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"[H]istorical 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."–Chief Justice BURGER

"[T]he Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers."–Justice BRENNAN

MARSH v. CHAMBERS

463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983).

Under a long established practice, Nebraska's legislature, like the U.S. Congress, opens each day's session with a prayer offered by a chaplain– for almost twenty years the same Presbyterian minister– paid from money raised by taxes. Ernest Chambers sued as a member of the legislature and as a taxpayer for an injunction to forbid the practice as a violation of the Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth. The federal district judge held that the legislature's praying was constitutional but paying the chaplain out of public funds was not. The U.S. Court of Appeals for the Eighth Circuit ruled that both praying and paying violated the Establishment Clause. Nebraska sought and obtained certiorari.

Chief Justice **BURGER** delivered the opinion of the Court ....

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition 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 United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

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 Sept. 22, 1789.

On Sept. 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 First Amendment Religion Clause 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. It has also been followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood ....

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. Wisconsin v. Pelican Ins. Co. (1888).

In Walz v. Tax Comm'n (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 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 First 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 First Amendment to the states through the Fourteenth Amendment, Cantwell v. Connecticut (1940), it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government.

This unique history leads us to accept the interpretation of the First 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 (1946), beneficial grants for higher education, Tilton v. Richardson (1971), or tax exemptions for religious organizations, *Walz*.

Respondent cites Justice Brennan's concurring opinion in Abington School Dist. v. Schempp (1963), 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 one religious view." Rather, the Founding Fathers looked at invocations as "conduct whose ... effect ... harmonize[d] with the tenets of some or all religions." McGowan v. Maryland (1961). 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. 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, "[w]e are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson (1952) ....

Reversed.

Justice **BRENNAN,** with whom Justice **MARSHALL** joins, dissenting ....

The Court's main argument for carving out an exception sustaining legislative prayer is historical. The Court cannot– and does not– purport to find a pattern of "undeviating acceptance," *Walz* (Brennan, J., concurring), of legislative prayer. It also disclaims exclusive reliance on the mere longevity of legislative prayer. The Court does, however, point out that, only three days before the First Congress reached agreement on the final wording of the Bill of Rights, it authorized the appointment of paid chaplains for its own proceedings, and the Court argues that in light of this "unique history," the actions of Congress reveal its intent as to the meaning of the Establishment Clause. I agree that historical practice is "of considerable import in the interpretation of abstract constitutional language." This is a case, however, in which– absent the Court's invocation of history– there would be no question that the practice at issue was unconstitutional. And despite the surface appeal of the Court's argument, 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. Indeed, that formal history is profoundly unilluminating on this and most other subjects. Rather, the Court assumes that the Framers of

the Establishment Clause would not have themselves authorized a practice that they thought violated the guarantees contained in the clause. This assumption, however, is questionable. Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the members of the First Congress as any other. Indeed, the fact that James Madison, who voted for the bill authorizing the payment of the first congressional chaplains, later expressed the view that the practice was unconstitutional is instructive on precisely this point. Madison's later views may not have represented so much a change of *mind* as a change of *role*, from a member of Congress engaged in the hurley-burley of legislative activity to a detached observer engaged in unpressured reflection. Since the latter role is precisely the one with which this Court is charged, I am not at all sure that Madison's later writings should be any less influential in our deliberations than his earlier vote.

Second, the Court's analysis treats the First 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. This observation is especially compelling in considering the meaning of the Bill of Rights. The first 10 Amendments were not enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution. To treat any practice authorized by the First Congress as presumptively consistent with the Bill of Rights is therefore somewhat akin to treating any action of a party to a contract as presumptively consistent with the terms of the contract. The latter proposition, if it were accepted, would of course resolve many of the heretofore perplexing issues in contract law.

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 School Dist. v. Schempp (Brennan, J., concurring). 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 State Bd. of Education v. Barnette (1943).

The inherent adaptability of the Constitution and its amendments is particularly important with respect to the Establishment Clause. "[O]ur religious composition makes us a vastly more diverse people than were our forefathers .... In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike." *Schempp* (Brennan, J., concurring). President John Adams issued during his Presidency a number of official proclamations calling on all Americans to engage in Christian prayer. Justice Story, in

his treatise on the Constitution, contended that the "real object" of the First Amendment "was, not to countenance, much less to advance Mahometanism, Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects ...." Whatever deference Adams' actions and Story's views might once have deserved in this Court, the Establishment Clause must now be read in a very different light. Similarly, the members of the First Congress should be treated, not as sacred figures whose every action must be emulated, but as the authors of a document meant to last for the ages. Indeed, a proper respect for the Framers themselves forbids us to give so static and lifeless a meaning to their work. To my mind, the Court's focus here on a narrow piece of history is, in a fundamental sense, a betrayal of the lessons of history ....

Justice **STEVENS** dissenting ....