*1982 U.S. Briefs 23; 1983 U.S. S. Ct. Briefs LEXIS 1438, **

FRANK MARSH, STATE TREASURER, et al., Petitioners, v. ERNEST CHAMBERS, Respondent.

No. 82-23

SUPREME COURT OF THE UNITED STATES

1982 U.S. Briefs 23; 1983 U.S. S. Ct. Briefs LEXIS 1438

October Term, 1982

January 25, 1983

[*1]

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

BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI BRITH IN SUPPORT OF RESPONDENT

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Interest of the Amicus Curiae

The Anti-Defamation League of B'nai Brith was organized in 1913 as a section of B'nai Brith, the oldest civil service organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious

prejudice in the United States.

The Anti-Defamation league has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the Anti-Defamation League has previously filed amicus briefs before this Court in such cases as School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963), Sherbert v. Verner, 374 U.S. 399 (1963), Board of Education v. Allen, 392 U.S. 236 (1968), Lemon v. Kurtzman, 403 U.S. 602 (1971), Lemon v. Sloan, 413 U.S. 825 (1973), Meek v. Pittenger, 421 U.S. 349 (1975), Trans World Airlines v. Hardison, 432 U.S. 63 (1977), and Wolman v. Walter, 433 U.S. 229 (1977). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

In this case, the Court is asked to decide whether the chaplaincy practice of the Nebraska Unicameral Legislature violates the Establishment Clause of the First Amendment. Amicus believes that Nebraska's retention of a chaplain of one denomination for an extended period of time, and its expenditure of funds during that time to support the daily recitation of prayers, grant a denominational preference and constitute the type of governmental support for religion prohibited by the Establishment Clause. Accordingly, amicus urges the Court to affirm the Eighth Circuit's holding that Nebraska may not continue its present chaplaincy practice.

Amicus supports the position of respondent and respectfully submits that the judgment of the United States Court of Appeals for the Eighth Circuit in the above-captioned case should be affirmed. n1

n1 Amicus has filed with the Clerk of the Court letters, from counsel for all parties, consenting to the filing of this brief. **[*3]**

Statement of the Case

At the beginning of each session of Nebraska's Unicameral Legislature, the Executive Board of the Legislative Council of the Legislature recommends the selection of a chaplain. Chambers v. Marsh, 504 F.Supp. 585, 586 (D. Neb. 1980). Expressly authorized by statute until 1973, the procedure has since taken place pursuant to internal leglislative rules promulgated under a statute authorizing the selection of legislative officers. Rules of the Nebraska Unicameral Legislature, Rule 1, Section 2 ("Nebraska Rules"); Nebraska Revised Statutes § 50-111 (1978). The procedure has resulted in the selection of Robert Palmer, a Presbyterian clergyman, as the Legislature's sole chaplain since 1965. 504 F. Supp. at 586.

Mr. Palmer's duties, set by the nebraska Rules, include opening every session of the Legislature with a prayer. Nebraska Rules, Rule 7(a), Section 1(b). The Legislature compensates the chaplain for his services out of public funds pursuant to statutory authorization. Nebraska Revised Statutes § 50-112 (1978). Compensation is paid at the rate of $ 320 per month for every month the Legislature is in session. Chambers v. Marsh, 675 F.2d 228, 230 (8th Cir. 1982). **[*4]**

On three occasions during Mr. Palmer's 16-year tenure, prayer books containing compilations of his opening prayers have been published and made available for public distribution. Financing for this also came from state funds, the expenditure of which was approved by vote of the Legislature. 504 F. Supp. at 586.

A sampling of Mr. Palmer's published opening prayers, which is included in the record before this Court, reveals that the prayers which Mr. Palmer has used to open the legislative sessions are both religious and denominational. n2 All of them contain a theistic message and many contain references to basic tenets of the Christian faith. Indeed, Mr. Palmer himself characterized the prayers as Christian, although in his view they nevertheless remained non-sectarian since most Americans are Christian. n3

n2 Charles Stephen, Jr., a clergyman who testified at the trial of this case as an expert witness, observed:

"Roughly half the prayers that I have seen in those booklets... had Christian terminology, such as Jesus Christ or Our Lord or terminology such as that...." Joint Appendix, 36 ("J.A.")

n3 At his deposition, Mr. Palmer testified as follows about prayers he had offered in the Legislature:

"Q. The last sentence, what does the last sentence say? A. In the name of Christ Our Lord.

Q. You'd agree, I assume, that -- A. It's Christian --

Q. Narrows it down to a Christian prayer? A. I wouldn't say sectarian, but I'd say Christian." (J.A. 76)

"Q. The flavor. Would you say that they're Christian prayers, at least in the sense that you use the word 'Jesus' and 'Christ'? Would that be fair to say? A. No, that wouldn't be fair to say at all... The majority of the prayers reflect more of what I don't like to use as a phrase, but I will, to clarify things, just civil religion in America. The kind of religious expressions that are common to the vast majority of most all Americans. (J.A. 83) **[*5]**

The prayer practice is an integral part of the Nebraska Legislature's daily routine whenever it is in session. The Rules mandate that the chaplain "shall open with prayer each day's sitting of the Legislature." Nebraska Rules, Rule 1A, Section 21. And the prayer is part of the official

proceedings; under the Rules, the chaplain's prayer is the first item in the "order of business." Nebraska Rules, Rule 7(a), Section 1(b).

This case presents a challenge to this particular chaplaincy practice -- involving the retention of a chaplain of one denomination for an extended length of time and payment of state funds to compensate the chaplain for reciting prayers which are religious and emphasize the precepts of one denomination. This case does not involve a challenge to legislative chaplaincy practices in general.

Summary of Argument

The Nebraska Legislature's chaplaincy practice grants a denominational preference and involves governmental financial support of religious activity. These two factors void the chaplaincy practice under the principles developed by this Court.

The chaplaincy practice here involves religious activity -- the daily recitation of prayers which are religious **[*6]** in nature and the periodic publication of those prayers. By appointing a chaplain of one denomination to perform this religious activity for 16 straight years, Nebraska's Legislature has effectively granted a denominational preference. Under the Court's recent ruling in Larson v. Valente, 102 S Ct. 1673 (1982), such a preference calls for strict scrutiny of the challenged practice. Nebraska's chaplaincy practice cannot withstand that analysis.

Nebraska's chaplaincy practice also cannot survive under the traditional three tests enumerated in Lemon v. Kurtzman, 403 U.S. 602 (1971). Compensating the chaplain for offering prayers which are both religious and denominational has the direct effect of advancing religion in general and his religion in particular. In addition, church and state in Nebraska have become excessively entangled by virtue of the close and longstanding relationship between the Legislature and its chaplain and the potential that exists for political divisiveness.

Nebraska's chaplaincy practice cannot be upheld on the basis of legislative history which shows that the First Congress of the United States had chaplains, and compensated them, **[*7]** at the time that same Congress approved the language and content of the First Amendment. The First Congress' own nascent chaplaincy practice is the only one which that Congress can be deemed to have approved. That practice cannot be equated with the one challenged here.

ARGUMENT
THE NEBRASKA LEGISLATURE'S CHAPLAINCY PRACTICE VIOLATES THE FIRST AMENDMENT

A state practice cannot be sanctioned if it violates the First Amendment's prohibition against "establishment of religion." Cantwell v. Connecticut, 310 U.S. 296 (1940). To come within the ambit of the Establishment Clause, a practice must relate in some way to religion or religious

activity.

The three tests articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971), have served most often as this Court's tool for analyzing whether a practice which does involve religious activity conflicts with the Establishment Clause.

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental **[*8]** entanglement with religion.' Walz [v. State Tax Commission, 397 U.S. 664, 674 (1970)]..." 403 U.S. at 612-613.

In addition, the Court has given special consideration to certain factors, because their presence serves to "identify instances in which the objectives of the Establishment Clause have been impaired." Meek v. Pittenger, 421 U.S. 349, 358-59 (1975). These factors weight analysis heavily toward a finding of unconstitutionality. Thus, in Larson v. Valente, 102 S. Ct. 1673 (1982), the Court recently held that the presence of one such factor -- that the practice effectively grants a denominational preference -- requires that the law involved must be treated as suspect and its constitutionality adjudged under a strict scrutiny standard. Government financial support of religious activity is another factor which arouses heightened concern. Like denominational preference, it touches a central nerve of the Establishment Clause; indeed, the Court has termed it one of the three dangers the Framers meant to guard against with the Establishment Clause. Walz v. State Tax Commission, 397 U.S. 664, 668 (1970).

As we show **[*9]** below, Nebraska's chaplaincy practice does involve religious activity and must accordingly be analyzed for infirmity under the Establishment Clause. And whether considered under the standard developed in Larson or that set forth in Lemon, the practice's grant of a denominational preference and the use of state funds in support of religious activity makes Nebraska's chaplaincy practice violative of the Establishment Clause.

I.
NEBRASKA'S CHAPLAINCY PRACTICE INVOLVES RELIGIOUS ACTIVITY

The morning prayers recited by Nebraska's chaplain are religious in nature. As the district court found in this case: "To say that the prayers have no religious purpose would reach incredibility; they do indeed have a religious purpose for the chaplain and for those who choose to listen for spiritual reasons." 504 F. Supp. at 589.

It could not be otherwise, given the numerous references to God, Christ and precepts of Christianity. Indeed, the prayers here have far more religious content than the twenty-two word prayer whose recitation in New York schools was struck down in Engel v. Vitale, 370 U.S. 421 (1962), of which the Court said: "There can, of course, be no doubt **[*10]** that [it]... is a religious activity." Id. at 424.

That there is also a secular objective for offering the prayers -- "bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner," 504 F. Supp. at 589 --

does not change its inherently religious character. This Court has repeatedly refused to overlook the religious nature of practices involving the use of religious text, even where the stated objective of the practice is wholly secular. In School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 224 (1963), for example, the Court rejected the state's argument that the purposes of bible reading exercises were wholly secular, stating: "[s]urely the place of the Bible as an instrument of religion cannot be gainsaid." Similarly, in Stone v. Graham, 449 U.S. 39, 41 (1980), the Court rejected arguments that the Ten Commandments were being used in a classroom in a wholly secular way: "The Ten Commandments is undeniably a religious text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." See also Karen B. v. Treen, 653 F.2d 897, 901 (5th Cir. 1981), **[*11]** aff'd without opinion, 102 S. Ct. 1267 (1982) ("That [prayer] may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise").

Given the inherently religious character of the prayers -- which the chaplain recites daily in the Legislature when it is in session and which have been published periodically, pursuant to the Legislature's authorization --Nebraska's chaplaincy practice must be subjected to examination to determine whether it "establishes" religion in contravention of the First Amendment.

II.
NEBRASKA'S CHAPLAINCY PRACTICE IS UNCONSTITUTIONAL UNDER THIS COURT'S RULING IN LARSON V. VALENTE
A. Nebraska's Chaplaincy Practice Is Subject To Strict Scrutiny Under Larson

In Larson v. Valente, 102 S. Ct. 1673 (1982), the Court held that strict scrutiny is required of a statute which grants a denominational preference, because prevention of governmental preference of one religion over another is at the very heart of the Establishment Clause. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Id. at 1683. **[*12]**

The challenge in Larson was to a statute which exempted religious organizations from registration and disclosure requirements applicable to charitable organizations. The statute contained a "fifty percent rule," providing that the exemption was available only to those religious organizations that received more than half their total contributions from members or affiliated organizations. This, the Court found, "effectively distinguishes" between well-established churches and churches which are either new, lacking in members or favor public solicitation as a matter of policy. Id. at 1684 n. 23.

Applying the strict scrutiny test, the Court agreed that the statute did have a valid secular purpose: protecting citizens from abusive practices in solicitation of funds for charitable purposes. Id. at 1685. But, it held, even assuming arguendo that this could satisfy the requirement of a "compelling" governmental interest, the fifty percent rule was nevertheless constitutionally infirm because it was not "closely fitted" to furthering that interest: there was nothing in the record before the Court showing that the fifty percent rule was necessary to protect citizens **[*13]** from abusive practices, or that it was even logically related to the promotion of that interest. Id. at 1685-87.

Nebraska's chaplaincy practice poses the same danger -- denominational preference -- as the statute struck down in Larson. Retaining a chaplain of one denomination to perform a religious function over an extended period of time gives the unmistakable impression that the particular religion is preferred by those doing the choosing -- in this case, the Legislature. The practice, accordingly, should be subjected to the same strict scrutiny. n4

n4 Unlike the situation in Larson, denominational preference is not evident on the face of Nebraska's rule or statute. This difference, however, does not alter the need for strict scrutiny here. It is the Legislature's practice that is being challenged, not its statute or rule. That practice violates the "clearest command of the Establishment Clause" no less than the statute in Larson. The facial neutrality of Nebraska's statute and rule cannot save the practice, any more than an unconstitutional act of the executive branch can be validated by the soundness of the underlying statute which cloaks it with authority. **[*14]**

B. The Chaplaincy Practice Does Not Serve A Compelling Governmental Interest And, In Any Event, Is Not Closely Fitted To Furthering Any Such Interest

Although the chaplaincy practice unquestionably serves a valid secular interest, in addition to a religious purpose, this secular interest -- bringing the legislators to order in a solemn and thoughtful manner -- cannot fairly be characterized as compelling. It is at most only tangentially related to the real governmental interest implicated here: the legislative function. Bringing the legislators to order is preliminary. The calling-to-order by means of a ceremony is, in fact, probably not necessary at all, for the sound of a gavel can do that. And while the prayer may serve to create a sense of solemnity, ceremony or history, these are only matters of atmosphere. They do not have any significant relationship to the essence of lawmaking -- dissemination of information and debate.

Even if the interest served were deemed to be compelling, the practice is not "closely fitted" to it. The religious nature of the invocations is unrelated to the secular objective of calling the legislators to order in a solemn, thoughtful manner. There **[*15]** are numerous invocations without religious overtones which would create an atmosphere of order and solemnity. Similarly, restricting the chaplaincy to a representative of only one religion for an extended length of time has no relationship to this secular objective.

Nor is there the required close fit between the secular objective here and Nebraska's practice of compensating the chaplain with taxpayer funds. There is nothing to suggest that it is the use of taxpayers' funds, rather than funds from some other source, that enables the Legislature to secure chaplain services. In any event, using funds from some other source would not cure the problem. The state may not provide funds -- directly or indirectly -- for use in connection with an activity which is religious in character. See discussion at 11-14 infra.

Because Nebraska's Legislature through its chaplaincy practice, has granted a denominational preference, and because that practice neither furthers a compelling governmental interest nor is closely fitted to furthering any valid secular interest, the practice cannot be sanctioned.

III.
NEBRASKA'S CHAPLAINCY PRACTICE IS UNCONSTITUTIONAL UNDER LEMON V. KURTZMAN

Even if **[*16]** Nebraska's chaplaincy practice could survive strict scrutiny, it could not pass muster under the standard of Lemon v. Kurzman, supra. A practice must satisfy all three of the tests in Lemon in order to avoid the prohibition of the Establishment Clause. Stone v. Graham, 449 U.S. 39, 40 (1980). Nebraska's chaplaincy practice fails two of those tests. It has the direct effect of advancing religion and it fosters an excessive government entanglement with religion.
A. Nebraska's Practice Has The Direct Effect Of Advancing Religion Because It Involves Governmental Financial Support Of Religious Activity

The Establishment Clause was designed to guard against governmental financial support of religious activity. Walz v. State Tax Commission, 397 U.S. 664, 668 (1970). This Court, accordingly, has closely scrutinized schemes that funnel funds to religious institutions or otherwise subsidize or aid religious practices. Indeed, the proscription against providing financial support to religion is so central to the Establishment Clause, the Court has held that the mere possibility that government funds might be used in connection with religious activity is enough to **[*17]** void a practice under that Clause.

In Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), the Court struck down a financial aid program which gave money grants to non-public schools for maintenance and repair because nothing in the statute barred use of the funds to pay salaries of employees who maintained the school chapel, or the cost of renovating, heating or lighting classrooms in which religion was taught. Id. at 774. To pass muster, the Court said, there must be "an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral and nonideological purposes." Id. at 780. See also Tilton v. Richardson, 403 U.S. 672 (1971) (voiding that part of a statute which entitled the government to recover construction grants to sectarian colleges if the money was used to promote religious interests, but which provided for expiration of that condition after twenty years).

The Court has upheld state aid only where it is for use solely in connection with a wholly secular function. In such instances, the mere fact that aid goes to a religious institution does not invalidate **[*18]** the practice, since the aid to the institution is only incidental to the provision of support for the secular activity. See Everson v. Board of Education, 330 U.S. 1 (1947) (reimbursement for public transportation); Board of Education v. Allen, 392 U.S. 236 (1968) (provision of secular text-books). But supported activities must be "'so separate and so indisputably marked off from the religious function,'... that they may be fairly viewed as reflections of a neutral posture toward [religion]...." Committee for Public Education v. Nyquist, supra, 413 U.S. at 782, quoting Everson v. Board of Education, 330 U.S. 1, 18 (1947).

Nebraska's chaplaincy practice does not fit within that limited category of practices which are "so separate and indisputably marked off from the religious function," and it does not provide the necessary "guarantee" that state funds will be used only for secular functions. The prayer practice serves both religious and secular functions. The functions are interwined and cannot be separated from each other. Expenditure of state funds in connection with the practice thus inevitably

involves financial support of **[*19]** religious activity. That invalidates the practice. Expenditures for the purpose of publishing the prayers are impermissible for the same reasons.

It makes no difference that the payments go to the chaplain individually, rather than to his church. It is not the identity of the recipient that matters; it is the nature of the activity for which the state is providing support. If the activity is religious in nature -- even if it also has aspects which are secular -- the government cannot support it financially. The Court made this clear in Nyquist, invalidating a tuition reimbursement program which provided payments directly to low income parents who sent their children to non-public schools.

The presence of both secular and religious components in Nebraska's chaplaincy practice distinguishes this case from McGowan v. Maryland, 366 U.S. 420 (1961), where the Court rejected a challenge to Sunday Closing Laws. The holding there rested on the Court's finding that the Closing Laws had shed their religious character over time. Tracing the development of Sunday legislation over the years, the Court concluded that the Laws had "undergone extensive changes from its earliest forms, **[*20]** id. at 431; that over time Sunday had been transformed into a day of "recreation, cheerfulness, repose and enjoyment," di. at 448; and that legislation prohibiting certain activities on Sunday could no longer be characterized as religious in character, as evidenced by exemptions given to various activities, such as sale of alcoholic beverages and operation of beaches and amusement parks, id. On the basis of these findings, the Court held that any benefit to religion, such as facilitating church attendance, was incidental and not sufficient to invalidate the laws as "respecting an establishment of religion."

Unlike the Sunday closing practice at issue in McGowan, the purpose and character of Nebraska's chaplaincy practice remain religious to this day. And because Nebraska's chaplaincy practice involves religious activity, under the principles established by this Court in Nyquist and the other financial support cases, the use of state funds in connection with that activity has the proscribed effect of advancing religion, both directly and immediately.

B. Nebraska's Chaplaincy Practice Has The Prohibited Effect Of Advancing Religion Both In The Legislature And In Society **[*21]** As A Whole

It is amicus' contention that Nebraska's chaplaincy practice has the prohibited effect of advancing religion even though the prayers are directed at the legislative membership, not at the public at large, and even though the members of the Legislature are apparently free to absent themselves during the morning prayer.

There is no statute function more public than the making of laws. The sessions of the Legislature, at which this function takes place, are the subject of the attention of a broad spectrum of the citizenry, from politically minded adults to impressionable school children who study it in civics. The chaplaincy practice is part and parcel of those legislative sessions. Regardless of whom the chaplaincy practice was intended to benefit, its effects carry beyond the legislative chamber; indeed it is difficult to imagine a forum that would serve more effectively to convey a message to all Nebraskans.

Since the effects of the chaplaincy practice are not confined to the Legislature, the legislators' freedom to walk out during the prayer ceremony is of no significance. In any event, the Court

has consistently held that the Establishment Clause cannot be circumvented **[*22]** by making a practice voluntary:

"Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause...."
Engel v. Vitale, 370 U.S. 421, 430 (1962). See also School District of Abington Township, Pennsylvania v. Schempp, supra, 374 U.S. at 224-25.

Nor does it matter that, apart from the challenge respondent has mounted in this case, there has apparently been little concern voiced by either the Legislature or citizens over Nebraska's chaplaincy practice. It is enough that respondent objects. Whether a practice is or is not constitutional has no relationship to the number of people who agree with it. School District of Abington Township, Pennsylvania v. Schempp, supra, 374 U.S. at 226. In fact, the very purpose of the Bill of Rights was to take certain matters away from "the vicissitudes of political controversy." West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943). "One's rights to... freedom of worship... may not be submitted to vote; they depend on the outcome of no elections. **[*23]** " Id.

The Court has always shown great sensitivity to practices that threaten to impinge on the First Amendment. Even a minor encroachment is enough to warrant invalidating a practice. As the Court said in Schempp:

"[I]t is no defense to urge that the religious practice here may be a relatively minor encroachment on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent...." 374 U.S. at 225.

Nebraska's chaplaincy practice has an effect that advances religion. It is not necessary to determine the extent to which religion is advanced. The fact that there is an effect, and that it is direct and immediate, makes it inconsistent with the First Amendment.
C. Nebraska's Practice Fosters An Excessive Entanglement With Religion

The "entanglement" component of the Lemon tests guards against "the intrusion of either [church or state] into the precincts of the other." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), and the potential for political divisiveness along religious lines, Committee for Public Education v. Nyquist, supra.

The same aspects of Nebraska's chaplaincy practice **[*24]** which trigger strict scrutiny under Larson and directly advance religion also give rise to an excessive entanglement of church and state. The extended tenure of the chaplain and the use of state funds to pay his salary and publish his prayers result in so close a relationship between the chaplain and the Legislature that they have "invaded each other's precincts."

Additionally, the chaplaincy practice here has the potential for political divisiveness. The respondent in this case testified at trial that the prayer practice, and his response to it, create political divisiveness between him and the other legislators. (J.A., 24-25) And the longer the

legislature's employment of a chaplain of one denomination goes on -- foreclosing the chaplaincy from others -- the greater the likelihood that legislators and their constituents with a different religious orientation will balk at the seeming preference of another religion and press to have someone of their own religion occupy the post.

In short, Nebraska's chaplaincy practice cannot survive the "effect" or "entanglement" tests of Lemon. As reflected in the application of those tests, Nebraska's practice entails a relationship between **[*25]** religion and the Legislature which does not comport with the constitutional principle of separation of church and state.

IV.
NEITHER THE LEGISLATIVE HISTORY OF THE FIRST AMENDMENT NOR HISTORICAL ACCEPTANCE OF CHAPLAINCIES SAVES NEBRASKA'S CHAPLAINCY PRACTICE FROM UNCONSTITUTIONALITY

Petitioners, and the United States in its amicus brief, point out that members of the First Congress appointed and voted to compensate chaplains about the time that the First Amendment was ratified. On the basis of this legislative history, they argue that the Framers did not mean to disallow chaplaincies and Nebraska's present chaplaincy practice must therefore be held constitutional.

The argument proves too much. The existence of paid Congressional chaplaincies at the time the language of the First Amendment was accepted shows only that chaplaincies were not viewed as necessarily inconsistent with the First Amendment. But it does not follow, and there is nothing in the legislative history to suggest, that the First Congress gave, or intended to give, blanket and prospective approval to any and all chaplaincy practices.

The chaplaincy practice challenged in this case is different than the practice **[*26]** in Congress at the time it approved the content of the First Amendment. The practice at issue here involves a Legislature with but one House and the retention and compensation of a chaplain of one denomination for 16 consecutive years. These factors were not present in the chaplaincy practice the First Congress had. At the time Congress reached final agreement on the wording and content of the Bill of Rights, the Senate and House chaplaincies had been in effect only five months; and legislation to compensate the chaplains was only three days old. Brief for the United States as Amicus Curiae, at 11. Furthermore, the practice approved by Congress specifically provided for the hiring of two chaplains -- one in each House, to be interchanged weekly -- each of different faith. Brief for the United States as Amicus Curiae, at 10-11. n5 The use of two chaplains and the practice of rotating them between Houses, is, of course, not even possible in Nebraska, which has only one House.

n5 The United States points out that this rotation practice was discontinued in 1856, although as it happens, both Houses have always had chaplains of different denominations. Brief for the United States as Amicus Curiae, at 13. The fact that the rotation practice was discontinued is not relevant to the intent of the First Congress, which approved the language of the First Amendment

some seventy years earlier. **[*27]**

In light of these differences, it cannot reasonably be concluded that the implicit approval the First Congress gave to its own practice extends to the Nebraska practice at issue here.

Nor does the use of legislative chaplaincies over the years by Congress and the States serve to validate the chaplaincy practice challenged here. The mere fact of long use cannot validate an otherwise unconstitutional practice.

"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." Walz v. State Tax Commission, supra, 397 U.S. at 678.

Although the Court did review the history of challenged practices in both Walz and McGowan v. Maryland, supra, these historical overviews were provided because they illuminated aspects of the practices which negated any finding of unconstitutional effect. In Walz, the Court looked at history in explaining that tax exemptions for religious institutions were a response to earlier use of the tax to oppress religion as well as the product of a desire to minimize government involvement in religious affairs. **[*28]** 397 U.S. at 675. And in McGowan v. Maryland, supra, the passage of time was significant because during it, the practice of Sunday closing had shed its religious character.

Unlike the tax exemption upheld in Walz, Nebraska's chaplaincy practice does not derive from considerations underlying the Establishment Clause or any other constitutional source. And in contrast to the Sunday Closing Laws, Nebraska's chaplaincy has not shed its religious character.

The appropriate method for resolving the constitutionality of Nebraska's practice is by applying the principles the Court has developed in the context of Establishment Clause adjudication. Applying those principles here compels the conclusion that Nebraska's chaplaincy practice is unconstitutional.

Conclusion

"In the relationship between man and religion, the State is firmly committed to a position of neutrality." School District of Abington Township, Pennsylvania v. Schempp, supra, 314 U.S. at 203. Through its chaplaincy practice, the State of Nebraska has deviated from that position by granting a denominational preference and using state funds to advance religion.

Amicus urges the **[*29]** Court to restore the constitutionally mandated neutrality by voiding Nebraska's chaplaincy practice.

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