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THE CONGRESSIONAL CHAPLAINCIES

Christopher C. Lund*

ABSTRACT

Roughly twenty-five years ago, in *Marsh v. Chambers*, the Supreme Court considered the congressional chaplaincies, and concluded that they were not “an ‘establishment’ of religion or a step toward establishment,” but instead were “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”¹ That latter phrase has been repeated hundreds of times in cases and law review articles; it suggests that the chaplaincies are uninteresting and uncontroversial and that they have been so throughout our history.

The Court in *Marsh* looked only briefly at the history of the chaplaincies.² A deeper look at that history reveals an American institution that is neither boring nor entirely benign. The chaplaincies have a remarkable, and a remarkably checkered, history. Sometimes, they have indeed been a source of unity for the country, as *Marsh* intimated. But they have also, at times, been a source of discord and dissension. Indeed, perhaps one lesson taught by the history of the chaplaincies is that they operate in the way one would expect any religious establishment to operate—when the government is empowered to act religiously, there is a natural but sometimes unenviable fight for control. The history of the chaplaincies is, at least in part, a history of that fight for control.

In the last decade, this fight has reached a critical stage. While *Marsh* approved legislative prayer, it did so only with constitutional restrictions—restrictions which have themselves now become sources of constant litigation. In these modern battles, as was the case with *Marsh* itself, history plays an influential role. It is thus now more important than ever to bring to light certain episodes, some untold and some somewhat misremembered, in the history of the chaplaincies.

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¹ 463 U.S. 783, 792 (1983).

² See *id.* at 786–91.

This Article takes up that burden. It considers the practices of the Continental Congress and Constitutional Convention, the origin of the congressional chaplaincies in 1789, the rise of Catholicism and the fight over Catholic chaplains, the collapse of Unitarianism and the decline of Unitarian chaplains, the crisis over and suspension of the chaplaincies in the 1850s, and the modern operations of the chaplaincy. With that history in mind, this Article reflects on *Marsh* and the practice of legislative prayer.

INTRODUCTION

It is often said that the government cannot act religiously, or make religious statements, or favor religious people over nonreligious ones—indeed, the Supreme Court itself has often asserted these principles as fundamental axioms of modern church-state relations.³ But in many mostly minor and informal ways, the government bends this basic neutrality principle at various times and in varying ways. The examples come to mind quickly: the phrase “under God” in the Pledge of Allegiance, the inscription “In God We Trust” on the coin, the proclamation “God save the United States and this Honorable Court” opening the business of the federal courts, and various statements of Presidents and legislators, justices and executive officials, that suggest a belief in God by the government itself.

The congressional chaplaincies are often mentioned in the same breath as these other examples, but the similarities are only superficial—for the chaplaincies are on an entirely different level. To put the point more clearly, consider that since the beginning of the Republic, Congress has retained and paid permanent clergy to offer prayers to God on the government’s behalf.⁴ These features that the chaplaincies have—being official, institutional, clerical, paid, statutorily authorized, continuously

³ The Supreme Court has phrased this idea in many ways. It has sometimes said that there can be no favoritism “between religion and irreligion,” *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994), or “between religion and nonreligion,” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). It has said that the government cannot “aid all religions as against non-believers,” *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), that “the First Amendment embraces the right to select any religious faith or none at all,” *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985), and that the state must “be a neutral in its relations with groups of religious believers and non-believers,” *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

The neutrality principle was first articulated in the Supreme Court’s decision in *Everson*, when the Court offered the following formulation:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.

Id. at 15 (emphasis added).

⁴ See *infra* notes 19–27 and accompanying text.

operating, long-standing, and undeniably religious—make the chaplaincies a singular phenomenon in American church-state relations. The other deviations from the neutrality principle are minor exceptions that, to some, almost prove the rule; the chaplaincies, on the other hand, create doubt about the rule itself.

In 1983, in *Marsh v. Chambers*, the Supreme Court reasoned that the congressional chaplaincies were constitutional, and used that logic to uphold a similar chaplaincy by Nebraska's legislature.⁵ *Marsh*'s rationale was a historical one, grounded in principles of originalism. Given that the First Congress had instituted the congressional chaplaincies within a few days of approving the Bill of Rights, the Framers of the Establishment Clause must not have perceived the chaplaincies as violating that Clause, and nothing that had happened subsequently cast doubt on that conclusion.⁶ From this history the Court drew various conclusions about legislative prayer. The Court said, for example, that the history of the chaplaincies showed that the Founders "did not consider opening prayers . . . as symbolically placing the government's official seal of approval on one religious view."⁷ The chaplaincies, the Court concluded, were "simply a tolerable acknowledgment of beliefs widely held among the people of this country."⁸

These assertions make the chaplaincies sound innocuous and insignificant. But that does not really capture the whole story. For while the chaplaincies have at times served to unify the country, they have also sometimes served as a source of discord. The history of the chaplaincies, it turns out, contains episodes of real conflict. *Marsh*'s view of legislative prayer, ultimately, is a somewhat idealized and romanticized one; the true history of legislative prayer in this country is more checkered than the *Marsh* Court seemed to believe.

This Article strives to develop that history, focusing in particular on those episodes of discord and conflict. It discusses the origin of the chaplaincies with the first legislative prayer given by Jacob Duché before the Continental Congress in 1774. It covers the actions, debates, and disagreements regarding the chaplaincies in the era of the First Congress and during the passage of the Bill of Rights. It chronicles the rise of Catholicism in the nineteenth century and the story of the first Catholic chaplain in 1832, who was subjected to persistent and vehement anti-Catholic sentiment. It discusses how fears of Catholicism, along with a number of other factors, led Congress to temporarily suspend (and nearly abandon altogether) the institutional chaplaincies in the 1850s. It witnesses the decline of Unitarianism and Unitarian chaplains, describes some peculiar intersections between the chaplaincies and slavery, and traces the development of the chaplaincies to the present day. Through the chaplaincies, and in the debates and disagreements it has produced, we can see slow change of this country and its religious makeup. In 1850, Unitarian chaplains were commonplace

⁵ 463 U.S. 783 (1983).

⁶ *Id.* at 790.

⁷ *Id.* at 792 (citations and quotations omitted).

⁸ *Id.*

and Catholic chaplains were almost impossible to imagine. By 2000, the reverse was true. In 2003, the Senate voted to have an African-American chaplain (in itself a first), who belonged to a relatively small and unorthodox Christian denomination. Yet Congress has never had a female chaplain. One motif running through this Article is how the chaplaincies have sometimes been the locus of significant religious and political conflict. Perhaps it is an inevitable part of religious establishments that they inspire a fierce battle for their control. The congressional chaplaincies are, in some sense, the closest thing we have ever had to a national religious establishment, and so we should probably not be surprised at how the history of the chaplaincies has some dark elements.

These issues have only taken on increasing importance after *Marsh*. While the *Marsh* Court attempted to defuse the issues connected with legislative prayer, it refused to commit legislative prayer entirely to the political process. Instead, it put several somewhat ill-defined constitutional limitations on legislative prayers, which has left lower courts struggling with a number of questions—whether certain types of prayers are constitutionally impermissible, whether the government can censor prayers that it disagrees with, and whether it can pick and choose which religious groups have the opportunity to pray. Collectively, legislative prayer disputes have stormed the federal courts,⁹ law reviews,¹⁰ and the public consciousness.¹¹ They have helped decide the

⁹ See, e.g., *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008); *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005); *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004); *Bacus v. Palo Verde Unified Sch. Dist.*, 52 F. App'x 355 (9th Cir. 2002); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998); *Dobrich v. Walls*, 380 F. Supp. 2d 366 (D. Del. 2005); *Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867 (Ct. App. 2002); see also Complaint at 1–2, *Galloway v. Town of Greece*, No. 06:08-cv-06088-CJS (W.D.N.Y. Feb. 27, 2008); Verified Complaint for Declaratory and Injunctive Relief and Nominal Damages at 1, *Joyner v. Forsyth County*, No. 1:07cv00 243 (M.D.N.C. Mar. 30, 2007), available at 2007 WL 1832616.

¹⁰ See, e.g., Robert J. Delahunty, “*Varied Carols*”: *Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517 (2006); Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEORGETOWN J. L. & PUB. POL'Y 219 (2008); Robert Luther III & David B. Caddell, *Breaking Away from the “Prayer Police”: Why the First Amendment Permits Sectarian Legislative Prayer and Demands a “Practice Focused” Analysis*, 48 SANTA CLARA L. REV. 569 (2008); Anne Abrell, Note, *Just a Little Talk With Jesus: Reaching the Limits of the Legislative Prayer Exception*, 42 VAL. U. L. REV. 145 (2007); Jeremy G. Mallory, Comment, “*An Officer of the House Which Chooses Him, and Nothing More*”: How Should *Marsh v. Chambers* Apply to Rotating Chaplains?”, 73 U. CHI. L. REV. 1421 (2006).

¹¹ The following sources, listed in reverse chronological order, describe some of the disputes over legislative prayer that transpired in the past year. Nick G. Maheras, *Prayer Issue Revisited*, HIGH POINT ENTERPRISE (N.C.), Oct. 30, 2008, available at 2008 WLNR 20700493; Ryan J. Foley, *Assembly Asked to Halt Prayers: Watchdog Calls Them Explicitly Christian, Unconstitutional*, ST. PAUL PIONEER PRESS (Minn.), June 19, 2008, at B1, available at 2008 WLNR 11628516; Mike Wiggins, *Prayer Complaint Puts City in Hot Seat: Council Likely to Alter Invocation*, DENVER ROCKY MOUNTAIN NEWS, June 11, 2008, at 7, available at 2008

outcome of elections;¹² they have inspired violent confrontations;¹³ and they have even spilled out to cause trouble abroad.¹⁴ Legislative prayer is now more important than

WLNR 11203170; Larissa Chinwah, *Guidelines Set for Prayer at Carpentersville Board Meetings*, DAILY HERALD (Chi.), June 5, 2008, available at <http://www.dailyherald.com/story/?id=203228&src=5>; Fraser Sherman, *No Fuss Over Prayer at Destin City Council*, DESTIN LOG (Fla.), June 4, 2008, available at 2008 WLNR 10551840; Dusty Ricketts, *Prayer Not Required: However, FWB Votes to Write an Ordinance Mandating Pledge of Allegiance at All Meetings*, NORTHWEST FLA. DAILY NEWS, May 28, 2008, at 1, available at 2008 WLNR 10061790; Kay Campbell, *Meeting Spiritual Needs*, HUNTSVILLE TIMES (Ala.), May 23, 2008, at 1B, available at 2008 WLNR 13689842; Sherry Youngquist, *Issues Led to Defeat of Yadkin Officials: Two on Board Ousted Over Decisions on Jail, Prayer*, WINSTON-SALEM J. (N.C.), May 11, 2008, available at 2008 WLNR 8869993; Edward Marshall, *Town Council Votes to Replace Lord's Prayer with Silence*, JOURNAL (W. Va.), May 6, 2008, <http://www.journal-news.net/page/content.detail/id/506481.html?nav=5006>; *Americans United Challenges Sectarian Prayers at New York Town Council*, CHURCH & ST., Apr. 1, 2008, at N, available at 2008 WLNR 7152770; Ben Beversluis, *To God We Pray, Officials Say*, GRAND RAPIDS PRESS, Mar. 9, 2008, at A1, available at 2008 WLNR 4773657; David Lea, *God's Role at Council*, OAKVILLE BEAVER (Ontario), Feb. 24, 2008, at 61, available at 2008 WLNR 3625254; Paul Carpenter, *Maybe Diversity Will Be Allowed, and Maybe Not*, MORNING CALL (Allentown, Pa.), Feb. 8, 2008, at B1, available at 2008 WLNR 2526847; Electa Draper, *Senate's Day Dawns With Hindu Chaplain's Prayer*, DENVER POST, Jan. 30, 2008, at B1, available at 2008 WLNR 1760576; Brian Barber, *Council Votes to Alter Prayer Policy*, TULSA WORLD, Jan. 25, 2008, available at 2008 WLNR 1490102.

¹² See Maheras, *supra* note 11 ("Area Christian ministers met Monday to discuss the High Point City Council prayer issue and Tuesday's upcoming election."); Tom Steadman, *Council Votes on Prayer*, GREENSBORO NEWS & REC. (N.C.), July 17, 2007, at A1, available at 2007 WLNR 13681870 (explaining that after a 9-1 vote to allow only non-denominational prayers, one minister "critical of the council vote, ended his comments with a political threat. . . . 'We're going to remember in 2008,'" which was followed by a "loud standing ovation"); Youngquist, *supra* note 11 ("Yadkin voters booted out incumbent commissioners Kim Clark Phillips and Joel Cornelius in the Republican primary last week as part of a backlash over the board's decision to drop sectarian prayer from meetings, residents said. . . . Days before the primary, advertisements ran in newspapers in Elkin and Yadkinville that promoted Wooten as the only commissioner to stand up in support of sectarian prayer.").

¹³ See Denyse Clark, *High Priestess Took Chester County Town to Court*, THE HERALD (Rock Hill, S.C.), Aug. 16, 2005, at 1B, available at 2005 WLNR 12874908 (describing how one legislative prayer plaintiff returned home to find her house had been broken into, her parrot had been beheaded and its heart cut out, and a note left behind that read, "You're next!"); Robert Patrick & Laura Green, *Rosenauers' Home, Truck Vandalized: The Jewish Family Suing the Manatee County School Board Over a Prayer Issue Calls Friday's Attack a Hate Crime*, SARASOTA HERALD-TRIB., Apr. 13, 2004, at A1, available at 2004 WLNR 2979228.

¹⁴ See *Australian House of Representatives Deny Hindu Prayer Request*, HINDUSTAN TIMES, Apr. 20, 2008, available at 2008 WLNR 7374615; Robert Benzie, *MPPs to Hear Lord's Prayer—and Many Others*, TORONTO STAR, June 13, 2008, at A1, available at 2008 WLNR 11161935; Daniel Martin, *Town Hall Prayers Fall Foul of Human Rights*, DAILY MAIL (U.K.), Mar. 13, 2008, at 21, available at 2008 WLNR 4932194.

ever, so it is more important than ever that the history go beyond what has been previously explored and beyond mere law office history.¹⁵

But this Article aspires to offer insights that go beyond just legislative prayer, insights on the general problems that can arise when government is permitted to act religiously. Religious endorsements like legislative prayer can seem quite mild, particularly to laypeople; atheists and agnostics might feel excluded, but their numbers are small and the exclusion is modest in nature. This has led many to wonder what the real harm is in allowing the government to speak religiously.¹⁶ To that query, the history of legislative prayer offers a partial response. Legislative prayer does indeed offend atheists and agnostics. But it may well be that legislative prayer's harshest impact is not on nonbelievers, but rather on believers who find themselves outside society's zone of acceptance—people like Charles Constantine Pise, the nineteenth-century Catholic chaplain who faced intense opposition from nativist Protestants, and Rajan Zed, the twenty-first century Hindu guest chaplain who endured similarly intense opposition from Christian protesters.¹⁷ Legislative prayer is often framed as pitting nonbelievers against believers, but that is an oversimplification. Having legislative prayer means committing religious decisions to a majoritarian governmental process, which has deep ramifications for all religious minorities.

This Article proceeds in three parts. Part I describes how the chaplaincies have developed over time, moving for the most part chronologically from the initiation of legislative prayer in the Continental Congress through the present day. Part II uses

¹⁵ See Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 842 (1985) ("Care must be taken that the so-called history is not what historians properly denounce as 'law office history,' written the way brief writers write briefs, by picking and choosing statements and events favorable to the client's cause."); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 933 (1986) ("Few areas of the law have suffered so much from law office history as have the religion clauses of the first amendment.").

¹⁶ A number of quite distinguished scholars have advanced this idea in recent scholarship. They suggest that the fuss over mild endorsements of religion (like legislative prayer) is overblown; some suggest that the fuss distracts the Court from more serious Establishment Clause issues. See, e.g., NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 6–9 (2005); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 100–02 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004). Justice Breyer has shown some receptivity to those ideas. He shocked many by providing the fifth vote to uphold a Ten Commandments display put on by the state of Texas, and by suggesting that society should tolerate some religious endorsements as a way of preventing religious division. See *Van Orden v. Perry*, 545 U.S. 677, 698–705 (2005) (Breyer, J., concurring and providing the fifth vote).

¹⁷ See *infra* notes 78–92 and accompanying text (discussing Pise); *infra* notes 181–87 and accompanying text (discussing Zed).

this history to reflect on the Supreme Court's decision in *Marsh v. Chambers* and the Establishment Clause more generally. The Article lays out its conclusions in Part III.¹⁸

I. THE HISTORY OF THE CONGRESSIONAL CHAPLAINCIES

A. *The Origins of Legislative Prayer*

The history of legislative prayer begins before the Constitution, before the Revolutionary War, with the first Continental Congress. That Congress had been assembled in the fall of 1774 at Carpenter's Hall in Philadelphia.¹⁹ On the second day of the convention, Congress heard a request from Thomas Cushing from Boston that the next day's session be opened with a prayer from a local Anglican minister, the Reverend Jacob Duché.²⁰ John Jay and John Rutledge objected, arguing that the delegates were too "divided in religious Sentiments" and thus "could not join in the same Act of Worship."²¹ But the motion passed, and the next day, Duché gave what has come to be known as the first American legislative prayer.²²

Duché opened with several form prayers, then read the thirty-fifth Psalm, and ended with a personal, extemporaneous prayer.²³ Both the Psalm and the extemporaneous prayer related deeply to the events of the day. The Continental Congress had just received word of an attack earlier that week on Boston by the British.²⁴ As a result, Congress had no trouble identifying with the thirty-fifth Psalm, which asks for divine refuge from the onslaught of foreign powers.²⁵ This seems to be what Adams meant

¹⁸ In a related piece that provides a counterpoint to this one, I address the specific constitutional and political issues presented by the recent flood of legislative prayer disputes. See Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements* (forthcoming Spring 2010) (on file with author).

¹⁹ See Martin J. Medhurst, *From Duché to Provoost: The Birth of Inaugural Prayer*, 24 J. CHURCH & ST. 573, 574 (1982).

²⁰ *Id.* (quoting EDWARD FRANK HUMPHREY, NATIONALISM & RELIGION IN AMERICA, 1774–1789 (1924)).

²¹ Letter from John Adams to Abigail Adams (Sept. 16, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 74 (Paul H. Smith ed., 1976); see also 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 26–27 & n.1 (Wash. GPO 1904) (1774).

²² See 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21.

²³ See Letter from John Adams to Abigail Adams, *supra* note 21.

²⁴ *Id.* ("You must remember this was the next Morning after we heard the horrible Rumour, of the Cannonade of Boston."). There is, however, doubt as to whether the attack actually happened. See Medhurst, *supra* note 19, at 577.

²⁵ That psalm begins:

Plead my cause, O LORD, with them that strive with me: fight against them that fight against me. Take hold of shield and buckler, and stand up for mine help. Draw out also the spear, and stop *the way* against them that persecute me: say unto my soul, I *am* thy salvation. Let them be confounded and put to shame that seek after my soul: let them be turned back and brought to confusion that devise my hurt. Let them be as chaff

when he said that it was “as if Heaven had ordained that Psalm to be read on that Morning,”²⁶ and what Silas Deane meant when he called the readings “accidentally extremely Applicable.”²⁷

The extemporaneous portion of Duché's prayer was almost lost to history. It was deliberately not recorded by the Continental Congress out of an apparent fear that the British might retaliate against Duché, who was again an Anglican clergyman.²⁸ Yet Charles Thomson, the secretary of the Continental Congress, secretly wrote down the text of Duché's extemporaneous prayer in Thomson's personal copy of the thirteen-volume Journals of Congress:

O! Lord, our heavenly father, King of Kings and Lord of lords: who dost from thy throne behold all the dwellers upon earth and reignest with power supreme & uncontrouled over all kingdoms, empires and governments, look down in mercy, we beseech thee, upon these our American states who have fled to thee from the rod of the oppressor and thrown themselves upon thy gracious protection, desiring henceforth to be dependent only on thee. To thee they have appealed for the righteousness of their Cause; to Thee do they look up, for that countenance & support which Thou alone canst give. Take them, therefore, Heavenly Father, under thy nurturing care: give them wisdom in council, valour in the field. Defeat the malicious designs of our cruel adversaries. Convince them of the unrighteousness of their cause. And if they persist in their sanguinary purposes, O! let the voice of thy unerring justice sounding in their hearts constrain them to drop the weapons of war from their enerved hands in the day of battle. Be thou present, O God of Wisdom and direct the counsels of this honourable Assembly. Enable them to settle things upon the best and surest founda-

before the wind: and let the angel of the LORD chase *them*. Let their way be dark and slippery: and let the angel of the LORD persecute them. For without cause have they hid for me their net in a pit, *which* without cause they have digged for my soul. Let destruction come upon him at unawares; and let his net that he hath hid catch himself: into that very destruction let him fall.

Psalms 35: 1–8.

²⁶ Letter from John Adams to Abigail Adams, *supra* note 21.

²⁷ Letter from Silas Deane to Elizabeth Deane (Sept. 7, 1774), in *LETTERS OF DELEGATES TO CONGRESS*, *supra* note 21, at 34.

²⁸ James Duane's Notes of Debates (Sept. 7, 1774), in *LETTERS OF DELEGATES TO CONGRESS*, *supra* note 21, at 35 (“The Congress was opened with prayers by the revnd Mr Dutché which he Concluded with one suitable to the occasion. . . . It was then movd that he should be requested to print the prayer. But it being objected that as this might possibly expose him to some disadvantage it was out of Respect to him waived.”).

tion, that the scene of blood may be speedily closed; that harmony and peace may effectually be restored, and truth and justice, religion and piety prevail and flourish amongst thy people. Preserve the health of their bodies and the vigour of their minds; shower down upon them and the millions they represent such temporal blessings as Thou seest expedient for them in this world, and crown them with everlasting glory in the world to come. All this we ask in the name and through the merits of Jesus Christ thy son, Our Saviour, Amen.²⁹

This extemporaneous prayer continues the themes of the thirty-fifth Psalm—it again asks for divine assistance in turning the hearts of the British (the “cruel adversaries” mentioned in the prayer) toward the colonists (“Convince them of the unrighteousness of their cause”). As with the Psalm, the colonists found this prayer extraordinarily appropriate and deeply moving.³⁰

Yet the fact that there were earnest religious motives behind Duché’s selection and prayer should not blind us to the other possible purposes being served as well. Duché was a relatively influential Anglican clergyman—he had two large Philadelphia congregations, Christ Church and St. Peter’s.³¹ The Continental Congress desperately needed help ingratiating the revolutionary movement with the Anglican laity and clergy (who would be overwhelmingly Loyalist when the Revolutionary War came).³² Duché’s selection thus was a way to move Anglican clergy into supporting the cause for liberty—or at least not opposing it so vigilantly.³³ This seems to be what John Adams meant when he wrote that “[Joseph Reed] says We never were guilty of a more Masterly Stroke of Policy, than in moving that Mr. Duché might read Prayers,”³⁴ and presumably what Samuel Adams was hinting at when he explained his selection of Duché in these terms: “As many of our warmest friends are members of the Church of England, [I] thought it prudent, as well on that as on some other accounts, to move

²⁹ Letter from Charles Thomson to George Washington (July 25, 1789), in 25 LETTERS OF DELEGATES TO CONGRESS, *supra* note 21, at 551–52 (citations omitted).

³⁰ Letter from John Adams to Abigail Adams, *supra* note 21, at 74 (“I must confess I never heard a better Prayer or one, so well pronounced. . . . Mr. Duché is one of the most ingenious Men, and best Characters, and greatest orators in the Episcopal order, upon this Continent—Yet a Zealous Friend of Liberty and his Country.”).

³¹ See Medhurst, *supra* note 19, at 575.

³² See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2125 (2003) [hereinafter McConnell, *Establishment and Disestablishment*] (noting that “only twenty-seven percent of Anglican ministers nationwide supported independence” and explaining how the “loyalist sympathies of the Anglicans stemmed from both theology and history”).

³³ See Medhurst, *supra* note 19, at 573–75.

³⁴ John Adams’ Diary (Sept. 10, 1774), in LETTERS OF DELEGATES TO CONGRESS, *supra* note 21, at 60.

that the service should be performed by a clergyman of that denomination."³⁵ This also perhaps explains the interesting ecumenism at play here. While Duché was Anglican (as was most of the Continental Congress),³⁶ Samuel Adams (who suggested him) was a strict Congregationalist.³⁷

One of the consistent themes of this Article will be how the prevailing anti-Catholicism of the times sometimes enters into the history of the chaplaincies, and that theme seems present in small part even at this early juncture. At the time of Duché's prayer, the colonists' most recent grievance was the Quebec Act, which had been passed by Parliament earlier in the year.³⁸ The Quebec Act made life easier for Catholics in Canada by doing things like deleting the essentially Protestant parts of the Canadian oath of allegiance. Yet while we would now conceptualize the Quebec Act as a measure mostly enhancing religious freedom, the colonists in American territories did not see it that way at all. They saw the Quebec Act as an attack on their Protestantism and a threat to their very way of life.³⁹

Of course, Parliament did not pass the Quebec Act because it was moved either by Catholicism or by a lofty spirit of religious tolerance. The Catholics in Canada were embittered by their treatment by the Crown, and Parliament knew that embittered Canadians might join the mounting revolutionary forces in the American colonies. The Quebec Act deliberately sought to undermine the growing revolutionary tension in Canada and, scholars have concluded, ultimately it "did much to preserve the loyalty of the French Canadians when the thirteen colonies rebelled and invited Canada to join the secession."⁴⁰

³⁵ See JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 26 n.1.

³⁶ Medhurst, *supra* note 19 ("[T]he majority of the Continental Congress were nominally Episcopalian.").

³⁷ WILLIAM V. WELLS, 2 THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 221 (Boston, Little, Brown, & Co. 1865).

³⁸ See *An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America*, 1774, 14 Geo. 3, ch. 83, § 5 (Eng.), reprinted in 30 PICKERING'S STATUTES AT LARGE 549, 551 (1773) (providing, *inter alia*, that Quebec citizens may generally enjoy the "free exercise of religion" subject to certain restrictions).

³⁹ See T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYUL. REV. 419, 445 ("Although the Quebec Act provided in relevant part only for the freedom of religion for Catholics, the Continental Congress and provincial legislatures throughout America condemned it for having established a tyranny."); see also T. JEREMY GUNN, A STANDARD FOR REPAIR: THE ESTABLISHMENT CLAUSE, EQUALITY, AND NATURAL RIGHTS 73–78 (1992) (discussing colonial reactions to the Quebec Act).

The Quebec Act became one of the five Intolerable Acts that formed the core of the American colonists' grievances, and the perceived unjustness of it was a prominent part of the Declaration of Independence. See THE DECLARATION OF INDEPENDENCE para. 22 (U.S. 1776) ("For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies.").

⁴⁰ WILLIAM ADAMS BROWN, CHURCH AND STATE IN CONTEMPORARY AMERICA 321 (1936); see also Richard Albert, *American Separationism and Liberal Democracy: The*

All of this was surely on the minds of the Continental Congress, as the Quebec Act had been passed only a few months before. It was only a matter of days after Duché's prayer, and only half a dozen pages later in the Congress's *Journals of the Continental Congress*, that the Continental Congress adopted objections to the Quebec Act made by colonists in Massachusetts:

[T]he late act of parliament for establishing the Roman Catholic religion and the French laws in that extensive country, now called Canada, is dangerous in an extreme degree to the Protestant religion and to the civil rights and liberties of all America; and, therefore, as men and Protestant Christians, we are indispensably obliged to take all proper measures for our security.⁴¹

Duché's selection can thus be seen as a sort of strategic counter-thrust to the Quebec Act. The Quebec Act worked to shore up support for the Crown among Catholics in Canada; Duché's selection worked to shore up support for the colonists among Anglicans in the colonies. By choosing Duché, the colonists would also have conveyed a message to the Crown and the Crown's supporters in the colonies: We are not all Anglicans, but many of us are—and all of us are fellow Protestants, unlike those to the north.⁴²

For all these reasons, Duché's appointment was not just a religious matter, but perhaps a political one as well. One historian said that "the institutionalization of the congressional chaplaincy was motivated from the outset by partisan political concerns."⁴³ That seems correct, although perhaps we should not underestimate the genuinely religious motives that also underlay the practice.

Turning back to history, from that point in 1774 onward, Duché became an informal chaplain for the Continental Congress, giving prayers,⁴⁴ conducting funerals,⁴⁵ and

Establishment Clause in Historical and Comparative Perspective, 88 MARQ. L. REV. 867, 878 (2005) (quoting Brown's work and providing thoughtful discussion of the Quebec Act).

⁴¹ JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 34–35.

⁴² As a sidenote, in his book, William Hutchison provides the artist T. H. Matteson's depiction of Duché's prayer—a depiction titled, *First Prayer in Congress*. Hutchison notes that in Matteson's painting, "we find a diversity consisting almost entirely of Episcopalians, Presbyterians, and Congregationalists. Catholics? Jews? Baptists or other radical dissenters? Not in this picture and not, of course, in the gathering it depicts." WILLIAM R. HUTCHISON, *RELIGIOUS PLURALISM IN AMERICA: THE CONTENTIOUS HISTORY OF A FOUNDING IDEAL* 23 (2003).

⁴³ Medhurst, *supra* note 19, at 573; *see also* LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 248 (rev. ed. 1967) (concluding, after reviewing some of the history, that "[t]he first chaplain of the Continental Congress was selected on the basis of political considerations").

⁴⁴ *See* 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 12 (requesting Duché to come and offer prayer).

⁴⁵ *See* 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 303 (instructing

acting in an informal capacity to the delegates. As revolution began to foment, Duché became steadily more notorious. On July 4, 1776, the day the Declaration of Independence was ratified, Duché, acting with the vestry of Christ Church in Philadelphia, set off a firestorm of controversy by resolving that prayers for King George III would no longer be included in prayers for the church, and by crossing his name out of the Book of Common Prayer.⁴⁶ This was illegal under English law and possibly treasonous.⁴⁷ Five days later, on July 9, 1776, Duché was appointed the official chaplain of the Continental Congress.⁴⁸

It is surprising just how quickly Duché moved from hero to outcast during the Revolutionary War. In 1777, after being detained by the British, he wrote a famous letter to George Washington, urging Washington to lay down his arms.⁴⁹ John Adams, who had written his wife in praise of Duché and his prayers, now wrote to tell her of his treachery: "Mr. Duché I am sorry to inform you has turned out an Apostate and a Traitor."⁵⁰ Other colonists, unsurprisingly, felt similarly.⁵¹

B. The Development of the Legislative Chaplaincy

After word spread of Duché's treachery, the Continental Congress appointed new chaplains—William White (an Anglican) and George Duffield (a Presbyterian).⁵² Like Duché had done, they too offered prayers, delivered sermons, conducted funerals,

a committee to ask Duché to preside at the funeral of Peyton Randolph, the first President of the Continental Congress).

⁴⁶ See Rev. Edward Duffield Neill, *Rev. Jacob Duché, The First Chaplain of Congress*, in 2 PA. MAG. OF HIST. & BIOGRAPHY 58, 67 (1878).

⁴⁷ The Act of Uniformity required ministers to adhere to traditional Anglican practice and the Book of Common Prayer. See Act of Uniformity, 1662, 14 Car. 2, c. 4 (Eng.), reprinted in 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 543–46 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937). For more on the established church in England, see McConnell, *Establishment and Disestablishment*, *supra* note 32, at 2112–15 & nn.28–53.

⁴⁸ See Letter from John Hancock to Jacob Duché (July 9, 1776), in 4 LETTERS OF DELEGATES TO CONGRESS, *supra* note 21, at 418.

⁴⁹ Letter from Jacob Duché to General George Washington (Oct. 8, 1777), in CORRESPONDENCE OF THE AMERICAN REVOLUTION 448–58 (Jared Sparks ed., Boston, Little, Brown, & Co. 1853).

⁵⁰ Letter from John Adams to Abigail Adams (Oct. 25, 1777), in 8 LETTERS OF DELEGATES TO CONGRESS, *supra* note 21, at 179.

⁵¹ Letter from North Carolina Delegates to Richard Caswell (Oct. 20, 1777), in 8 LETTERS OF DELEGATES TO CONGRESS, *supra* note 21, at 155 ("The Revd. Mr. Duché has acted such a part as will for ever disgrace him, in short he may be said to be the first of Villains."); Letter from Henry Laurens to Robert Howe (Oct. 20, 1777), in 8 LETTERS OF DELEGATES TO CONGRESS, *supra* note 21, at 150 (calling the letter to Washington a "[r]ascally epistle from the Ir-Revd. Jacob Duché").

⁵² 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 451 (1950).

and acted in general as the Congress's chaplains.⁵³ This arrangement was maintained throughout the Continental Congress and the Congress of the Confederation, until the Constitution was ratified and a new Congress selected.⁵⁴

This brings us to the events of the Constitutional Convention of 1787. The Convention was markedly different with respect to legislative prayer than the Continental Congress. The Constitutional Convention did not have formal chaplains or any institutionalized practice of prayer. It met from May to September, but the only push for any sort of organized convention-wide prayer came at the end of June. After lamenting "[t]he small progress we have made after 4 or five weeks,"⁵⁵ Benjamin Franklin suggested prayer as a common bond:

I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that *God governs in the affairs of men*. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings, that "except the Lord build the House they labour in vain that build it." I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel

I therefore beg leave to move—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, and that one or more of the Clergy of this City be requested to officiate in that service.⁵⁶

Franklin's motion failed to win the day. Some said that his concerns should have been thought of earlier and not brought up a month into the Convention. Some feared that the takeaway point for the public would be that the Convention was failing to make progress. Others said simply that the Convention had no funds to hire a chaplain. In any event, the meeting was adjourned without any resolution of Franklin's motion.⁵⁷

⁵³ *Id.*

⁵⁴ DEREK H. DAVIS, *RELIGION AND THE CONTINENTAL CONGRESS 1774–1789*, at 76–77 & nn.15–19 (2000).

⁵⁵ *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 450 (Max Farrand ed., rev. ed. 1937).

⁵⁶ *Id.* at 451–52.

⁵⁷ *See id.* at 452. Apparently only three or four delegates (out of fifty-five) supported Franklin's motion, for it was later noted that "[t]he Convention, except three or four persons, thought Prayers unnecessary." *Id.* at 452 n.15.

Unsurprisingly, commentators have taken the absence of prayers at the Constitutional

This brings us to the actions of the First Congress, which picked up in 1789 after the dissolution of the Continental-Confederation Congress. It was resolved early that the House and Senate would each appoint their own initial chaplains, that the chaplains would be of different denominations, and the chaplains would regularly switch between the two bodies.⁵⁸ On April 25, 1789, the Senate elected its first chaplain, Samuel Provoost, an Episcopalian bishop.⁵⁹ On May 1, the House followed suit, electing Presbyterian William Linn.⁶⁰ Later, on September 22, Congress passed a statute setting the salaries of various congressional officials, including the chaplains, at \$500 per year.⁶¹ As many commentators have noticed, and as the *Marsh* Court stressed, this last act occurred only three days before Congress reached its final agreement on the Bill of Rights.⁶²

Now because the vote for the creation of the chaplaincies was not recorded in the *Annals of Congress*,⁶³ it is difficult to gauge how much dissent there was within Congress over the decision to have congressional chaplaincies. Yet there is evidence of at least some dissent. For example, Thomas Paine, a well-known critic of then-contemporary organized religion, received three votes to be chaplain. In retrospect, those votes clearly seem to have been votes cast in protest of the chaplaincies.⁶⁴

One fiercely debated question has been whether, and to what extent, Madison supported or opposed the chaplaincy.⁶⁵ Madison's views, of course, matter greatly; he served as principal drafter of the Establishment Clause, and was part of the joint com-

Convention one of two ways. Compare PFEFFER, *supra* note 43, at 247 (suggesting that the failure of Franklin's motion was due to reasons of principle and speculating that "if the Congress created by [the Constitutional Convention] had not been preceded by the Continental Congress it would likewise have started without benefit of chaplain or prayer"), with ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 25 (1982) (arguing that it was "concern about public profile and *not the principle of separation of Church and State* that kept the Constitutional Convention from daily prayers and a chaplain").

⁵⁸ 1 ANNALS OF CONG. 19 (Joseph Gales ed., 1834) ("That two Chaplains, of different denominations, be appointed to Congress for the present session, the Senate to appoint one, and give notice thereof to the House of Representatives, who shall, thereupon, appoint the other; which Chaplains shall commence their services in the Houses that appoint them, but shall interchange weekly.").

⁵⁹ *Id.* at 24.

⁶⁰ *Id.* at 233.

⁶¹ See Act of Sept. 22, 1789, ch. 17, 1 Stat. 70–71 ("And be it further enacted, That there shall be allowed to each chaplain of Congress, at the rate of five hundred dollars per annum during the session of Congress . . .").

⁶² See *Marsh v. Chambers*, 463 U.S. 783, 788 (1983) ("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.").

⁶³ DAVIS, *supra* note 54, at 77; see also ANNALS OF CONG., *supra* note 58, at 24, 233.

⁶⁴ STOKES, *supra* note 52, at 457.

⁶⁵ See, e.g., Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NW. U. L. REV. 145 (2008).

mittee that recommended the creation of the congressional chaplaincies.⁶⁶ Yet it is unclear whether Madison ever really specifically intended to support the chaplaincy. Madison did surely vote for the chaplaincies, in the sense of voting for the appropriations bill that set and funded the salaries of various congressional officers, which included the chaplains.⁶⁷ And later, as President, Madison approved the appropriations bill allocating money for the existing chaplains.⁶⁸ Yet Madison always maintained that he never had given outright approval to the congressional chaplaincies.⁶⁹ There has been a modest debate about whether Madison's actions were truly consistent.⁷⁰ And it probably would not be surprising if Madison's views did indeed change over time.⁷¹

⁶⁶ The Court in *Marsh* emphasized Madison's importance. See *Marsh*, 463 U.S. at 788 n.8 ("It bears note that James Madison, one of the principal advocates of religious freedom in the Colonies and a drafter of the Establishment Clause was one of those appointed to undertake this task by the House of Representatives and voted for the bill authorizing payment of the chaplains." (citations omitted)).

⁶⁷ Leonard Levy once doubted *Marsh*'s claim that Madison voted the bill authorizing payment for the chaplains. Levy noted that "Burger [in *Marsh*] cited I Annals of Cong. 891" for evidence of Madison's vote, but he said that "[n]othing on that page is pertinent," and further noted that "the *Annals* does not [even] record the vote nor say how any member voted." LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 97 & 209 n.13 (1986).

Yet as Professor Olree has shown, Levy was simply mistaken on this point—Madison's vote in favor of funding the chaplains (again, along with the other recently selected congressional officials) was indeed recorded in the *Annals*. See Olree, *supra* note 65, at 175–76 & nn.157–59 (citing *ANNALS OF CONG.*, *supra* note 58, at 714–15).

⁶⁸ See Act Fixing the Compensation of the Chaplains of Congress, ch. 170, 3 Stat. 334 (1816).

⁶⁹ See LEVY, *supra* note 67, at 97 ("I observe with particular pleasure the view you have taken of the immunity of religion from civil jurisdiction . . . This has always been a favorite principle with me; and it was not with my approbation, that the deviation from it took place in Congress when they appointed Chaplains, to be paid from the National Treasury." (quoting Letter from James Madison to Edward Livingston (July 10, 1822) (internal quotation marks omitted))).

⁷⁰ Compare LEVY, *supra* note 67, at 97 (suggesting Madison was consistent), with CORD, *supra* note 57, at 30 (suggesting he was not).

⁷¹ Madison changed his mind on religious Thanksgiving proclamations, which he issued while he was President, but then later regretted. See Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 914 (1986). He also changed his position on the Bank of the United States, which he opposed as unconstitutional in 1791 when he was in the House of Representatives, but then, as President, signed the legislation for in 1816. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1474 (2001).

Yet the most detailed historical examination seems to conclude that Madison consistently opposed the chaplaincies throughout his political life.⁷²

In any event, it is clear that Madison ultimately came to oppose the chaplaincies. In retirement, in his *Detached Memoranda*, Madison laid out his arguments against the chaplaincies:

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.

The establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles: The tenets of the chaplains elected [by the majority] shut the door of worship against the members whose creeds & consciences forbid a participation in that of the majority. To say nothing of other sects, this is the case with that of Roman Catholics & Quakers who have always had members in one or both of the Legislative branches. Could a Catholic clergyman ever hope to be appointed a Chaplain? To say that his religious principles are obnoxious or that his sect is small, is to lift the veil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers, or that the major sects have a right to govern the minor.⁷³

⁷² Olree, *supra* note 65. Olree ends his historical analysis by concluding that, although the historical record does not permit certainty, "in all likelihood James Madison consistently opposed the legislative chaplaincy throughout his political life and also considered it a violation of the Establishment Clause he helped to frame." *Id.* at 221.

⁷³ Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WILLIAM & MARY Q. 534, 558 (1946).

Madison's critique of the chaplaincies set the stage for all the later critiques. His first paragraph mirrors Justice Brennan's later argument that the chaplaincies are intrinsically unconstitutional,⁷⁴ while his second paragraph mirrors Justice Stevens's argument that the chaplaincies will inevitably operate in a way that unconstitutionally disadvantages religious minorities.⁷⁵ Note also the then-rhetorical query as to whether a Catholic priest could ever become a clergyman—this theme too is a recurring one, and will be picked up shortly.

In any event, by 1789, the chaplaincies were by law established under the new Constitution, and thus our focus moves from the debates about their existence to the practicalities of their operation. Again, by statute, the House and the Senate were to elect chaplains of different denominations. From 1789 to 1809, the Senate had eight chaplains, all Episcopalian—while the House rotated through Presbyterians, Methodists and Baptists.⁷⁶ When Congress moved from Philadelphia to Washington in 1800, there were only three small churches in the new capital, and so the House of Representatives used its own hall to host Sunday religious services, often put on by the chaplains.⁷⁷

C. Catholicism and the Chaplaincies

In his "Detached Memoranda," Madison asked an insightful question—whether a Catholic clergyman could ever hope to be appointed chaplain.⁷⁸ By 1830, the House and the Senate had collectively seen chaplains of a variety of denominations: Episcopalian, Presbyterian, Methodist, Baptist, Unitarian, and Congregationalist. What had not been seen—and what would not be seen again until the year 2000—was a Catholic chaplain. Yet in 1832, the Senate elected Charles Constantine Pise, a Roman Catholic priest, to be the first Catholic congressional chaplain.⁷⁹

A bit of history is needed to appreciate this fact. At the founding of this country, Catholics were few and far between. There were no Catholics in the Continental Congress and only two at the Constitutional Convention.⁸⁰ In 1789, there were only 35,000 Catholics in this country—they made up less than 1% of the population. But

⁷⁴ See *Marsh v. Chambers*, 463 U.S. 783, 795–822 & nn.1–54 (1983) (Brennan, J., dissenting).

⁷⁵ See *id.* at 822–24 & nn.1–2 (Stevens, J., dissenting).

⁷⁶ See generally Senate Chaplain, http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm (last visited Apr. 17, 2009); History of the Chaplaincy, Office of the Chaplain, <http://chaplain.house.gov/chaplaincy/history.html> (last visited Apr. 17, 2009).

⁷⁷ See generally 2 ROBERT C. BYRD, *THE SENATE 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 299–300 (Wendy Wolff ed., 1991); STOKES, *supra* note 52, at 499–507.

⁷⁸ Fleet, *supra* note 73.

⁷⁹ See *Charles Constantine Pise*, in 7 *DICTIONARY OF AMERICAN BIOGRAPHY* 634 (Dumas Malone ed., 1934).

⁸⁰ See Ralph E. Pyle & James D. Davidson, *The Origins of Religious Stratification in Colonial America*, 42 J. FOR SCI. STUDY RELIGION 57, 70 tbl.3 (2003).

the middle part of the nineteenth century saw massive Catholic immigration from Ireland and parts of Eastern Europe. By 1840, there were over half a million Catholics (3.3% of the population), and by 1891, there were eight million (12.9%).⁸¹

This was a significant demographic shift, and it caused considerable domestic upheaval. Nativist and Know-Nothing movements developed and clashed with fledgling Catholic communities. Some of the most intense fights were over the public schools. Protestants tried to insist that the public schools continue having Protestant religious observances, and they simultaneously worked to bar Catholics from any governmental funding for any Catholic private schools. This one-two punch effectively maintained Protestant hegemony in the school system for generations.⁸²

In 1832, the year of Pise's appointment, the battles between Protestants and Catholics for the soul of the country were only just beginning, but Pise himself was already well acquainted with anti-Catholicism. In 1823, a writer named Grace Kennedy had written a somewhat anti-Catholic book, *Father Clement; A Roman Catholic Story*.⁸³ In direct response, Pise wrote what some have called the "first American Catholic Novel."⁸⁴ Titled *Father Rowland: A North American Tale*, Pise's book offered a contrary and more sympathetic view of American Catholicism.⁸⁵

Pise's nomination for the office of Senate Chaplain provoked a heated and polarizing debate. One biographer wrote of the "intense anti-Catholic feeling and bigotry [in] press and pulpit . . . alike" at the time of Pise's nomination, and described how "[t]he thought of a Catholic priest holding such a position of honor in the Senate of the United States called forth strenuous efforts to prevent this 'disaster' to the

⁸¹ These statistics were helpfully collected in Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 135–36 (2000). They are generally comparable with those given in MARTIN E. MARTY, *PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA* 271–72 (1984).

⁸² For more on these points, see John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297–305 (2001), and FELDMAN, *supra* note 16, at 57–92.

⁸³ GRACE KENNEDY, *FATHER CLEMENT; A ROMAN CATHOLIC STORY* (Garland Publishing 1976) (1823).

⁸⁴ See Sister M. Eulalia Teresa Moffatt, *Charles Constantine Pise (1801–1866)*, in 20 HISTORICAL RECORDS AND STUDIES 75 (Thomas F. Meahan ed., 1931) (calling Pise the "first American Catholic novelist"); *The First American Catholic Novel*, LIBRARY ASSOCIATES OF GEORGETOWN U., Spring & Summer 1998, available at <http://library.georgetown.edu/advancement/newsletter/51/rowland51.htm>.

⁸⁵ See CHARLES CONSTANTINE PISE, *FATHER ROWLAND; A NORTH AMERICAN TALE* (Baltimore, Fielding Lucas, Jr. 1829); see also James J. Green, Rev. Dr. Charles Constantine Pise, D.D. 12 (May 20, 1960) (unpublished manuscript on file with author) ("The book purposed to present in an attractive form a convincing defense of the Church's teachings in reply to the calumnies contained in an abusive publication edited the previous year under the title, 'Father Clement.'").

Republic.”⁸⁶ A more contemporary account by the Congressional Research Service tried to explain the rationale behind the protests—namely that “nativists and anti-Catholic elements . . . regarded Catholicism as involving a dual allegiance (to the United States and to the Holy See)” and thus they, as a result, “bitter[ly] campaign[ed] against [Pise].”⁸⁷ But, despite the controversies, Pise was indeed elected on December 11, 1832, as the twenty-eighth chaplain of the Senate.⁸⁸

Yet Pise’s struggle continued. Suspiciously soon after his election, Congress began receiving petitions to end the chaplaincies.⁸⁹ Protestant chaplains in state legislatures refused to offer prayers, apparently in protest.⁹⁰ On July 4, 1833, Pise responded to the chorus of anti-Catholic sentiment in a remarkable address that would echo addresses later given by other Catholic political figures:

Was it not stated—I regret to be obliged to speak of myself individually, but the subject and the occasion will be my apology—was it not circulated through the press, as an argument against my election to the Chaplaincy of the Senate, that I am a subject of the Pope; that I had taken an oath of allegiance to him as a temporal Lord, and that certain honors had been conferred on me—which excluded me from the birth-rights of my country. Shall I contradict all these assertions? Is it necessary before such an assembly, for me to declare, that I know of no temporal connexion existing between myself and the Pope—I acknowledge no allegiance to his temporal power—I am no subject of his dominions—I have sworn no fealty to his throne—but I am, as all American Catholics glory to be, independent of all foreign temporal authority—devoted to freedom, to unqualified toleration, to republican institutions.

⁸⁶ Moffatt, *supra* note 84, at 79; see also *Charles Constantine Pise*, in 7 *DICTIONARY OF AMERICAN BIOGRAPHY* 634 (Dumas Malone ed., 1934) (noting that Pise “was duly elected . . . despite an intense nativist opposition in press and pulpit to his creed and foreign honors”).

⁸⁷ Charles H. Whittier, *The Only Roman Catholic Chaplain of the United States Senate*, CONG. RES. SERV., Mar. 27, 1986, at 1.

⁸⁸ See 9 REG. DEB. 5–6 (1833) (noting that Pise won election after four ballots, with twenty-two out of the thirty-eight votes); see also JOURNAL OF THE SENATE, 22d Cong., 2d sess., Dec. 12, 1832, at 25 (reporting the election).

⁸⁹ See GETTYSBURG STAR & REPUBLICAN BANNER, May 20, 1833, at 2 (“A society of Christians . . . intends petitioning the next Congress for the repeal of the law authorizing the payment of Chaplains to that body, out of the public treasury. They offer as a reason, the disunion, in this country, of *Church and State* . . .”(quotations omitted)).

⁹⁰ In New York, shortly after Pise took office, thirteen clergymen together opted to decline the invitation of the New York Assembly to come and offer prayers. “The reasons given [were] the opposition which the employment of Chaplains has met with—the unpleasant discussions which it has given rise to, and which probably will be renewed from year to year.” GETTYSBURG STAR & REPUBLICAN BANNER, Jan. 22, 1833, at 3.

America is our country—her laws are our safeguard—her Constitution our Magna Carta—her tribunals our appeal—her Chief Magistrate our national head—to all which we are subject and obedient, in accordance with the injunction of our religion, which commands us to give honor where honor is due—to be subject to the powers that be—and to give unto Caesar the things that are Caesar's.⁹¹

Pise ended up leaving office on December 10, 1833, ultimately serving one day short of a year. Congressional records report only that Congress decided to go with a new chaplain—they say nothing about what motivated Congress to do so, though it was common at the time for chaplains to only serve for a term or two.⁹² It is thus unclear whether, and to what extent, anti-Catholicism may have been among the reasons for Pise's departure.

What is clear, however, is that the anti-Catholicism that Pise experienced did not suddenly end with Pise. That continued for many decades to come. From this point on, Protestants came to oppose the congressional chaplaincies precisely because they feared the chaplaincies would again fall into Catholic hands. Congressmen spoke of how the chaplaincies "place us upon a level with the priest ridden despotisms of the Old World" and they objected to Catholic priests "promulgating [their] sectarian views" while on government salaries.⁹³ Citizens and congressmen alike had special distrust toward Catholicism's quick growth in this country. Given the "rapid strides of priestcraft, now being made in these United States," many thought it would be better to abandon the chaplaincies altogether than for them to be maintained only to eventually fall into Catholic hands.⁹⁴ Some saw a natural parallel between the Catholic Church's hierarchical structure (which they perceived as authoritarian) and the inherent authority and power of a governmental minister. Both came to be seen as corruptions of liberty. As one citizen vehemently put it, "Priestcraft is in the ascendancy, as is made manifest

⁹¹ ADAMS SENTINEL (Gettysburg, Pa.), Aug. 12, 1833, at 3. The magazine editors reporting the address remarked at being "struck with this passage." *Id.*; OHIO REPOSITORY (Canton, Ohio), Aug. 23, 1833, at 4 (same); see also 3 STOKES, *supra* note 52, at 130 (reporting parts of this passage).

⁹² In the first ballot, Pise finished in second place, receiving ten ballots out of thirty-nine. He did worse in subsequent votes. By the fifth ballot, he got only one ballot. The Senate ultimately went with Frederick Hatch, an Episcopalian. See 10 REG. DEB. 27 (1834).

⁹³ See CONG. GLOBE, 35th Cong., 1st Sess. 25–26 (1857). Note that the term "sectarian" during this time period acted as secret shorthand for "Catholic." See Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 188 (2004) [hereinafter Laycock, *Theology Scholarships*] ("[F]or most of the nineteenth century, 'sectarian' was a code word for Catholic." (citation omitted)).

⁹⁴ S. MISC. DOC. NO. 30-2 (1848).

by the Senate's having elected a *Rev.* to mock the Supreme Being through the dirty business of saying official prayers, for filthy lucre's sake."⁹⁵

The hostility toward Catholicism became so deeply ingrained that the government-funded Catholic chaplains became a sort of *reductio ad absurdum* against the chaplaincies altogether. One early petition to Congress, in arguing that the chaplaincies were unconstitutional, stressed that the best proof of the unconstitutionality of the chaplaincies lay in the possibility that Catholics could potentially be chaplains: "If the Legislature should enact a law . . . to pay the wages of *priests* hired to perform prayers among the representatives, such a measure would meet a reception adapted to its unjust object and odious character."⁹⁶ To the author of this petition, the obvious injustice of having Catholic chaplains was proof that the chaplaincies had been illegitimate all along. These fears were exacerbated by developments in the military chaplaincies. During the war with Mexico, President Polk began permitting Catholic priests to serve as military chaplains.⁹⁷ This, as one historian put it, "caused something of a furore in some Protestant circles";⁹⁸ one newspaper called Polk's move "a flagrant outrage upon the constitution."⁹⁹

Given all this, it was perhaps a miracle that Pise even got the position of Senate chaplain in the first place. His position seems largely attributable to two things. First, there was the strength of his personal friendships with certain influential politicians—President Jackson, Senator Henry Clay and future President Tyler.¹⁰⁰ And second, there was the simple fact that in 1832, the bulk of Catholic immigration to the United States was yet to come and the anti-Catholic turn in American history was only at its beginning. Appointing Pise would likely have been much more difficult twenty years later.¹⁰¹

It is perhaps unsurprising then that the House and Senate were hesitant to select another Catholic chaplain. What is surprising is just how long this hesitancy endured. It was not until March 2000—166 years after Pise left office—that the second Catholic

⁹⁵ THE BANNER OF LIBERTY (Middletown, N.Y.), Mar. 28, 1860, at 103. It must also be stressed that references to "priestcraft" were not references to clergy generally—they were references to Catholic priests specifically. See, e.g., Sarah Barringer Gordon, *"Free" Religion and "Captive" Schools: Protestants, Catholics, and Education, 1945–1965*, 56 DEPAUL L. REV. 1177, 1192 (2007) ("For much of American history, priestcraft meant Roman Catholicism *tout court*.").

⁹⁶ H.R. DOC. NO. 23-9 (1833) (emphasis added).

⁹⁷ 2 STOKES, *supra* note 52, at 77.

⁹⁸ *Id.*

⁹⁹ *Id.* at 79 (citation omitted). For a more detailed discussion of the controversy that arose in appointing military chaplains, see Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1132–34 (1998).

¹⁰⁰ See Whittier, *supra* note 87, at 1–2; see also Moffatt, *supra* note 84, at 64, 79–80.

¹⁰¹ It was not until the 1840s and 1850s, for example, that the fights for the public schools began in earnest between Catholics and Protestants. See, e.g., Jeffries & Ryan, *supra* note 82, at 298–302.

chaplain was appointed. The Senate went through thirty-four chaplains and the House went through thirty-seven chaplains before the House of Representatives finally chose Daniel P. Coughlin as the second Catholic to serve as a congressional chaplain.¹⁰²

Moreover, Coughlin's own path to the congressional chaplaincy was marked by struggle—a kind of struggle that suggests that anti-Catholicism likely had a significant role in the long time period between the two Catholic chaplains. The Rev. James Ford, a Lutheran, was retiring from his position as chaplain for the House of Representatives, a position he had held for twenty-one years.¹⁰³ A bipartisan committee was formed to help select the next chaplain—a plurality of the committee's votes went to Rev. Timothy O'Brien, a Catholic priest and professor at Marquette University, while two Protestant ministers, Rev. Robert Dvorak and Rev. Charles Wright, were the second- and third-place vote getters, respectively. At that point, however, House Speaker Dennis Hastert and House Majority Leader Richard Armey (both Republicans) elected to go with Rev. Charles Wright, who had finished third in the committee's voting.¹⁰⁴

This sparked an outcry. O'Brien himself directly suggested that the decision was the result of anti-Catholic prejudice, telling the *New York Times*, "I do believe that if I were not a Catholic priest I would be the House chaplain."¹⁰⁵ And several prominent Republican Catholics took O'Brien's side against the Republican leadership—Henry

¹⁰² 146 CONG. REC. 3478–81 (2000) (recording selection and swearing in of Father Coughlin).

¹⁰³ The facts that follow come from a number of sources scattered across the political and religious spectrum. See William Safire, *Protestant Picked Over Catholic, and Hell Breaks Loose*, MOBILE REG., Mar. 19, 2000, at D4, available at 2000 WLNR 8907208; Judy Ball, *Helping a Nation Heal Through Prayer*, ST. ANTHONY MESSENGER, Dec. 31, 2001, at 36, available at 2001 WLNR 4938949; Robert S. Alley, *The Senate Chaplain and God as Ex-Officio Member*, FREE INQUIRY, Dec. 31, 2001, at 14, available at 2001 WLNR 4658356; Steve Neal, *No Room for Politics in This Pulpit*, CHI. SUN-TIMES, Mar. 16, 2001, at 35, available at 2001 WLNR 4715151; Alison Mitchell, *Rancor in House on Choice of a Chaplain*, N.Y. TIMES, Dec. 2, 1999, at A32, available at 1999 WLNR 3016126; David Waters, *Is There an Anti-Catholic Bias Afoot in the Halls of Congress?*, STUART NEWS (Fla.), Feb. 26, 2000, at D6, available at 2000 WLNR 7551920; Frank A. Aukofer, *Skiba Asks House GOP Leaders to Reconsider Rejection of O'Brien: Auxiliary Bishop Tells Them in Letter He is Troubled by Appearance of Religious Bias*, MILWAUKEE J. SENTINEL, Feb. 17, 2000, at A5, available at 2000 WLNR 3233890; Steve Benen, *A House Divided: Religious War Erupts Over Selection of Congressional Chaplain*, CHURCH & STATE, Mar. 2000, at 4, available at 2000 WLNR 4162875; Richard John Neuhaus, *While We're At It*, FIRST THINGS, May 2000, at 70.

¹⁰⁴ Technically, it was the responsibility of a three-house-member panel, which included Hastert and Armey, along with House Minority Leader Richard Gephardt (a Democrat) to choose the nominee to submit to the full House. Gephardt went with the committee's recommendation of O'Brien, while Hastert and Armey went with Wright. See Benen, *supra* note 103 (reporting that Hastert and Armey believed Wright had the "best interpersonal and counseling skills").

¹⁰⁵ Mitchell, *supra* note 103.

Hyde, a Catholic Republican Congressman from Illinois, was quoted as saying, "I hate to think it is anti-Catholic bigotry, but I don't know what other conclusion to draw."¹⁰⁶ O'Brien pointed to numerous incidents he found unusual in his conversations with Protestant House members, such as suggestions that he not wear a clerical collar, questions suggesting that he (being unmarried and celibate) could not relate to the marital and family problems of congresspeople, and queries attacking his understanding and knowledge of scripture.¹⁰⁷ One Catholic bishop, writing on O'Brien's behalf, said that such "questions [were] rooted, if not in anti-Catholicism, at least in a denominational bias,"¹⁰⁸ and the bishop concluded that he was "deeply troubled by the appearance of a serious violation of the basic American principles of equity and justice."¹⁰⁹ Eventually, Hastert decided the best solution was to give up on both O'Brien and Wright, and he instead asked Cardinal Francis George for a recommendation. Cardinal George suggested Coughlin, which then led to Coughlin's election.¹¹⁰

Now some have steadfastly denied that any discrimination took place,¹¹¹ and it is indeed doubtful that we will ever know with certainty what exactly happened. But, in any event, it is clear that issues of religious affiliation and discrimination, as well as the ghosts of our anti-Catholic past, have not altogether disappeared.

D. Unitarianism and the Chaplaincies

Related to the issue of Catholicism is the relationship between the chaplaincies and another religious denomination, Unitarianism. The question most often arises like this: Has there ever been a congressional chaplain that was not Christian? At times, this question has been given a quick response,¹¹² but the full answer is perhaps a little more

¹⁰⁶ Neal, *supra* note 103. More predictably, Catholic Democrats also attacked the Republicans on this point. See Mitchell, *supra* note 103, at A32 (quoting Representative Anna G. Eshoo, a Democratic congresswoman from California, as saying, "As a member of the House and a member of the committee and as a Catholic, I'm offended and resentful").

¹⁰⁷ See Mitchell, *supra* note 103.

¹⁰⁸ Waters, *supra* note 103.

¹⁰⁹ Waters, *supra* note 103; Aukofer, *supra* note 103.

¹¹⁰ Neal, *supra* note 103.

¹¹¹ Father Neuhaus, a well-known Catholic priest, denied that any discrimination took place—and he, apparently, was in a position to know. See Neuhaus, *supra* note 103 ("For my sins, I was drawn into this dispute [over the selection of chaplains] and spent hours and hours talking with parties involved and going over the pertinent documentation. . . . Just for the record, however, the charge that the initial House Chaplain decision was motivated by anti-Catholicism is as plausible as [something that is very, very, implausible]"). Neuhaus did not explain the underlying facts that led him to this conclusion.

¹¹² See Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U.L. REV. 1097, 1135 (2006) ("Every single one of the 121 congressional chaplains in American history has been an ordained Christian minister.").

complicated, and it reveals a great deal about how our religious perceptions have changed over the last two centuries.

We can cut to the heart of the issue by noting that there have been four Unitarian chaplains and one Universalist chaplain in House and Senate history. The first was Jared Sparks, who was the Unitarian chaplain of the House in 1821;¹¹³ the last was Ulysses Grant Baker Pierce, who was the Unitarian chaplain of the Senate in 1909.¹¹⁴

The interesting and difficult question then becomes whether or not Unitarian chaplains should be considered Christian. We must recall that Unitarianism arose in the early nineteenth century as a wildly popular offshoot of Congregationalism, a denomination of Protestantism.¹¹⁵ For some time, it was thought that Unitarianism would eventually become the dominant religion of the United States.¹¹⁶ In those early days, Unitarians clearly thought of themselves as Christians—as essentially another kind of Protestants, along with Baptists, Presbyterians, and so on. Perhaps the defining theological moment of nineteenth-century Unitarianism was a sermon titled “Unitarian Christianity,”¹¹⁷ given by William Ellery Channing, a leading Unitarian theologian, at the ordination of Jared Sparks in May of 1819,¹¹⁸ which tried to situate Unitarianism inside the boundaries of Christianity.¹¹⁹ Such a conclusion is also consistent with the resolution of the American Unitarian Association, which affirmed Unitarian allegiance

¹¹³ See EARL MORSE WILBUR, *A HISTORY OF UNITARIANISM: IN TRANSYLVANIA, ENGLAND, AND AMERICA* 425–26 (1952).

¹¹⁴ Senate Chaplain, *supra* note 76.

¹¹⁵ See WILBUR, *supra* note 113, at 380.

¹¹⁶ See, e.g., Letter from Thomas Jefferson to James Smith (Dec. 8, 1822), in *THE WRITINGS OF THOMAS JEFFERSON* 408–09 (Albert Ellery Bergh ed., 1905) (“I confidently expect that the present generation will see Unitarianism become the general religion of the United States.”); Letter from Thomas Jefferson to Thomas Cooper (Nov. 2, 1822), in *15 THE WRITINGS OF THOMAS JEFFERSON*, *supra*, at 403, 405 (“That this [Unitarianism] will, ere long, be the religion of the majority from North to South, I have no doubt.”).

¹¹⁷ WILLIAM ELLERY CHANNING, *Unitarian Christianity*, reprinted in WILLIAM ELLERY CHANNING: *SELECTED WRITINGS* 70 (David Robinson ed., 1985).

¹¹⁸ Both Channing and Sparks have direct connections to the congressional chaplaincies. Sparks was the first Unitarian congressional chaplain, assuming the role of House Chaplain in 1821. See *supra* note 113 and accompanying text. William Ellery Channing was uncle to William Henry Channing, see WILLIAM HENRY CHANNING, *THE LIFE OF WILLIAM ELLERY CHANNING*, D.D. (Boston, Am. Unitarian Ass’n 1899) (cover page), who was the second Unitarian House chaplain, assuming his duties in 1863.

¹¹⁹ CHANNING, *supra* note 117, at 70–72 (“We regard the Scriptures as the records of God’s successive revelations to mankind, and particularly of the last and most perfect revelation of his will by Jesus Christ. Whatever doctrines seem to us to be clearly taught in the Scriptures, we receive without reserve or exception. We do not, however, attach equal importance to all the books in this collection. Our religion, we believe, lies chiefly in the New Testament. The dispensation of Moses, compared with that of Jesus, we consider as adapted to the childhood of the human race, a preparation for a nobler system, and chiefly useful now as serving to confirm and illustrate the Christian Scriptures.”).

to the Christian gospel.¹²⁰ But perhaps it was Supreme Court Justice Joseph Story, himself a Unitarian, who stated most clearly and forcefully the idea that Unitarianism was merely a type of Christianity:

The Unitarians are universally steadfast, sincere, and earnest Christians. They all believe in the divine mission of Christ, the credibility and authenticity of the Bible, the miracles wrought by our Saviour and his apostles, and the efficacy of his precepts to lead men to salvation. They consider the Scriptures the true rule of faith, and the sure foundation of immortality.¹²¹

Thus, from this standpoint—the standpoint of the mid-nineteenth century—Unitarians were often seen as Christians, and thus it would have been natural enough to conclude that all congressional chaplains have indeed been Christians.

But Unitarianism, and society's perception of Unitarianism, has changed over the past century and a half. Other Christians now tend to see Unitarians as non-Christians.¹²² And Unitarians themselves seem to feel this way as well. One recent study asking Unitarian Universalists to self-identify found that more of them self-identified as Buddhists than as Christians.¹²³

¹²⁰ The resolution read: "*Resolved*, That the divine authority of the Gospel, as founded on a special and miraculous interposition of God for the redemption of mankind, is the basis of the action of this Association." WILBUR, *supra* note 113, at 463 (quoting AM. UNITARIAN ASS'N, TWENTY-EIGHTH REPORT (1853)).

¹²¹ Letter from Joseph Story to William Williams (Mar. 6, 1824), in 1 LIFE AND LETTERS OF JOSEPH STORY 441–42 (William W. Story ed., 1851). For more on Justice Story's religious views, see Jay Alan Sekulow & Jeremy Tedesco, *The Story Behind Vidal v. Girard's Executors: Joseph Story, The Philadelphia Bible Riots, and Religious Liberty*, 32 PEPP. L. REV. 605 (2005).

¹²² A recent student note seems to accurately convey the perceptions of many Christians. See Rachel R. Myers, Comment, *Pledge Protection: The Need for Official Supreme Court Recognition of Civil Religion*, 3 U. ST. THOMAS L.J. 661, 665 n.20 (2006) ("Unitarianism is defined as 'the belief that God exists in one person, not three,'" and thus "is the denial of the doctrine of the Trinity, as well as the full divinity of Jesus, and is, therefore, not Christian." (internal citations omitted)).

One dictionary definition of Unitarianism, quite amusingly, punts entirely on the issue of whether Unitarians are Christians. See AMERICAN HERITAGE COLLEGE DICTIONARY 1500 (4th ed. 2007) (defining "Unitarian" in relevant parts as *both* "[a] monotheist who is not a Christian" *and* "a Christian who is not a Trinitarian").

¹²³ See COMM'N ON APPRAISAL, UNITARIAN UNIVERSALIST ASS'N, ENGAGING OUR THEOLOGICAL DIVERSITY 72 (2005), available at <http://www.25.uua.org/coa/TheoDiversity/EngagingOurTheoDiversity.pdf> (noting one study where seventeen percent of Unitarian Universalists self-identified as Buddhists, while thirteen percent identified as Christian).

Understandably then, Unitarian Universalism has had difficulty as a denomination reconciling its Christian beginnings with the current makeup of its congregations. See *id.* at 86

We can thus summarize our conclusions by noting that, vis-à-vis the chaplaincies, Unitarianism and Catholicism seem to be perfect opposites. In 1850, Unitarian chaplains were considered standard fare, while Catholic ones were difficult to imagine. By 2000, it was the Unitarian chaplains that had become hard to imagine, and Catholic ones were no longer out of the question.¹²⁴ In this way, the chaplaincies serve as a mirror of our larger society. Nineteenth-century Protestants saw Catholicism as beyond the boundaries of Christianity; they felt both culturally and spiritually closer to Unitarianism. Now the situation is reversed, with modern Protestants situating Catholicism (but not Unitarianism) within Christianity, and feeling both culturally and spiritually closer to Catholics than Unitarians.¹²⁵ While it should not surprise us that Congress would choose chaplains with whom it feels most religiously compatible, it is interesting to see those decisions as a way of measuring how our society has changed.

E. The 1850s and the Crisis in the Chaplaincies

The congressional chaplaincies had always faced some opposition, from Jay and Rutledge opposing Duché's prayers, to the dissenting votes cast for Thomas Paine to be chaplain. But the opposition grew throughout the nineteenth century, and by 1850, the role and existence of the chaplaincies were in serious dispute. Throughout this period, there was a flood of petitions, received by both the House¹²⁶ and the

("Today most UUs, if asked, 'Are you Christian?' would respond with something between 'Well, not really,' and 'Hell, no!' Though there are many UU Christians, they have become a minority within the denomination. In fact, UUs seem almost proud of the way they have abandoned their roots. 'We are not Christian,' some say, perhaps implying that they are better than Christian, that they have moved beyond Christianity. . . . Unitarian Universalists need to make peace with their heritage.").

¹²⁴ To defend the claim about how Unitarianism has moved to the fringe of our society, note that in 2004, the State of Texas temporarily revoked the tax-exempt status of a Unitarian Universalist Congregation in Texas, concluding that not only was the congregation not Christian, but that it was not a religious organization at all. See, e.g., R.G. Ratcliffe, *Strayhorn Under Fire for Religion Litmus Test / Tax-Status Denials Draw Controversy*, HOUSTON CHRON., May 31, 2004, at A27, available at 2004 WLNR 20896000 (reporting that Carole Keeton Strayhorn, the state comptroller, denied the church an exemption because it "does not have one system of belief"). Comptroller Strayhorn eventually changed her mind regarding Unitarians, although she later denied tax-exempt status to the Ethical Society of Austin. That decision was challenged, and the Texas courts sided with the Ethical Society. See *Strayhorn v. Ethical Soc'y of Austin*, 110 S.W.3d 458 (Tex. App. 2003) (granting the Ethical Society tax-exempt status).

¹²⁵ How Catholicism made this extraordinary transition merits a fuller explanation. For the legal aspects of the change, consider Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121 (2001). For the sociological ones, consider JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 35-47, 83-84, 93-97 (1991).

¹²⁶ The petitions are recorded in the House and Senate Journals. They are too voluminous

Senate,¹²⁷ from various groups of citizens asking that the congressional chaplaincy be abolished. Many of these petitions were actually collections of a number of petitions all presented together.¹²⁸ Ultimately, it is difficult to discern how unpopular the chaplaincy was, but the ubiquity of these petitions suggests that opposition to the chaplaincy had become quite widespread.

Many groups now found something to object to in the chaplaincies. There were, of course, those who had opposed the congressional chaplaincies from the beginning—religious groups like the Baptists¹²⁹ as well as groups with more secular

to cite in their entirety, but it is important to give a sense of their quantity, as it is the best demonstration of how controversial the chaplaincies had become. To that end, the following all involve petitions sent to the House in protest of the congressional chaplaincies from January 1, 1850, to January 1, 1855. 45 JOURNAL OF THE HOUSE OF REPRESENTATIVES, 31st Cong., 1st Sess. 216 (Jan. 3, 1850); *id.* at 224 (Jan. 4, 1850); *id.* at 271 (Jan. 9, 1850); *id.* at 299 (Jan. 12, 1850); *id.* at 325 (Jan. 16, 1850); *id.* at 338 (Jan. 17, 1850); *id.* at 362 (Jan. 19, 1850); *id.* at 370 (Jan. 21, 1850); *id.* at 384 (Jan. 22, 1850); *id.* at 392 (Jan. 23, 1850); *id.* at 413 (Jan. 28, 1850); *id.* at 434 (Jan. 30, 1850); *id.* at 436 (Jan. 31, 1850); *id.* at 451 (Feb. 4, 1850); *id.* at 486 (Feb. 7, 1850); *id.* at 496 (Feb. 8, 1850); *id.* at 511 (Feb. 12, 1850); *id.* at 534 (Feb. 14, 1850); *id.* at 537–38 (Feb. 15, 1850); *id.* at 544 (Feb. 18, 1850); *id.* at 584 (Feb. 20, 1850); *id.* at 598 (Feb. 25, 1850); *id.* at 640 (Mar. 6, 1850); *id.* at 648 (Mar. 8, 1850); *id.* at 655 (Mar. 11, 1850); *id.* at 660 (Mar. 12, 1850); *id.* at 899 (May 9, 1850); *id.* at 1240 (Aug. 7, 1850); *id.* at 1601 (Sept. 30, 1850); 46 JOURNAL OF THE HOUSE OF REPRESENTATIVES, 31st Cong., 2d Sess. 32 (Dec. 9, 1850); *id.* at 120 (Jan. 8, 1851); *id.* at 142 (Jan. 14, 1851); *id.* at 335 (Feb. 24, 1851); 47 JOURNAL OF THE HOUSE OF REPRESENTATIVES, 32d Cong., 1st Sess. 74 (Dec. 10, 1851); *id.* at 80 (Dec. 11, 1851); *id.* at 102 (Dec. 16, 1851); *id.* at 110 (Dec. 17, 1851); *id.* at 119 (Dec. 18, 1851); *id.* at 161 (Jan. 2, 1852); *id.* at 164 (Jan. 5, 1852); *id.* at 236 (Jan. 20, 1852); *id.* at 242 (Jan. 22, 1852); *id.* at 318 (Feb. 5, 1852); *id.* at 350 (Feb. 16, 1852); *id.* at 408 (Mar. 1, 1852); *id.* at 435 (Mar. 6, 1852); *id.* at 522 (Mar. 29, 1852); *id.* at 686 (May 10, 1852); *id.* at 872 (July 8, 1852); 48 JOURNAL OF THE HOUSE OF REPRESENTATIVES, 32d Cong., 2d Sess. 46 (Dec. 14, 1852); *id.* at 50 (Dec. 17, 1852); *id.* at 53 (Dec. 20, 1852); *id.* at 58 (Dec. 21, 1852); *id.* at 65 (Dec. 22, 1852); *id.* at 76 (Dec. 27, 1852); 49 JOURNAL OF THE HOUSE OF REPRESENTATIVES, 33rd Cong., 1st Sess. 140 (Dec. 27, 1853); *id.* at 442 (Mar. 2, 1854); *id.* at 538 (Mar. 21, 1854); *id.* at 671 (Apr. 20, 1854); *id.* at 699 (May 1, 1854).

¹²⁷ The following is a list of petitions sent to the Senate demanding the abolition of the congressional chaplaincies from January 1, 1850, to January 1, 1855. 41 JOURNAL OF THE SENATE, 31st Cong., 1st Sess. 48 (Jan. 3, 1850); *id.* at 83–84 (Jan. 16, 1850); *id.* at 113 (Jan. 28, 1850); *id.* at 147 (Feb. 13, 1850); *id.* at 227 (Mar. 21, 1850); *id.* at 230 (Mar. 22, 1850); *id.* at 233 (Mar. 25, 1850); *id.* at 235 (Mar. 26, 1850); *id.* at 241 (Mar. 28, 1850); *id.* at 266 (Apr. 10, 1850); 43 JOURNAL OF THE SENATE, 32d Cong., 1st Sess. 34 (Dec. 4, 1851); *id.* at 42 (Dec. 9, 1851); *id.* at 93 (Jan. 5, 1852); 44 JOURNAL OF THE SENATE, 32d Cong., 2d Sess. 31 (Dec. 13, 1852); *id.* at 34–35 (Dec. 14, 1852); *id.* at 42 (Dec. 20, 1852); *id.* at 123 (Jan. 21, 1853); 45 JOURNAL OF THE SENATE, 33rd Cong., 1st Sess. 332 (Apr. 20, 1854).

¹²⁸ For example, one of the petitions listed in the footnote immediately above was actually a collection of sixty separate petitions submitted from citizens of ten different states. *See* 41 JOURNAL OF THE SENATE, 31st Cong., 1st Sess. 227 (Mar. 21, 1850).

¹²⁹ *See, e.g.,* Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding*

aims.¹³⁰ But by the 1850s, there were a number of new reasons to oppose the chaplaincy. The first was mentioned earlier—the rise of Catholicism and the concomitant fear of Protestants that the congressional chaplaincies would be taken over by Catholics.¹³¹ Another was the fact that the chaplaincies had become competitive prizes, and Congress found it untoward how ministers would so vigorously petition for the position of chaplain.¹³²

Another issue was slavery. Slavery, of course, had by this point grown to be a dominant political issue of the time, and it spilled over into discussions of religion generally and the chaplaincies in particular. Take, for example, the Kansas-Nebraska Act, a remarkable victory for the pro-slavery side.¹³³ Supporters of the bill were harassed by abolitionist ministers, who preached to them the error of their ways.¹³⁴ Senator Butler, sponsor of the Kansas-Nebraska Act, responded to the ministers with choice words:

Religious Expression by the State, 75 NOTRE DAME L. REV. 433, 446 n.56 (1999) (discussing and providing citations to the objections to the chaplaincy made by Baptist preacher John Leland).

¹³⁰ See *supra* text accompanying note 64 (referring to the protest votes for Thomas Paine as the first congressional chaplain).

¹³¹ See *supra* Part I.C.

¹³² This was a point frequently returned to when the House and Senate considered discarding the institutional chaplaincy. See CONG. GLOBE, 34th Cong., 1st Sess. 411 (1856) (statement of Rep. Jones, Tennessee) (“I want to record my vote against [having a chaplain], believing that it is a burlesque on the Christian religion to have this wild hunt after the chaplaincy of the House.”); *id.* at 478 (statement of Rep. Sandidge, Louisiana) (“At the opening of every session of Congress, the ministers, not only of this city, but of the surrounding country, come here, either in person or through their agents, and log-roll to obtain the position of Chaplain. I think it is high time that this system should be abolished.”); *id.* at 479 (statement of Rep. Etheridge, Tennessee) (“I confess that I have witnessed electioneering efforts connected with the chaplaincy of the House which I think were not at all compatible with the ministerial character.”); *id.* at 485 (statement of Rep. Smith, Virginia) (referring to the “unbecoming solicitation on the part of those who undertake to teach the law and the prophets, for payment from this House”); CONG. GLOBE, 35th Cong., 1st Sess. 13 (1857) (statement of Sen. Mason, Virginia) (“Every Senator, I have no doubt, has had some experience (I think it is very unfortunate, but perhaps it is incident to the subject-matter) that a sort of competition has grown up by the usage of the Senate in electing a Chaplain, which I have thought is not altogether consistent with the office of a clergyman or a pastor.”).

¹³³ The Missouri Compromise of 1820 had banned slavery in the lands that would become Kansas and Nebraska; the Kansas-Nebraska Act modified that to allow the people of Kansas and Nebraska to choose for themselves whether to be slave states or free states. See An Act to Organize the Territories of Nebraska and Kansas, ch. 59, § 19, 10 Stat. 277, 284 (1854) (providing that Kansas and Nebraska be “received into the Union with or without slavery, as their Constitution may prescribe at the time of their admission”).

¹³⁴ See LORENZO D. JOHNSON, CHAPLAINS OF THE GENERAL GOVERNMENT, WITH OBJECTIONS TO THEIR EMPLOYMENT CONSIDERED 5 (1856).

When the clergy quit the province which is assigned to them, in which they can dispense the Gospel . . . [and] assume to organize themselves as clergymen to come before the country and protest against the deliberations of the Senate of the United States, they deserve, at least, the grave censure of the body.¹³⁵

It seems that the congressional chaplaincies eventually became a sort of forum for debating slavery, and congressional chaplains were chosen based on their position on the peculiar institution. An amazing example of this is the case of William Henry Channing, who was selected by the House as chaplain in 1863.¹³⁶ The House was at that time controlled by the anti-slavery Republicans, who told Channing, in no minced words, that they were selecting him because of his anti-slavery views. Channing reported that they told him, "[Another minister] had been proposed as candidate, and his nomination strongly urged. But he was so notoriously a [slavery] sympathizer that the question instantly arose, Who best represents the antislavery policy of the Republican party in Washington? So we chose you."¹³⁷

Channing, it seems, was the right man for the job. The Republicans who arranged for his appointment were no doubt pleased when Channing had an African-American minister and choir conduct the Sunday service in the Hall of the House of Representatives, infuriating the Democrats.¹³⁸

Thus, it was likely the confluence of a number of factors that led Congress to re-examine the congressional chaplaincies. This was done in three committee reports: the Thompson Report done by the House Committee on the Judiciary in 1850,¹³⁹ the

¹³⁵ *Id.* at 58. Here are similar comments from Representative Hibbard of New Hampshire: Some three thousand clergymen have come from the Senate Chamber by memorial, protesting, as they allege, 'in the name of Almighty God, and in his presence,' against this measure, as a 'breach of faith,' a 'great moral wrong,' and denouncing 'the judgments of the Almighty' upon its supporters! . . . They say they have a legal right thus to mingle in political affairs. So they have; thanks to the liberality and toleration of the Constitution and laws, it is their daily business to blacken and denounce. There is no doubt of their right, Mr. Chairman, and equally clear is the right of others to condemn their conduct, rebuke their presumption, and laugh at their folly.

Id. at 58–59.

¹³⁶ OCTAVIUS BROOKS FROTHINGHAM, MEMOIR OF WILLIAM HENRY CHANNING 316 (1886).

¹³⁷ *Id.*; see also *id.* at 325 ("In regard to [Channing's] service as Chaplain of the House of Representatives, little can be added to what he has said. There is this, however, to be noted. He regarded this as the people's church. It was not Unitarian, or Universalist, or Baptist, or Methodist, or sectarian in any kind. He was chosen simply because he had antislavery principles, and any believer with those principles had a right to speak there on Sundays.").

¹³⁸ *Id.* at 316.

¹³⁹ H.R. REP. NO. 31-171 (1850) ("Thompson Report").

Badger Report done by the Senate Judiciary Committee in 1853,¹⁴⁰ and the Meachum Report done by the House Committee on the Judiciary in 1854.¹⁴¹ All three are similar. They are all fairly short, and they all reason that because the chaplaincies are non-denominational and noncoercive, they are thus constitutional.¹⁴²

But these reports did not resolve much. To be sure, they temporarily disposed of the constitutional issue. But there remained the political question of whether Congress would continue on with the chaplaincies. Ultimately, the House and the Senate both decided to do so, but for a period of time, they both suspended their regular chaplaincies and went with a rotation system where unpaid local ministers would come and offer invocations before congressional proceedings.

It was the House that first took this step. The House of the Thirty-third Congress (like all the Houses before it) had an institutional chaplain.¹⁴³ But soon after the Thirty-fourth Congress opened in December 1855, the House passed a resolution to instead have local ministers come, unpaid, to open the House's sessions with prayer.¹⁴⁴ The measure passed by a substantial margin,¹⁴⁵ and in fact, the recorded opposition to the change was on the ground that it did not go far enough. Some argued that the House should abandon the chaplaincy without replacing it with any sort of local-minister program—congressmen themselves could offer prayers when so inclined.¹⁴⁶ For roughly the next month, the House had local ministers give the invocations preceding its business.¹⁴⁷ In February, the House considered reinstating the institutional chaplaincy.¹⁴⁸ Long debates were held, and the usual objections to the chaplaincies made.¹⁴⁹

¹⁴⁰ S. REP. NO. 32-376 (1853) ("Badger Report").

¹⁴¹ H.R. REP. NO. 33-124 (1854) ("Meachum Report").

¹⁴² For a thorough discussion of these reports, which addressed not only the congressional chaplaincies but also the military ones, see Lash, *supra* note 99, at 1134–38 & nn.246–65.

¹⁴³ History of the Chaplaincy, *supra* note 76.

¹⁴⁴ See 51 JOURNAL OF THE HOUSE OF REPRESENTATIVES, 34th Cong., 1st Sess. 354 (Jan. 23, 1856); see also JOHNSON, *supra* note 134, at 35 (describing the proceedings in the House).

¹⁴⁵ See CONG. GLOBE, 34th Cong., 1st Sess. 282 (1856) (recording a vote of 84–39 in favor).

¹⁴⁶ See *id.* (statement by Rep. Elliott) (arguing that "[w]e need not go out of the House for religious consolation; there are ministers of the gospel enough in our midst to do all our praying").

¹⁴⁷ See, e.g., *id.* at 298 ("The House was called to order by the Clerk at twelve o'clock, m. Prayer by Rev. Byron Sunderland."); *id.* at 300 ("The House was called to order by the Clerk at twelve o'clock, m. Prayer by Rev. Mr. Gurley, of the Old School Presbyterian church."); *id.* at 304 ("The House was called to order by the Clerk at twelve o'clock, m. Prayer by Rev. J. G. Butler.").

¹⁴⁸ It may have been the case that the local-minister program originated as a sort of stopgap measure, designed to deal with the fact that some in Congress were no longer in support of the chaplaincies and that the remainder might not be able to quickly decide on a chaplain. See, e.g., JOHNSON, *supra* note 134, at 35 (arguing that the visiting-minister resolution was passed because "it now seemed probable that some time might elapse before the election of a Chaplain would be reached").

¹⁴⁹ The debate spanned several days. CONG. GLOBE, 34th Cong., 1st Sess. 410–11 (1856);

Representative Dowdell was the chief advocate of the local-minister program, astutely pointing out its core virtues, namely, that it avoided any question of financial support of religion while simultaneously dodging some of the potential for denominational favoritism.¹⁵⁰ Nevertheless, the House chose to go back to the institutional chaplaincy, selecting as their chaplain Daniel Waldo, who was a veteran of the Revolutionary War and ninety-three years old at the time.¹⁵¹

The issue, however, again resurfaced at the start of the Thirty-fifth Congress. This time the move started with the Senate. After debate, the Senate elected to go with a similar program of local ministers giving invocations.¹⁵² The House quickly did so as well.¹⁵³ This was the most serious departure the House and Senate ever had from the institutional-chaplaincy model. For the whole of the Thirty-fifth Congress, neither the House nor the Senate had an institutional chaplain.

In turn, this all changed with the election of the Thirty-sixth Congress. The Senate, perhaps surprisingly, considered the issue of the chaplaincy only briefly. A petition was made to reinstitute the local-minister program. But the Senate refused to adopt it, instead voting to go back to the institutional chaplaincy,¹⁵⁴ and ultimately

id. at 478–79; *id.* at 483–86; *see also* JOHNSON, *supra* note 134, at 35–47 (vividly recounting the debate).

¹⁵⁰ *See, e.g.,* CONG. GLOBE, 34th Cong., 1st Sess. 478 (1856) (statement of Rep. Dowdell) (“Under [the local-minister program] no money will be taken out of the Treasury, and not the slightest discrimination will be made between the different denominations of Christians in our country.”).

¹⁵¹ 51 JOURNAL OF THE HOUSE OF REPRESENTATIVES, 34th Cong., 1st Sess. 582 (Feb. 21, 1856) (discussing Waldo’s election); 3 STOKES, *supra* note 52, at 133 (discussing Waldo’s age and circumstances).

Some openly suspected that Waldo was selected not because of his religious sensibilities or his oratory proficiency, but rather because he was a Revolutionary War veteran, because of the belief that he would be a relatively harmless chaplain due to his age, and because the House had grown tired of continually debating the issues involved. *See* JOHNSON, *supra* note 134, at 49 (“[T]hey voted for Rev. Mr. Waldo more to get rid of a longer debate, than from a conviction of its propriety.”); *id.* at 51 (“There is no question that many votes were given for him with no . . . expectation of his being able to perform the active duties of a Chaplain.”).

The House Chaplain’s office maintains a list of the House Chaplains, but the list for some reason does not include Rev. Daniel Waldo. *See* History of the Chaplaincy, *supra* note 76.

¹⁵² 49 JOURNAL OF THE SENATE, 35th Cong., 1st Sess. 34–35 (Dec. 9, 1857); *see also* CONG. GLOBE, 35th Cong., 1st Sess. 13–14 (1857) (recording the debate).

¹⁵³ 54 JOURNAL OF THE HOUSE OF REPRESENTATIVES, 35th Cong., 1st. Sess. 78 (Dec. 16, 1857).

¹⁵⁴ For the Senate’s very modest discussion of the issue, *see* CONG. GLOBE, 36th Cong., 1st Sess. 97–98 (1859); *id.* at 162. The chief argument made against the policy of visiting ministers was by Senator Wilson of Massachusetts, who found guest chaplains too distant to the congressmen to be all that helpful. *See id.* at 98 (statement of Sen. Wilson) (“Besides, these [visiting] clergymen cannot become acquainted with us. We cannot look to them as we should look to a Chaplain of the Senate. I think the plan of the last Congress is a very poor substitute for the former plan of having a Chaplain of the body, to whom we can look and consider as such; a Chaplain who would become acquainted with us, and who would know the interests

selecting Phineas Gurley as its chaplain.¹⁵⁵ Three months later, the House followed suit, abandoning the local-minister program and selecting a permanent institutional chaplain.¹⁵⁶ Since that brief experiment in the 1850s, both the House and the Senate have stuck with their institutional chaplaincies.

F. The Chaplains in the Twentieth Century

The institution of the chaplaincy saw some changes in the twentieth century. One of the largest was the duration of the average chaplain's tenure. In the nineteenth century, a chaplain would serve for a session of a Congress or perhaps even a full term or two. But in the twentieth century, a chaplain would serve for decades. The House of Representatives had fifty-two institutional chaplains in the nineteenth century; it had only five in the twentieth.¹⁵⁷

Over time, the institutional chaplains have grown more diverse. The House's selection in 2000 of a Catholic chaplain, discussed earlier, was a prominent example.¹⁵⁸ Yet perhaps even more significant was the election in 2003 of the current Senate Chaplain, Barry Black. Before becoming Senate Chaplain, Black had served as an Admiral and chaplain in the Navy, coordinating the Navy's chaplains.¹⁵⁹ His election in the Senate was extraordinary in two senses. First, he was the first African-American to ever be a congressional chaplain.¹⁶⁰ And second, he was the first Seventh-Day Adventist.¹⁶¹ The importance of this from a racial standpoint is likely obvious, but the religious dimension may not be. Seventh-Day Adventists are a small Christian denomination, making up only 0.4% of the population (roughly 1.2 million people).¹⁶² And Seventh-Day Adventists are not just a minority in terms of numbers. They are also distinctive from other Christians in other ways, observing Saturday rather than

and wants of the body.").

¹⁵⁵ 51 JOURNAL OF THE SENATE, 36th Cong., 1st Sess. 12 (Dec. 15, 1859).

¹⁵⁶ The House's discussion was similarly short on substance, although it was quite long due to some procedural glitches. The House first rejected the local-minister program by a vote of 116-61, and then adopted the institutional chaplaincy model by a vote of 87-35. *See* CONG. GLOBE, 36th Cong., 1st Sess. 992-94 (Mar. 5, 1860); *id.* at 1015-16. The House then selected Thomas Stockton as chaplain. *See* 56 JOURNAL OF THE HOUSE OF REPRESENTATIVES, 36th Cong., 1st Sess. 462 (Mar. 6, 1860).

¹⁵⁷ *See* History of the Chaplaincy, *supra* note 76; Senate Chaplain, *supra* note 76.

¹⁵⁸ *See supra* notes 102-11 and accompanying text.

¹⁵⁹ *See* Navy Chaplain Named to Serve U.S. Senate, CHRISTIAN CENTURY, July 12, 2003, at 15, available at 2003 WLNR 6563864.

¹⁶⁰ *See* Bryan A. Keogh, *Pioneering Chaplain Gets Call to Counsel in Senate: Navy Admiral is First Black to Serve in Either Chamber*, CHI. TRIB., June 28, 2003, at 11.

¹⁶¹ *See* Bill Broadway, *Naming of Chaplain Sets Two Precedents: Black Seventh-Day Adventist From Navy to Counsel Senate*, LEXINGTON HERALD-LEADER, July 12, 2003, at H1, available at 2003 WLNR 14587175.

¹⁶² THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 12 (2008).

Sunday as their Sabbath,¹⁶³ and adhering to certain theological principles not shared by other Christians.¹⁶⁴ Moreover, with the exception of the Unitarians and the Universalist, all of the congressional chaplains came from Christian denominations that were established long before the founding of this country. Seventh-Day Adventism developed in this country in the middle of the nineteenth century, making it seem more suspect to some.¹⁶⁵

Yet, while the chaplains have been increasingly diverse, there have been limits to this diversity. As much as any other position in American politics, the chaplaincies have been dominated by Caucasian, Protestant men. Inroads have been made at the edges; the current House and Senate chaplains are good examples. But these exceptions only go so far. We have never had a Jewish chaplain, or a female one, or an openly gay one—and all three, at this point, seem difficult to imagine.¹⁶⁶ The reasons why are almost too obvious to state. A chaplain is hired as a religious and spiritual guide—and so, inevitably, congresspeople will act on their own individual religious and spiritual beliefs in selecting such a guide. For years, the dominant religious groups did not allow African-American ministers—so it came as no surprise that there were no African-American chaplains. In the same vein, it is easy to see why we have never had a female chaplain: Roman Catholics (who do not ordain women) comprise the largest

¹⁶³ See MINISTERIAL ASS'N, GEN. CONFERENCE OF SEVENTH-DAY ADVENTISTS, SEVENTH-DAY ADVENTISTS BELIEVE: A BIBLICAL EXPOSITION OF 27 FUNDAMENTAL DOCTRINES 263 (1988) (“The Sabbath begins at sunset on Friday evening and ends at sunset Saturday evening.”).

¹⁶⁴ The history of Seventh-Day Adventism may illustrate how other Christian denominations find Seventh-Day Adventism somewhat unusual. The early Millerite movement in the United States believed that Jesus Christ would return in 1844. When this did not happen in the way expected, the movement fractured. The Seventh-Day Adventists took the position that 1844 did not mark Christ’s return to Earth, but rather Christ’s entrance into the Most Holy Place of the heavenly sanctuary and the beginning of God’s investigative judgment of mankind, which would determine who would be eligible for salvation. These sorts of views are not widely held among either mainline or more evangelical Christians, although they are still adhered to by the Seventh-Day Adventist Church (despite some serious internal disputes within the Adventist Church). See *id.* at 317, 320–22, 324–26, 329 & nn. 29–30 (1988) (discussing the doctrine of the investigative judgment).

¹⁶⁵ It is perhaps a natural tendency for people to be suspicious of religions that developed in historical memory and on familiar soil. See Noah Feldman, *What Is It About Mormonism?*, N.Y. TIMES MAG., Jan. 6, 2008, at 34, available at 2008 WLNR 306349 (“Still, even among those who respect Mormons personally, it is still common to hear Mormonism’s tenets dismissed as ridiculous. . . . When it comes to prophecy, antiquity breeds authenticity. Events in the distant past, we tend to think, occurred in sacred, mythic time. Not so revelations received during the presidencies of James Monroe or Andrew Jackson.”). For more on Seventh-Day Adventists as religious minorities, see Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 228 n.28 (2003).

¹⁶⁶ It is also somewhat inconceivable at this point that we would have another Unitarian chaplain. See *supra* Part I.D.

religious denomination in Congress, and Baptists (many of whom do not ordain women) make up the second largest.¹⁶⁷ There is thus an inescapable tension between wanting permanent chaplains to be selected on a neutral basis, and wanting chaplains to serve a Congress that, on certain issues, is obviously non-neutral.¹⁶⁸

Perhaps as a way of countering that, both the Senate and the House now have guest chaplains—visiting ministers who come in to Congress to offer prayers.¹⁶⁹ This has led to some very encouraging and memorable events. In 1991, for example, the House invited the Imam Siraj Wahaj, who became the first Muslim guest chaplain in either house of Congress.¹⁷⁰ One year later, the Senate followed suit, inviting Imam Wallace Mohammed to be the first Muslim Senate guest chaplain.¹⁷¹ Both these events were deeply appreciated by the American Muslim community, who rightly saw them as important tokens of respect.¹⁷² There are other similar pioneering examples—the first

¹⁶⁷ For these statistics and others regarding the religious demography of the current Congress, see Jonathan Tilove, *Religious Makeup of New Congress is Groundbreaking*, *HOUSTON CHRON.*, Dec. 30, 2006, at 1, available at 2006 WLNR 22735942.

¹⁶⁸ As a final point, note that having an institutional chaplaincy has meant that groups like the Quakers and Mennonites (who do not ordain paid clergy) simply do not participate. See THOMAS D. HAMM, *THE QUAKERS IN AMERICA* 21 (2003) (“Friends had no priests or official pastors. They believed that God, through the Holy Spirit, could move anyone to speak, that all Christians could and should be ministers.”). For more on the objections of Quakers and Mennonites to paid clergy at the Founding, see James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 864 n.129 (2004).

¹⁶⁹ The exact date when the House and the Senate developed their guest chaplaincy programs is unclear, but Sen. Byrd suggests that this had been the practice of the Senate dating back to at least 1960. See BYRD, *supra* note 77, at 305 (noting interactions between Lyndon Johnson, as Majority Leader in the Senate, and guest chaplains).

¹⁷⁰ See *A First: Islamic Clergyman Gives House Prayer*, *ORLANDO SENTINEL*, June 26, 1991, at A6, available at 1991 WLNR 4113818; Rebecca Buckman, *Muslim Voice Delivers House Invocation*, *USA TODAY*, June 26, 1991, at 2A, available at 1991 WLNR 2113645.

¹⁷¹ See *Muslim Leader Gives Senate Invocation, Urges Understanding*, *DAILY NEWS* (L.A.), Feb. 22, 1992, at N14, available at 1992 WLNR 1252065; Ari L. Goldman, *Religion Notes*, *N.Y. TIMES*, Feb. 22, 1992, at 17, available at 1992 WLNR 3315454.

¹⁷² See DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS NOW BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION* 67 (2001) (noting that “after many thousands of Christian and Jewish prayers, decade after decade, the first Islamic prayers before Congress do indeed constitute a landmark in American public life”); see also Delahunty, *supra* note 10, at 517, 547 n.109.

female guest chaplain,¹⁷³ the first Roman Catholic nun to act as guest chaplain,¹⁷⁴ the first guest chaplain from a Native American religion.¹⁷⁵

But, as was the case with the permanent chaplaincies, there is a dark lining to the guest chaplaincy programs as regards diversity. Consider the case of Hinduism. In 2000, the House arranged for Venkatachalapathi Samuldrala, a Hindu priest, to come and offer a prayer as guest chaplain.¹⁷⁶ This was an important act of religious inclusivity, but it also had political ramifications; Samuldrala's prayer coincided with a visit to Congress by the Indian Prime Minister Atal Behari Vajpayee, and it was attended by the United States Ambassador to India. The congressman who sponsored Samuldrala's prayer focused on the ecumenical aspects of it—"[Samuldrala's prayer] reminds us," he said, "that while we may differ in culture and traditions, we are all alike in the most basic aspiration for peace and righteousness."¹⁷⁷ Indian newspapers picked up on the event as a historic act of American tolerance for Indian culture.¹⁷⁸ Yet Samuldrala's prayer sparked some controversy. The Family Research Council, a prominent Christian organization, issued a statement objecting to Samuldrala's prayer. It claimed that "[o]ur founders expected that Christianity—and no other religion—would receive support from the government as long as that support did not violate peoples' consciences and their right to worship."¹⁷⁹ Yet, after protest, the group largely retracted its statement.¹⁸⁰

The story of the first Hindu guest chaplain to offer prayer in the Senate is even more arresting. In 2007, Rajan Zed came to the Senate as a guest chaplain, expecting to offer an invocation. But before he even began speaking, he was interrupted by a spectator from the gallery who loudly prayed over him, "Lord Jesus, forgive us, Father, for

¹⁷³ See Romaine Kosharsky, *Pioneering Senate Guest Chaplain Dies*, ST. PETERSBURG TIMES, June 7, 1999, at 7B, available at 1999 WLNR 2646041 (discussing the first female Senate guest chaplain who offered prayer in 1971).

¹⁷⁴ See Robert Cohen, *Newark Nun Makes History in the House*, THE STAR-LEDGER (Newark, N.J.), Sept. 13, 2000, at 3, available at 2000 WLNR 8706109 (discussing the first female House nun who was a guest chaplain in 2000).

¹⁷⁵ See BYRD, *supra* note 77, at 304 (describing various guest chaplain invitations offered by the Senate, including one to an eighty-three-year-old Sioux Indian).

¹⁷⁶ See *Hindu Priest From Parma to Offer Historic Invocation in D.C.*, PLAIN DEALER (Cleveland, Ohio), Sept. 13, 2000, at 16A, available at 2000 WLNR 9044783.

¹⁷⁷ See Tom Diemer, *India Meets Washington*, PLAIN DEALER (Cleveland, Ohio), Sept. 17, 2000, at 5G, available at 2000 WLNR 9047451 (quoting Representative Sherrod Brown of Ohio).

¹⁷⁸ See *Hindu Priest's Invocation on House Floor is Prayer for Peace*, INDIA ABROAD (N.Y. edition), Sept. 22, 2000, at 12, available at 2000 WLNR 7484146; *Vajpayee Urges Indo-US Concert Against Terror*, STATESMAN (Calcutta, India), Sept. 14, 2000, available at 2000 WLNR 5314735.

¹⁷⁹ Associated Press, *Conservative Group Rips Hindu Priest's Invocation*, N.J. REC., Sept. 22, 2000, at A21, available at 2000 WLNR 1876985.

¹⁸⁰ See *Family Research Council Clarifies Hindu Criticism*, CHRISTIAN CENTURY, Oct. 11, 2000, at 993, available at 2000 WLNR 4634863.

allowing a prayer of the wicked, which is an abomination in your sight.”¹⁸¹ The spectator was removed from the gallery. But after order was restored and Zed resumed praying, other spectators interrupted him again, making similar comments. The three spectators, who were members of the pro-life Christian group Operation Save America, were arrested on misdemeanor charges of interrupting congressional business.¹⁸²

This time, the outcry was more intense. Several Christian organizations wrote in support of the protestors, simultaneously denouncing the Senate for accepting Zed’s prayer. Operation Save America said that the prayer placed “the false god of Hinduism on a level playing field with the One True God, Jesus Christ”; the American Family Association made similar remarks, circulating a petition stating that “[t]his is not a religion that has produced great things in the world.”¹⁸³ A former vice president of the Southern Baptist Convention claimed that he too would have protested Zed’s prayer, and faulted the Senate for allowing it.¹⁸⁴ Many condemned these statements along with the acts of the protestors,¹⁸⁵ although some wrote in defense of them.¹⁸⁶ Foreign newspapers also picked up on the dispute.¹⁸⁷

And while some attempts to increase diversity have encountered notable setbacks, there are other unspoken boundaries that neither the House nor the Senate have yet

¹⁸¹ The whole incident was recorded by C-SPAN and can be viewed at http://tpmelectioncentral.talkingpointsmemo.com/2007/07/christian_right_activists_disr.php (last visited Apr. 17, 2009).

¹⁸² *Id.*; see, e.g., Associated Press, *A Hindu Prayer In the Senate Meets Protest*, N.Y. TIMES, July 13, 2007, at A14, available at 2007 WLNR 13351623; Associated Press, *Hindu Leads Senate Prayer After Protesters Led Away*, CHARLESTON GAZETTE (W. Va.), July 14, 2007, at 6C, available at 2007 WLNR 13560867.

¹⁸³ See Michelle Boorstein, *Hindu Groups Seek Condemnation of Senate Prayer Protest*, WASH. POST, July 27, 2007, available at 2007 WLNR 14427047.

¹⁸⁴ See John Nichols, Editorial, *Founders Respected All Religions*, CAPITAL TIMES (Madison, Wis.), July 17, 2007, at A6, available at 2007 WLNR 13651207.

¹⁸⁵ See, e.g., Rebeca Chapa, Editorial, *Intolerance, Not Hindu Chaplain, is Real Threat to Christianity*, SAN ANTONIO EXPRESS-NEWS, July 19, 2007, at 7B, available at 2007 WLNR 13782860; Nichols, *supra* note 184; Dave Peyton, *Self-Righteous Extremism is Off-Putting: Tomfoolery Undermines too Many Creeds*, CHARLESTON DAILY MAIL (W. Va.), July 16, 2007, at 4A, available at 2007 WLNR 13632720; Jennifer Platte, Editorial, *Fundamentalist Threat Not an Isolated Event*, BOULDER DAILY CAMERA (Colo.), July 20, 2007, available at 2007 WLNR 15824732, at A12; *Show Respect for U.S. Faiths*, BATON ROUGE ADVOC., July 29, 2007, at B6, available at 2007 WLNR 14530699; William Wineke, *Christian Group Takes Cheap Shot*, WIS. ST. J., July 21, 2007, at C1, available at 2007 WLNR 13980260.

¹⁸⁶ See, e.g., William Gardoski, Letter to the Editor, *Insulting to Begin Senate with Hindu Prayer*, IDAHO STATESMAN, July 28, 2007, at 16, available at 2007 WLNR 14507925 (“Hindu religion has nothing in common with even the most basic beliefs of America, and because of their teachings, India and Nepal are destitute and in abject poverty. They worship many gods, not one, and I am disgusted and appalled at this affront to the American way of life.”).

¹⁸⁷ See, e.g., *Fanatics Disrupt Senate Vedic Prayer*, STATESMAN (Calcutta, India), July 14, 2007, available at 2007 WLNR 13396879; *Protest at Senate Hindu*, EVENING STANDARD (London), July 13, 2007, at 16, available at 2007 WLNR 13397674.

ventured to cross. Neither the House nor the Senate has had a Wiccan guest chaplain. Neither has had an openly gay or lesbian clergyperson as guest chaplain. Imagine, for a moment, the havoc that might ensue if the House or Senate were to invite someone like Gene Robinson, an openly gay bishop in the Episcopal Church, to serve as a guest chaplain. The issue of gay clergy divides the Episcopal Church and a number of other Christian denominations.¹⁸⁸ Many would see an openly gay guest chaplain as a governmental endorsement of the propriety of gay clergy—and one could expect such a chaplain to encounter the same sort of resistance that Rajan Zed did (and likely more). Thus again we see that although the guest chaplaincy program is more diverse than the permanent chaplaincies, it too is imperfectly diverse. If the selection of permanent chaplains inevitably reflects what congresspeople themselves believe, the selection of guest chaplains inevitably reflects what congresspeople believe to be generally tolerable in the larger society. The guest chaplaincy program thus requires Congress to decide what is religiously acceptable and what must remain beyond the boundary of religious tolerance.

II. THE CHAPLAINCIES AND THE CONSTITUTION: *MARSH V. CHAMBERS*

Throughout the history of the chaplaincies, a persistent question has been whether they are constitutional at all. Madison was among the first to lay out the constitutional arguments against the chaplaincy in his “*Detached Memoranda*.”¹⁸⁹ Those and other arguments were forcefully asserted again when Congress was presented with objections to the chaplaincies in the 1840s and 1850s.¹⁹⁰ Some in Congress sought to definitively resolve those objections by issuing authoritative pronouncements on the topic, but those pronouncements did not end the controversy. Yet the crisis over the chaplaincies faded in the latter part of the nineteenth century, and it took another hundred years for the chaplaincies to eventually reach the United States Supreme Court, when the Court finally confirmed their constitutionality in its 1983 case, *Marsh v. Chambers*.¹⁹¹

Now there had been earlier judicial challenges to the chaplaincies. In the 1920s, a suit had been brought which attacked the financial support that the chaplaincies received.¹⁹² The D.C. Circuit dismissed the claim without reaching the merits, con-

¹⁸⁸ See Manya A. Brachear, *Lutherans Split Over Rule of Celibacy for Gay Clergy*, CHI. TRIB., Aug. 3, 2007, at 4, available at 2007 WLNR 14897220 (discussing the divide in the Lutheran Church); John F. Burns, *Anglicans to Seek Pact to Prevent a Schism*, N.Y. TIMES, Aug. 4, 2008, at A6, available at 2008 WLNR 14490241 (discussing the divide in the Anglican Church and Episcopal Churches in the United States); *Methodists Retain Policies on Homosexuality*, CHRISTIAN CENTURY, June 3, 2008, at 14, available at 2008 WLNR 11251495 (discussing the divide in the Methodist Church).

¹⁸⁹ See *supra* Part I.C.

¹⁹⁰ See *supra* Part I.E.

¹⁹¹ 463 U.S. 783 (1983).

¹⁹² See *Elliott v. White*, 23 F.2d 997 (D.C. Cir. 1928).

cluding that taxpayers generally lacked standing to sue over the federal government's decisions as to how to disburse taxpayer funds.¹⁹³ What this meant was that the chaplaincies became essentially immune to judicial challenge. Plaintiffs did not have standing to complain about the financial injury inherent in their taxes funding the chaplaincy—and the nature of the Establishment Clause at the time was such that the mere act of viewing or witnessing the chaplaincy did not constitute a violation.¹⁹⁴

In the 1960s, however, the Supreme Court threw out both halves of that analysis. Standing doctrine expanded to permit taxpayer challenges to governmental expenditures allegedly in violation of the Establishment Clause.¹⁹⁵ And the Establishment Clause itself changed to allow a plaintiff's mere exposure to a governmental religious act to sometimes make out a constitutional violation.¹⁹⁶ But yet these changes came with warnings—while the chaplaincies could be challenged in federal court, such a challenge

¹⁹³ *Id.* at 997–98. The standing doctrine *Elliott* applied was a recently crafted one. *Elliott* cited only a single case—the Supreme Court's decision five years earlier in *Frothingham v. Mellon*, 262 U.S. 447 (1923), which had held that a taxpayer had an insufficient interest in the constitutionality of the Maternity Act (which appropriated money for mothers' and children's health), and thus lacked standing to challenge it. The principle announced in *Frothingham* is, by and large, still valid today. Litigants must, in general, allege a particularized sort of injury—and merely being forced to pay taxes that are used to subsidize an allegedly unconstitutional government action is not generally enough. *See id.* at 488 (“The party [challenging] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.”).

¹⁹⁴ *See* PFEFFER, *supra* note 43, at 250 (“In any event, under present Federal court decisions, it appears that the issue [of the constitutionality of the congressional chaplains] cannot be directly determined in the courts.”); Arthur E. Sutherland, Jr., *Establishment According to Engel*, 76 HARV. L. REV. 25, 41 (1962) (explaining how the courts have “prevented a judicial inquiry into the constitutionality of maintenance of chaplains in the armed forces and in the Congress”).

¹⁹⁵ *See* *Flast v. Cohen*, 392 U.S. 83 (1968) (permitting standing in a suit by taxpayers to enjoin the expenditure of federal funds for the purchase of textbooks and other materials for use in parochial schools).

¹⁹⁶ *See* *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (holding that it violated the Establishment Clause for state school students to be read passages from the Bible by school agents); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that it violated the Establishment Clause for state school students to be encouraged to participate in a state school's daily classroom invocation).

could well go nowhere.¹⁹⁷ Eventually, however, such a challenge made it through to the Supreme Court, and was rejected, in the case of *Marsh v. Chambers*.¹⁹⁸

In some ways, *Marsh* was the irresistible force meeting the unmovable object. The Court had frequently asserted and vigorously applied the principle that government had to be neutral toward religion, which would suggest that the principled answer was to declare the chaplaincies unconstitutional.¹⁹⁹ But there was an obvious problem—no one had ever taken the principle nearly so far. In this sense, *Marsh* was perhaps akin to the recent battle regarding “under God” in the Pledge of Allegiance²⁰⁰—in both situations, while precedent clearly led to the conclusion that the government’s action was unconstitutional, political realities cut strongly the other way.²⁰¹

Perhaps what was most surprising about *Marsh*, however, was the way in which the Court reasoned. The Court’s analysis was straightforward. Legislative prayers had a long and established history dating back to before the enactment of the Constitution, and the First Congress had explicitly authorized legislative prayer at the time of the finalization of the Bill of Rights in 1789. Thus, it was clear that “the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and

¹⁹⁷ This warning had been offered early. See *Zorach v. Clauson*, 343 U.S. 306, 312–13 (1952) (suggesting that “[p]rayers in our legislative halls” were indeed permissible under the Establishment Clause); cf. *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892) (referring positively to “the custom of opening sessions of all deliberative bodies and most conventions with prayer”). But when Justice Brennan, a decade later, intimated that the chaplaincies were constitutional, people really took notice. See *Schempp*, 374 U.S. at 299–300 (1963) (Brennan, J., concurring) (noting that, for various reasons, “[t]he saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause”).

¹⁹⁸ 463 U.S. 783 (1983). There had been one slightly earlier judicial challenge to the congressional chaplaincies. In 1981, the Federal District Court for the District of Columbia dismissed a constitutional challenge to the congressional chaplaincies. See *Murray v. Morton*, 505 F. Supp. 144 (D.D.C. 1981). The court dismissed the case on procedural grounds, despite *Flast*. The court’s rationale was that while *Flast* created taxpayer standing in Establishment Clause cases generally, it did not authorize a suit that attacked expenditures relating to Congress’s own internal affairs. *Id.* at 146 (“*Flast* and its progeny did not, however, resolve the interrelated questions of standing and justiciability with respect to a taxpayer’s suit challenging the constitutionality of Congress’ decisions and expenditures concerning its internal affairs.”). For an overview of this litigation, see Mallory, *supra* note 10, at 1440 & n.123.

¹⁹⁹ Requiring neutrality between religion and its alternatives was a theme that ran through the Establishment Clause cases handled by the Warren and Burger Courts. See Douglas Laycock, “Noncoercive” Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U. L. REV. 37, 53–61 (1991). This was encapsulated in the *Lemon* test, named for *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but dated back to *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). On this point, see *supra* note 1 and accompanying text.

²⁰⁰ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

²⁰¹ In referring to *Newdow* shortly after it was decided, Douglas Laycock remarked that it was “politically impossible to affirm and legally impossible to reverse.” Laycock, *Theology Scholarships*, *supra* note 93, at 224. The same could be said for *Marsh*.

opening prayers as a violation of that Amendment.”²⁰² To the *Marsh* Court, these plain historical facts conclusively resolved the constitutional question regarding the chaplaincies.²⁰³ Never before had the Court done this; never before had it taken an originalist approach to the Establishment Clause. Perhaps part of it was that *Marsh* was the first Establishment Clause case where such an approach could so easily resolve the issue.²⁰⁴ Establishment Clause cases usually tended to resist such easy historical analysis.²⁰⁵ But, in any event, *Marsh* was a complete departure from traditional Establishment Clause analysis. The majority opinion did not mention the then-dominant three-part test of *Lemon v. Kurtzman*²⁰⁶ and did not cite *Engel v. Vitale*,²⁰⁷ the only other case the Court had ever decided that dealt with government-sponsored prayer.

There were, of course, criticisms of *Marsh*—both on and off the Court. The two main dissents focused on different points. Justice Brennan argued that the chaplaincies constituted inappropriate aid to religion, and thus were intrinsically unconstitutional.²⁰⁸

²⁰² *Marsh*, 463 U.S. at 788.

²⁰³ See, e.g., Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988) (“The interesting thing about the opinion is that it is based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause.”).

²⁰⁴ In its brief to the Court, the Solicitor General made the point about how the issues in *Marsh* were uniquely susceptible to resolution under an originalist logic. See Brief for the United States as Amicus Curiae in Support of Petitioners at 14, *Marsh*, 463 U.S. 783 (No. 82–83) (“In the instant case, the appropriateness of historical review is more compelling, and the results are more instructive and conclusive, than in any Establishment Clause case previously considered by this Court.”); cf. McConnell, *supra* note 203 (“We know, far more certainly than we usually know these things, that the framers did not consider legislative chaplains to violate the establishment clause.”).

²⁰⁵ Most of the Establishment Clause cases the Supreme Court took during this period involved states and (in particular) state public schools, which by and large did not exist at the Founding, making originalist analysis complicated. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (arguing that the “historical approach [of *Marsh*] is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted”).

²⁰⁶ 403 U.S. 602 (1971). Justice Brennan pointed this out in his dissent. See *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) (“The Court makes no pretense of subjecting Nebraska’s practice of legislative prayer to any of the formal ‘tests’ that have traditionally structured our inquiry under the Establishment Clause.”).

As many courts have now put it, “*Marsh* is one-of-a-kind.” *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 211 (5th Cir. 2006) (Stewart, J., concurring in part and dissenting in the judgment) (citations omitted); *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (citations omitted); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999); *Newman v. City of E. Point*, 181 F. Supp. 2d 1374, 1378 (N.D. Ga. 2002) (citations omitted).

²⁰⁷ 370 U.S. 421 (1962) (prohibiting the composition of an official state prayer to be recited at the beginning of every school day).

²⁰⁸ See *Marsh*, 463 U.S. at 795–822 (Brennan, J., dissenting). This again mirrored the first paragraph of the arguments made in Madison’s *Detached Memoranda*. See *supra* note 73

Justice Stevens argued that the chaplaincies would inevitably disadvantage religious minorities, and thus were unconstitutional in their operation.²⁰⁹ Other commentators added their critiques.²¹⁰

Less attention has been paid to *Marsh*'s historical analysis. *Marsh*'s focus was, of course, historical in nature, but its view of that history was deeply partial—partial in the sense of being a bit slanted as well as partial in the sense of being somewhat incomplete. Regarding the history that it did report, *Marsh* minimized the ways in which the chaplaincies were seen as political or denominational or controversial. *Marsh* discussed how legislative prayer began with the Continental Congress, but it did not mention the political reasons why Congress would have been so interested in appointing Duché.²¹¹ *Marsh* noted that the Constitutional Convention decided not to have a chaplain, but tersely waived off any implications from that fact—saying it “may simply have been an oversight.”²¹² *Marsh*'s most extensive discussion was of that single week in 1789 when Congress approved both the Establishment Clause and the chaplaincies. But, even there, the Court withheld contentious details—it did not mention, for example, the protest votes Thomas Paine and others received to be the first chaplains.²¹³

Yet the more puzzling part of *Marsh* lies in all the history that the Court simply left out. The Court said virtually nothing about the chaplaincies after the passage of the Bill of Rights in 1789. It said nothing about how political issues intersected with the chaplaincies (such as with slavery)²¹⁴ and said nothing about how religious denom-

and accompanying text.

²⁰⁹ See *Marsh*, 463 U.S. at 822–24 (Stevens, J., dissenting). This again mirrored the second paragraph of the arguments made in Madison's *Detached Memoranda*. See *supra* note 73 and accompanying text.

²¹⁰ See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14–15, at 1288–89 (2d ed. 1988). The criticisms of *Marsh*, it should be noted, did not just come from the left. See, e.g., McConnell, *supra* note 203, at 362–63 (arguing that “[u]nless we can articulate some principle that explains why legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause” and concluding that because no such principle exists, “I am forced to disagree with the holding in *Marsh*”).

²¹¹ See *Marsh*, 463 U.S. at 787, 790–91. For a discussion of those political and denominational considerations, see *supra* Part I.A.

²¹² *Marsh*, 463 U.S. at 787 n.6. For other possible rationales behind the Convention's decision, see *supra* note 57 and accompanying text.

²¹³ This fact was certainly available to the Court. The Court cites Anson Phelps Stokes's monumental work for its discussion of this time period. *Marsh*, 463 U.S. at 787 n.6 (citing STOKES, *supra* note 52, at 455–56). On the very next page beyond what the Court cites, Stokes discusses the votes given to Paine. See STOKES, *supra* note 52, at 457.

²¹⁴ See *supra* notes 133–36 and accompanying text (discussing the intersection of slavery and the chaplaincies).

ination became an important issue in selecting chaplains (such as with Catholicism and Unitarianism).²¹⁵ The Court's only stab at nineteenth-century history was to report, in a footnote, that Congress suspended the chaplaincies in the 1850s and considered abolishing them.²¹⁶ But that footnote offers nothing in the way of context—there is no explanation of why anyone would have come to see the chaplaincies as unconstitutional. To the average person reading the opinion, the movement to abolish the chaplaincies would seem an inconsequential peculiarity of history—an inexplicable historical glitch that probably says nothing about the institution as a whole. This framing of the history subtly minimizes the quite widespread opposition to the chaplaincies, and it sidelines all the reasons why that opposition had developed. And one of the important reasons for that opposition, of course, was Catholicism.²¹⁷

And this perhaps is the most glaring omission in *Marsh*'s historical account—its failure to even mention Catholicism. Catholicism had radical implications for the chaplaincies in the nineteenth century. Parts of Protestant America came to fear Catholicism, and would rather see the chaplaincies dismantled than fall into Catholic hands. Through Catholicism, Protestants began to appreciate one of the dangers always inherent in religious establishments—the danger that political power could shift, and those that control the establishment one day could find themselves out of power the next.²¹⁸ These realizations—realizations borne of anti-Catholic sentiment—played a role in the suspension (and the near abolition) of the chaplaincies. Yet of all this, *Marsh* said nothing. The Court never so much as mentioned Catholicism, let alone discussed what happened to Charles Constantine Pise.

One consequence of *Marsh*'s restricted view of the relevant history is that it often made grand overarching assertions about the chaplaincies that are not entirely true. *Marsh* claimed an “unambiguous and unbroken history of more than 200 years”²¹⁹ behind legislative prayer, which proved that it creates “no real threat to the Establishment Clause.”²²⁰ *Marsh* boldly asserted that people “did not consider opening prayers . . . as symbolically placing the government's official seal of approval on one religious

²¹⁵ See *supra* Part I.C (discussing Catholicism); *supra* Part I.D (discussing Unitarianism).

²¹⁶ *Marsh*, 463 U.S. at 788 n.10.

²¹⁷ See *supra* Part I.C.

²¹⁸ The classic example of this is the dispute between Congregationalists and Unitarians in Massachusetts in the 1830s. The Congregationalists were initially satisfied with having a religious establishment in Massachusetts. But when they began losing ground to the Unitarians, the Congregationalists chose to help end the establishment rather than lose control of it. See John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAULL. REV. 567, 569 (1992) (“[T]he Congregationalists realize[d] that establishment was not very pleasant, if you were no longer the established church.”).

²¹⁹ *Marsh*, 463 U.S. at 792.

²²⁰ *Id.* at 791. The Court later repeated this, when it concluded that there was “no real threat ‘while this Court sits.’” *Id.* at 795 (citation omitted).

view,”²²¹ and it casually referred to the chaplaincies as “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”²²²

But these statements do not square with certain parts of the chaplaincies’ history. The chaplaincies may have existed for 200 years, but their existence was not unbroken (what about the lack of prayer at the Constitutional Convention?) and hardly unambiguous (what about all the groups that sought to abolish the chaplaincies during the nineteenth century?). And, of course, many did see “opening prayers . . . as symbolically placing the government’s ‘official seal of approval on one religious view’”²²³—that was precisely why it became so important to prevent Catholic priests from becoming congressional chaplains.²²⁴ Finally, there is *Marsh*’s core claim—its claim that the chaplaincies were “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”²²⁵ This is simply wrong, and almost risibly so. It perpetuates the very false illusion that the chaplaincies were altogether innocuous and universally supported; it ignores all of the ways in which the chaplaincies were sometimes controversial and divisive. In the end, the Court’s desire to portray the chaplaincies as benign ends up distorting its historical analysis. *Marsh* wanted the chaplaincies to seem sterile, but this required disinfecting parts of the relevant history.²²⁶

²²¹ *Id.* at 792 (citation and internal quotation marks omitted).

²²² *Id.*

²²³ *Id.* (citation omitted).

²²⁴ Indeed, the very first time the Supreme Court had referred to the chaplaincies, it had taken them as support not for religion generally, but for Christianity in particular. See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (claiming that “the custom of opening sessions of all deliberative bodies and most conventions with prayer,” along with a number of other governmental practices, “add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation”).

²²⁵ *Marsh*, 463 U.S. at 792.

²²⁶ For originalists, there is a final, related criticism of *Marsh*. The *Marsh* Court’s historical focus was on whether the congressional chaplaincies were considered constitutional in 1789—the year the Establishment Clause was passed. But *Marsh*, it must be remembered, was a Fourteenth Amendment case. From an originalist standpoint, the issue then should have been whether the congressional chaplaincies were considered constitutional in 1868—the year the Fourteenth Amendment was passed (and through which the Establishment Clause would eventually be incorporated against the states). Kurt Lash made this point in another context when he attacked the assumption that “[t]he historical period surrounding the adoption of the original Establishment Clause is directly relevant to determining the intent behind the *incorporated* Establishment Clause.” Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1087–88 (1995).

Now, to be sure, focusing on 1868 rather than 1789 would probably not have changed the result. But it would have changed the analysis—the Court would have been forced to consider the somewhat unpalatable nineteenth-century history of the chaplaincies. In its opinion, the Court recognized this issue, but quickly put it aside. See *Marsh*, 463 U.S. at 790–91 (“In applying the First Amendment to the states through the Fourteenth Amendment, 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.” (citation omitted)).

CONCLUSION

From their inception to the present day, the congressional chaplaincies have had an extraordinary history. They have been praised, despised, manipulated, fought over, and thought indispensable to the functioning of the Republic. But they were never tame or benign, never immune to controversy, and never entirely insulated from the political culture that surrounds them. They were not, as the *Marsh* Court believed, “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”²²⁷ They were, and are, much, much more than that.

The congressional chaplaincies have had a remarkable and fascinating history—a history that would be worth telling, even if it had no modern-day applications. But the contemporary relevance of the congressional chaplaincies is clear, for the controversies associated with legislative prayer have not at all gone away in the decades after *Marsh*. In fact, they have only gotten more frequent and intense.²²⁸ This is not the place to comprehensively evaluate those disputes.²²⁹ But there is no doubt that the history of the chaplaincies has played, and will continue to play, the most central role in their resolution.

This Article has sought to cast light on the history of the chaplaincies, because so much of that history has remained in the dark, despite (or, perhaps, because of) the efforts of the *Marsh* Court and commentators. This Article has tried to offer what no one has thus far offered—a comprehensive account of certain aspects of the chaplaincies, told without undue bias or prejudice, with an eye toward helping us understand the conflicts of the past, in the hope that it might help us better consider the related conflicts of today.

²²⁷ *Marsh*, 463 U.S. at 792.

²²⁸ See *supra* notes 9–10.

²²⁹ I undertake that task in a companion piece, which focuses on the present disputes and connects them with the history laid out in this one. See Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements* (forthcoming 2010).