The Burger Court Opinion Writing Database

Marsh v. Chambers

463 U.S. 783 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Justice Brennan
Justice White
Justice Marshall
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 Legislature'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.[1] 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-

[1] Rules of the Nebraska Unicameral, Rules 1, 2, and 21. These prayers are recorded in the Legislative Journal and, upon the vote of the Legislature, 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.

STYLISTIC CHANGES AS MARKED: 1,3,4,5,6,7,9,10,11

FOOTNOTES RENUMBERED

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: MAY 28 1983

2nd 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

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

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1983

PERSONAL

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

Dear Harry:

I already have a change in the mill that will likely meet your second thought. As to the first, let me ponder on it.

Regards,

WEB/bg

Justice Blackmun

STYLISTIC CHANGES AS MARKED:

3, 5 - 9, 11

To: Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 3 1983

3rd 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

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1 stylistic changes as marked

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: June 29, 1983

4th 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

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 3, 1983

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

Dear Thurgood and John:

We three are in dissent in the above. I will be glad to try my hand at the dissent.

Sincerely,

Justice Marshall
Justice Stevens

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,

The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: JUN 28 1983

Recirculated: _____

Marsh v. Chambers

No. 82-23

JUSTICE BRENNAN, dissenting.

The Court today has written a narrow and, on the whole, careful opinion. In effect, the Court holds that officially sponsored legislative prayer, primarily on account of its "unique history," ante, at 7, is generally exempted from the First Amendment's prohibition against "the establishment of religion." The Court's opinion is consistent with dictum in at least one of our prior decisions,[1] and its limited rationale should pose little threat to the overall fate of the Establishment Clause. Moreover, disagreement with the Court requires that I confront the fact that some twenty years ago, in a concurring opinion in one of the cases striking down official prayer and ceremonial Bible reading in the public schools, I came very close to endorsing essentially the result reached by the Court today.[2] Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other State

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[1]See Zorach v. Clauson, 343 U.S. 306, 312-313 (1952); cf. Abington School Dist. v. Schempp, 374 U.S. 203, 213 (1963).

[2]"The saying of invocational prayers in legislative chambers, state or federal, might well represent no involvements of the kind prohibited by the Establishment Clause. Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercise without incurring any penalty, direct or indirect." Schempp, supra, at 299-300 (BRENNAN, J., concurring).

STYLISTIC CHANGES THROUGHOUT
CITATIONS COMPLETED
SEE P. 1

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: 6/29/83

PRINTED
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

[June ——, 1983]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today has written a narrow and, on the whole, careful opinion. In effect, the Court holds that officially sponsored legislative prayer, primarily on account of its "unique history," *ante*, at 7, is generally exempted from the First Amendment's prohibition against "the establishment of religion." The Court's opinion is consistent with dictum in at least one of our prior decisions,[1] and its limited rationale should pose little threat to the overall fate of the Establishment Clause. Moreover, disagreement with the Court requires that I confront the fact that some twenty years ago, in a concurring opinion in one of the cases striking down official prayer and ceremonial Bible reading in the public schools, I came very close to endorsing essentially the result reached by the Court today.[2] Nevertheless, after much reflection, I

[1] See *Zorach* v. *Clauson*, 343 U. S. 306, 312–313 (1952); cf. *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 213 (1963).

[2] "The saying of invocational prayers in legislative chambers, state or federal, might well represent no involvements of the kind prohibited by the Establishment Clause. Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercise without incurring any penalty, direct or indirect." *Schempp*, *supra*, at 299–300 (BRENNAN, J., concurring).

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

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,

T.M.

Justice Brennan

cc: The Conference

HAB

May 31, 1983

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

Dear Chief:

I am disposed to join your opinion, but I wonder if you would consider two minor changes. In the second sentence of the full paragraph at page 8, you distinguish the school prayer cases. I fully agree that those cases are distinguishable on the grounds you state; because children are susceptible to religious indoctrination and peer pressure, school prayer presents what Arthur Goldberg called a "real threat," and not a "mere shadow." I would be more comfortable, however, if in the second sentence you dropped the words "And this is especially true where, as." The sentence would then read: "Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' ... or peer pressure ...." As the sentence stands, it could suggest that the Establishment Clause might not bar a State from conducting public prayers even when the individual claiming injury is a child -- a result inconsistent with our prior cases.

I also suggest a footnote at the end of the carryover paragraph on pages 11-12. I recognize that, as a general rule, courts must avoid scrutinizing the content of legislative prayer. But if we are to distinguish real threats from mere shadow, it seems to me that we must admit the possibility that a legislative chaplaincy consistently utilized to proselytise for a particular faith, or to denigrate individuals not sharing a particular faith, might genuinely threaten the core values of the Establishment Clause by generating excessive symbolic identification or religious strife or controversy. I also suppose that such a practice might vary so much from the model contemplated by the First Congress -- as you have explained it -- as to remove the endorsement of history altogether. Without insisting on any particular phrasing, I offer the following:

> "[19]We do not deal with a legislative chaplaincy consistently utilized to proselytise for a particular faith, or to denigrate the beliefs of others. Such a practice might pose a different question."

Sincerely,

HAB

The Chief Justice

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,

HAB

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 29, 1983

82-23 Marsh v. Chambers

Dear Chief:

Please join me.

Sincerely,

Lewis

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 WILLIAM H. REHNQUIST

May 27, 1983

Re: No. 82-23 Marsh v. Chambers

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: 6

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

[June ——, 1983]

JUSTICE STEVENS, dissenting.

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,[1] 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 Estab-

[1] The Court holds that a chaplain's 16-year tenure is constitutional as long as there is no proof that his reappointment "stemmed from an impermissible motive." *Ante*, at 10. Thus, once again, the Court makes the subjective motivation of legislators the decisive criterion for judging the constitutionality of a state legislative practice. Compare *Rogers* v. *Lodge*, —— U. S. —— (1982), and *City of Mobile* v. *Bolden*, 446 U. S. 55 (1980). Although that sort of standard maximizes the power of federal judges to review state action, it is not conducive to the evenhanded administration of the law. See —— U. S., at —— (STEVENS, J., dissenting) (slip op., at 12–19); 446 U. S., at 91–94 (STEVENS, J., dissenting).

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