, but because they have lost any true religious significance**. Legislative invocations, however, are very different. First of all, as Justice Stevens'

[10] Case 1A-S-9 on this website.

dissent so effectively highlights, legislative prayer, unlike mottos with fixed wordings, can easily turn narrowly and obviously sectarian. I agree with the Court that the federal judiciary should not sit as a board of censors on individual prayers, but to my mind the better way of avoiding that task is by striking down all official legislative invocations. More fundamentally, however, *any* practice of legislative prayer, even if it might look "nonsectarian" to nine Justices of the Supreme Court, will inevitably and continuously involve the State in one or another religious debate...**The argument is made occasionally that a strict separation of religion and state robs the Nation of its spiritual identity. I believe quite the contrary.** It may be true that individuals cannot be "neutral" on the question of religion. But the judgment of the Establishment Clause is that neutrality by the organs of *government* on questions of religion is both possible and imperative. Alexis de Tocqueville wrote the following concerning his travels through this land in the early 1830's:

> "The religious atmosphere of the country was the first thing that struck me on arrival in the United States...In France I had seen the spirits of religion and of freedom almost always marching in opposite directions. In America I found them intimately linked together in joint reign over the same land. My longing to understand the reason for this phenomenon increased daily. To find this out, I questioned the faithful of all communions; I particularly sought the society of clergymen, who are the depositaries of the various creeds and have a personal interest in their survival...; **all thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state.** I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that."

...If the Court had struck down legislative prayer today, it would likely have stimulated a furious reaction. But it would also, I am convinced, have invigorated both the "spirit of religion" and the "spirit of freedom." I respectfully dissent.

DISSENT: Justice Stevens...In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature. Regardless of the motivation of the majority that exercises the power to appoint the chaplain, it seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the 1st Amendment...

In balance, I have to disagree with this ruling. First, in spite of some 'spinning,' it does give constitutional life to an argument based upon 'long standing tradition' which I believe is a dangerous principle. Second, as has often been stated by the Court, "Constitutional rights are not subject to a vote"; in other words, they are not to be subjugated to the will of the majority. Yet, this Court in this case gives great weight to a "**tolerable acknowledgment of widely held beliefs.**" Third, the saying of a prayer to **adults** who are not compelled to be present for the first few seconds of the day, to me, is not the problem. The problem lies in spending the tax money of constituents of all faiths to hire a chaplain of one faith.