The Congressional Chaplaincies

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by Christopher C. Lund

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.” 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. But a deeper look at that history reveals an American institution that is far from being either boring or benign. The chaplains 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 just as frequently have been a source of discord. Perhaps the most fundamental lesson taught by the history of the chaplaincies is that they operate the way one would expect any religious establishment to operate – when the government is empowered to act religiously, there is a natural but unenviable fight for control over what the government will do. The history of the chaplaincies is, 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 certain constitutional restrictions – restrictions which have themselves become sources of almost endless litigation. In these modern battles, as was the case with Marsh itself, history plays an exceedingly influential role. It is thus now more important than ever that the true and complete history of the chaplaincies be told.

This Article takes up that burden and examines the history of the congressional chaplaincies. It considers the practices of the Continental Congress and Constitutional Convention, the origin of the congressional chaplaincies in 1787, 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, the intersection of the chaplaincies and slavery, and the modern operations of the chaplaincy. With that history in mind, it turns to Marsh and attempts to take an understanding of the eighteenth and nineteenth centuries to guide us in the present struggles.
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. 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 most clearly, consider that since the beginning of the Republic (and in fact before), Congress has by official statute retained and paid permanent clergy to offer prayers to God on the government’s behalf. These features that the chaplaincies have – they are official, institutional, clerical, paid, continuously operating, longstanding, and undeniably religious – make the chaplaincies a singular phenomena in American church-state relations. The other deviations from the neutrality principle are minor exceptions that tend almost to prove the rule; the chaplaincies create existential 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. *Marsh*’s rationale was a historical one, grounded in principles of originalism. Given that the First Congress had

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1 The Supreme Court has phrased this idea in many ways. It has sometimes said that there can be no favoritism “between religion and irreligion,” see McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 875 (2005); Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994), or “between religion and nonreligion,” see Gillette v. United States, 401 U.S. 437, 469 (1971); 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 neutral in its relations with groups of religious believers and nonbelievers,” Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 18 (1947).

The neutrality principle was first articulated in full in the Supreme Court’s decision in *Everson*, when the Court explained, “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.” *Everson*, supra, at 15 (emphasis added).

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. The chaplaincies were not an establishment of religion, the Court reasoned, but rather “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”

This last assertion makes the congressional chaplaincies sound trifling and innocuous. But nothing could be further from the truth. The chaplaincies have a far more nuanced and checkered history than the Marsh court seemed to imagine. This Article develops that history, in unparalleled detail. It fleshes out the origin of the chaplaincies and the first legislative prayer uttered 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 first Catholic chaplain in 1832, who left less than a year after being hired, having been dogged by anti-Catholic bigotry. It discusses how fears of Catholicism, along with 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 the peculiar intersection of 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 and Catholic chaplains were inconceivable – by 2000, the reverse is true. In 2003, the Senate voted to have an African-American chaplain (in itself a first), who also belonged to a tiny and unorthodox Christian denomination. Yet Congress has never had a female chaplain. Another persistent motif running through this piece is the conflict the chaplaincies have sometimes produced. Perhaps it is an inevitable part of religious establishments that they inspire a fierce battle for their control. The congressional chaplaincies are the closest thing this country has had to a religious establishment, and so we should probably not be surprised at how the history of the chaplaincies has some very dark elements indeed.

The congressional chaplaincies 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 important but 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

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with, and whether it can pick and choose which religious groups have the opportunity to pray. Collectively, these issues have stormed the federal courts, the law reviews, and the public consciousness—they have even spilled out into other countries, and caused violent confrontations. In these battles, much has

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been said about history. But the history itself has never been comprehensively examined. The article tells the story of the congressional chaplaincies, and in doing so, hopes to advance the historical understanding of legislative prayer beyond mere law office history.9

To that end, this piece proceeds in three parts. Part I describes how the chaplaincies have developed over time, moving chronologically from the initiation of legislative prayer in the Continental Congress through the present day. In Part II, this historical understanding is used to reconsider the Supreme Court’s decision in Marsh v. Chambers. The Article lays out its conclusions in Part III.10

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 Continental Congress. That Congress had been assembled in the fall of 1774 at Carpenter’s Hall in Philadelphia.11 On the second day of the convention, Congress heard a request from Thomas Cushing from Boston that the next day’s session by opened with a prayer from a local Anglican minister, the Rev. Jacob Duché. John Jay and John Rutledge objected, arguing that the delegates were too “divided in religious sentiments” and thus

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The military chaplaincies, as well, have been the source of much conflict in recent years. See Ira C. Lupu & Robert W. Tuttle, Instruments of Accommodation: The Military Chaplaincy and the Constitution, 110 W. VA. L. REV. 89, 90 (2007) (“Over the past several years, constitutional issues involving the military chaplaincy have progressed from a low simmer to a rolling boil. After decades of little public attention, stories about the chaplaincy regularly reach the national news, cases proliferate in the courts, and new scholarly articles on the subject appear regularly.”).

9 See Philip B. Kurland, The Origins of the Religion Clauses of the Constitution, 27 WM. & MARY L. REV. 839, 842 (1986) (“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.”)

10 In a related piece that provides a counterpoint to this one, I tackle the specific issues presented by the recent flood of legislative prayer cases. See Christopher C. Lund, Marsh v. Chambers Revisited: The Second Generation of Legislative Prayer Cases (unpublished manuscript, on file with author) (forthcoming Spring 2009).

“could not join in the same act of worship.” 12 But the motion passed, and the next day, Duché gave essentially the first American legislative prayer.

Duché opened with several form Anglican prayers, then read the 35th Psalm, and ended with a personal, extemporaneous prayer. Both the Psalm that Duché chose, and the personal prayer he gave, were intimately related to a then-current concern of the Continental Congress – an alleged attack earlier that week on Boston by the British.13 In the 35th Psalm, the psalmist seeks divine refuge from the onslaught of foreign powers.14 Congress had no trouble identifying with such a sentiment, for it of course saw itself as similarly besieged by foreign powers (in its case British ones). This seems to be what Adams meant when he said that it was “as if Heaven had ordained the Psalm to be read on that morning,”15 and perhaps what Silas Deane meant when he said that that the readings “were accidentally extremely Applicable.”16

The extemporaneous portion of Duché’s prayer was almost lost to history. It was deliberately not recorded by the Continental Congress, for fear that the British might retaliate against Duché, who was again an Anglican

12 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); 1 JOURNALS OF THE CONTINENTAL CONGRESS 26-27 & n.1 (1774).

13 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) (“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 Martin J. Medhurst, From Duché to Provoost: The Birth of Inaugural Prayer, 24 J. CHURCH AND STATE 573, 577 (1982).

14 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 before the wind: and let the angel of the LORD persecute 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.


15 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).

16 Letter from Silas Deane to Elizabeth Deane (Sept. 7, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 34 (Paul H. Smith ed. 1976).
clergyman. Yet Charles Thomson, the secretary of the Continental Congress, secretly wrote down the text of Duché extemporaneous prayer in Thomson’s personal copy of the 13-volume Journals of Congress:

(1) O! Lord, our heavenly father, (2) King of Kings and Lord of lords: who dost from thy throne behold all the dwellers upon earth and reignest with power supreme & uncontroled (3) over all kingdoms, empires and governments, look down in mercy, (4) we beseech thee, upon these our (5) American states who have fled to thee from the rod of the oppressor and thrown themselves upon thy gracious protection, desiring henceforth to be (6) dependent only on thee. To thee they have appealed for the righteousness of their Cause; to Thee do they look up, (7) 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 (8) in their sanguinary purposes, O! let the voice of thy (9) unerring justice sounding in their hearts constrain them to drop the weapons of war from their enerved (10) hands in the day of battle. Be thou present, O God of Wisdom and direct the counsels (11) of this honourable Assembly. Enable them to settle things upon the best and surest foundation, that the scene of blood may be speedily closed; that (12) 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 (13) 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.

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17 James Duane’s Notes of Debates (Sept. 30, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 35 (Paul H. Smith ed. 1976) (“The Congress was opend with prayers by the revnd Mr Dutche 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.”).

Like Duché’s recitation of the 35th Psalm, this prayer has the British (the “cruel adversaries” of phrase 7) squarely in mind in asking for divine assistance to turn their hearts 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.19

Of course, 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. The Continental Congress desperately needed help ingratiating the revolutionary movement with the Anglican clergy and laity (who would be overwhelmingly Loyalist when the Revolutionary War came).20 The Continental Congress surely hoped that Duché’s selection might move Anglican clergy either to support the cause for liberty, or at least to not oppose it so vigilantly. This is presumably what John Adams meant when he wrote that “[Joseph Reed] says we never were so guilty of a more masterful stroke than in moving that Mr. Duché might read prayers,”21 and what Samuel Adams meant 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 as as on some other accounts, to move that the service be performed by a clergyman of that denomination.”22 Note also the interesting ecumenism inherent in the fact that while Duché was Anglican (as was most of the Continental Congress),23 Samuel Adams (who suggested him) was Congregationalist.24

One of the consistent themes of this piece will be how the prevailing anti-Catholicism of the times sometimes enters into the history of the chaplaincies, and even this early history demonstrates that. At the time of Duché’s prayer, the

19 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) (“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.”).

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


22 See 1 JOURNALS OF THE CONTINENTAL CONGRESS 26 n.1 (1774).

23 Martin J. Medhurst, From Duché to Provoost: The Birth of Inaugural Prayer, 24 J. CHURCH AND STATE 573, 574 (1982) (“[T]he majority of the Continental Congress were nominally Episcopalian.”).

24 2 WILLIAM V. WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 221 (1865).
colonists’ most recent grievance was the Quebec Act, which had been passed by Parliament earlier in the year. The Quebec Act attempted to make 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.

Of course, Parliament did not pass the Quebec Act because it was moved by either 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 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.”

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

“[T]he late act of parliament for establishment the Roman Catholic religion and the French laws in that extensive country,

25 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, s 5 (Eng.), reprinted in 30 PICKERING’S STATUTES 549, 551 (1774) (providing, inter alia, that Quebec citizens may enjoy the “free exercise of religion” subject to the King’s supremacy).

26 See T. Jeremy Gunn, Religious Freedom and Laïcité: A Comparison of the United States and France, 2004 BYU L. 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 75 (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 DECLARATION OF INDEPENDENCE ¶ 2 (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.”).

27 See Richard Albert, American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective, 88 MARQ. L. REV. 867, 878 (2005) (quoting WILLIAM ADAMS BROWN, CHURCH AND STATE IN CONTEMPORARY AMERICA 321 (1936)). Albert’s piece, in addition to providing sources, also provides a thoughtful discussion of the Quebec Act.
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 measures for our security.  

Duché’s selection can be seen as a sort of strategic counterthrust to the Quebec Act. The Quebec Act represented an attempt by the Crown to shore up support among Catholics in Canada; Duché’s selection represented an attempt by the colonists to shore up support among Anglicans in the colonies. It also sent an unmistakable 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.

For all these reasons, Duché’s appointment was obviously both a political matter as well as a religious one. One historian has said that “the institutionalization of the congressional chaplaincy was motivated from the outset by partisan political concerns.” That seems clearly 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, conducting funerals, and 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. This was illegal under English law and perhaps treasonous. Five days later, on July 9, 1776, Duché was appointed the official chaplain of the Continental Congress.

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29 Martin J. Medhurst, From Duché to Provoost: The Birth of Inaugural Prayer, 24 J. CHURCH AND STATE 573, 573 (1982); see also LEO PFEEFER, CHURCH, STATE, AND FREEDOM 248 (2d 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”).

30 See 2 JOURNALS OF THE CONTINENTAL CONGRESS 12 (1775) (requesting Duché to come and offer prayer).

31 See 3 JOURNALS OF THE CONTINENTAL CONGRESS 303 (1775) (instructing a committee to ask Duché to preside at the funeral of Peyton Randolph, the first President of the Continental Congress).


33 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
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. 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 Traytor.” Other colonists, unsurprisingly, felt similarly.

B. The Development of the Legislative Chaplaincy

New chaplains were appointed after word spread of Duché’s treachery. William White, another Philadelphian Anglican – and in fact the only Anglican clergyman in Pennsylvania who would remain loyal to the revolutionary forces – was appointed. Also appointed was George Duffield, a Presbyterian. Together, they (like Duché) offered prayers, delivered sermons, conducted funerals, and acted in general as chaplains. The chaplaincy was maintained throughout the Continental Congress and the Congress of the Confederation, until the Constitution was ratified and a new Congress selected.

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34 Letter from John Hancock to Jacob Duché (July 9, 1776), in 4 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 418 (Paul H. Smith ed. 1976).


37 Richard Caswell (Oct. 20, 1777), in 8 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 155 (Paul H. Smith ed. 1976) (“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, 1774-1789, at 149 (Paul H. Smith ed. 1976) (calling the letter to Washington a “[r]ascally epistle from the Ir-Revd. Jacob Duché”).

38 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 451 (1950).

Interestingly, White was Rector of Christ Church, the same parish from which Jacob Duché hailed.

39 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 451 (1950).

40 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 451 (1950).

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 on June 28, 1787. After lamenting “[t]he small progress we have made after 4 or five weeks,” 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.\(^{42}\)

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.\(^{43}\)

\(^{42}\) See [1 The Records of the Federal Convention of 1787, 451-52 (Max Farrand ed., 1937).]

\(^{43}\) See [1 The Records of the Federal Convention of 1787, 452 (Max Farrand ed., 1937). Apparenly only three or four delegates (out of fifty-five) supported Franklin’s motion, for Franklin himself later noted that “[t]he Convention, except three or four persons, thought Prayers unnecessary.” Id. at 452 n.15.

Perhaps unsurprisingly, commentators have taken the absence of prayers at the Constitutional Convention one of two ways. Compare LEO PFEFFER, CHURCH, STATE, AND FREEDOM 247 (2d ed. 1967) (suggesting that the failure of Franklin’s motion was due to reasons of principle and 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”) (emphasis in original).
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. On April 25, 1789, the Senate elected its first chaplain, Samuel Proovost, an Episcopalian bishop. On May 1, the House followed suit, electing Congregationalist William Linn. Later, on September 25, Congress passed a statute setting the salaries of various Congressional officials, including the chaplains, at $500 per year. As many commentators have noticed, and as the Marsh court stressed, this last act occurred only three days after Congress reached final agreement on the Bill of Rights.

In part because the vote for the creation of the chaplaincies was not recorded in the Annals of Congress, it is difficult to gauge how much dissent there was within Congress over the decision to have congressional chaplaincies. Yet there was clearly some dissent, as manifested by the votes choosing the first chaplains. For example, Thomas Paine, the well-known critic of then-contemporary organized religion, was nominated to be one of the first chaplains – and he received three votes, votes which in retrospect seem clearly to votes in protest of the chaplaincies.

One fiercely debated question has been whether, and to what extent, Madison supported or opposed the chaplaincy. Madison’s views, of course, matter greatly; he served as principal drafter of the Establishment Clause, and was part of the joint committee that recommended the creation of the congressional chaplaincies. Yet it is unclear whether Madison ever really

44 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 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.”).


47 See Act of September 22, 1789, 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.”).


50 1 ANSON PHILIPS STOKES, CHURCH AND STATE IN THE UNITED STATES 457 (1950).

51 The Court in Marsh emphasized Madison’s importance. See Marsh v. Chambers, 463 U.S. 783, 788 n.8 (1983) (“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
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. And later, as President, Madison approved the appropriations bill allocating money for the existing chaplains. Yet Madison always maintained that he never had given outright approval to the congressional chaplaincies. There has been a modest debate about whether Madison’s actions were truly consistent. And it probably would not be surprising if Madison’s views did indeed change over time. Yet the most detailed historical examination seems to conclude that Madison was instead consistent in his opposition to the chaplaincies.

to undertake this task by the House of Representatives . . . and voted for the bill authorizing payment of the chaplains.”) (quotations omitted). For more on why Madison’s views matter so much, see Vincent Philip Munoz, *James Madison’s Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17 (2003).

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 LEVY, *THE ESTABLISHMENT CLAUSE* 97 & 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 Andrew G. Olree, *James Madison and Legislative Chaplains*, at 40 (unpublished manuscript, on file with author) (citing 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 714-15 (Joseph Gales, 1834)).


See Letter from James Madison to Edward Livingston of July 10, 1822 (“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.”), quoted in LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 97 (1986).

Compare LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 97 (1986) (suggesting Madison was consistent) with ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE; HISTORICAL FACT AND CURRENT FICTION* 30 (1982) (suggesting he was not).

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 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).

This work is Andy G. Olree, *James Madison and Legislative Chaplains* (unpublished manuscript, on file with author). Olree ends his quite thoughtful and meticulous historical analysis by concluding that, although the historical record does not permit certainty, “in all likelihood James
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 Congs 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 agst 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 evil 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.58

As will be discussed later, Madison’s critique of the chaplaincies sets the stage for all the later critiques. Madison’s first paragraph mirrors Justice Brennan’s later argument that the chaplaincies are intrinsically

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unconstitutional, while Madison’s second paragraph mirrors Justice Stevens’ argument that the chaplaincies will inevitably operate in a way that unconstitutionally disadvantages religious minorities. Note also the 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. 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.

D. Catholicism and the Chaplaincies

In his *Detached Memoranda*, Madison asked an insightful question – whether a Catholic clergyman could ever hope to appointed chaplain. 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.

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. In 1789, there were only 35,000 Catholics in this country – they made up less than 1% of the population. But the middle part of the nineteenth century saw massive Catholic immigration from Ireland and parts of Eastern Europe. By 1840, there

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61 1 Anson Phelps Stokes, *Church and State in the United States* 499-507 (1950);


were over half a million Catholics (3.3% of the population), and by 1891, there were eight million (12.9%).

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.

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*. In direct response, Pise wrote what some have called the “First American Catholic Novel.” Pise’s book was titled, *Father Rowland: A North American Tale*, and it offered a contrary and more sympathetic view of American Catholicism.

Pise’s nomination for the office of Senate Chaplain immediately 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

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64 These statistics were helpfully collected in Toby J. Heytens, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 135-36 (2000). They are generally comparable with those given in another preferred source about the anti-Catholic turn in American history, MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 271-332 (1984).


66 Grace Kennedy, *Father Clement: A Roman Catholic Story* (1823).


68 CHARLES CONSTANTINE PISE, FATHER ROWLAND: A NORTH AMERICAN TALE (1829). In the book, Father Rowland was a Maryland Jesuit (as, indeed, was Pise) who encourages the wife and daughters of General Wolburn (a friend of General Washington) in their ultimate decision to become Catholics.
efforts to prevent this ‘disaster’ to the Republic. 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, “bitterly campaign(ed) against [Pise].”

But, despite the controversies, Pise was indeed elected on December 11, 1832, as the 28th chaplain of the Senate.

Yet Pise’s struggle continued. Suspiciously soon after his election, Congress began receiving petitions to end the chaplaincies. Protestant chaplains in state legislatures refused to offer prayers, apparently in protest.

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

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69 See M. Eulalia Teresa Moffatt, A.M., Charles Constantine Pise (1801-1866), at 79, in 20 HISTORICAL RECORDS AND STUDIES (United States Catholic Historical Society ed., 1931); see also Charles Constantine Pise, in 7 DICTIONARY OF AMERICAN BIOGRAPHY 634 (Dumas Malone ed., 1934) (noting that Pise was “duly elected . . . despite the intense nativist opposition in press and pulpit to his creed and foreign honors”).


71 See 9 REGISTER OF DEBATES IN CONGRESS, 22nd Congress, 2nd Session, Dec. 11, 1832, at 6 (Gales & Seaton ed. 1834) (noting that Pise won election after four ballots, with 22 out of the 38 votes); see also Journal of the Senate, 22d Congress, 2d session, Dec. 11, 1832, at 25 (reporting the election).

72 See THE 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 division, in this country, of Church and State.”) (quotations omitted, emphasis in original).

73 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.” THE GETTYSBURG STAR & REPUBLICAN BANNER, Jan. 1, 1833, at 3.
existing between myself and the Pope – I acknowledge no allegiance to the Pope’s 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. 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 which we are subject and obedient, in accordance with the injunction of religion, which commands us to give honor where honor is due – to be subject to the powers that are – and to give unto Caesar the things that are Caesar’s.  

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. 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. 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,” it would be better to abandon the chaplaincies altogether.

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74 The magazine editors reporting the address remarked at being “struck with this passage.” Adams Sentinel (Gettysburg, Pa.), Aug. 12, 1833, at 3; Ohio Repository, Aug. 23, 1833, at 4 (same); see also 3 Anson Phelps Stokes, Church and State in the United States 130 (1950) (reporting parts of this passage).

75 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, e.g., 10 Register of Debates in Congress, 23rd Congress, 1st Session, at 27 (Gales & Seaton ed. 1834).

than for them to be maintained only to eventually fall into Catholic hands.\footnote{See S. Misc. Doc. No. 30-2, 30th Congress, 2d Session (1848).}
Some saw a natural parallel between the Catholic Church’s hierarchical structure (which they perceived as authoritarian) with 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 by the Senate’s having elected a \textit{Rev.} to mock the Supreme Being through the dirty business of saying official prayers, for filthy lucre’s sake.”\footnote{\textit{The Banner of Liberty}, at 103, Mar. 28, 1860 (emphasis in original). 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: Protestant, Catholics and Education, 1945-1965, 56 DEPAUL L. REV. 1177, 1192 (2007) (“For much of American history, priestcraft meant Roman Catholicism tout court.”).}

The hostility toward Catholicism became so deeply ingrained that the government-funded Catholic chaplains became a sort of \textit{reductio ad absurdum} against the chaplaincies all together. 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 \textit{priests} hired to perform prayers among the representatives, such a measure would meet a reception adapted to its unjust object and odious character.”\footnote{See H.R. Doc. No. 9, 23d Congress, 1st Session (1833) (emphasis added).} To the author of this petition, the obvious injustice of having Catholic chaplains was proof positive that the chaplaincies were 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. This, as one historian put it, “caused something of a furore in some Protestant circles”;\footnote{2 \textit{Anson Phelps Stokes, Church and State in the United States 77 (1950).}} one newspaper called Polk’s move “a flagrant outrage upon the Constitution.”\footnote{2 \textit{Anson Phelps Stokes, Church and State in the United States} 79 (1950). For a more detailed discussion of the controversy that arose in appointing military chaplains, see Kurt T. Lash, \textit{Power and the Subject of Religion}, 59 OHIO ST. L.J. 1069, 1132-34 (1998).}

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 was the strength of his personal friendships with President Jackson, Senator Henry Clay and future President Tyler.\footnote{See Charles H. Whittier, \textit{The Only Roman Catholic Chaplain of the United States Senate}, CONGRESSIONAL RESEARCH SERVICE, Mar. 11, 1986, at 2-3; see also M. Eulalia Teresa Moffatt, A.M., \textit{Charles Constantine Pise (1801-1866)}, at 79, in 20 HISTORICAL RECORDS AND STUDIES (United States Catholic Historical Society ed., 1931).} And second 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 (or impossible) twenty years later.\footnote{It was not until the 1840s and 1850s, for example, that the fights for the public schools began between Catholics and Protestants. \textit{See, e.g.}, John C. Jeffries, Jr. & James E. Ryan, \textit{A Political History of the Establishment Clause}, 100 Mich. L. Rev. 279, 298-99 (2001).}

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 chaplain was appointed. The Senate went through 34 chaplains and the House went through 37 chaplains before the House of Representations finally chose Daniel P. Coughlin as the second Catholic to serve as a congressional chaplain.

Moreover, Coughlin’s own path to the congressional chaplaincy was marked by struggle – a kind of struggle that reveals that anti-Catholicism likely had a significant role in the long timeperiod 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 21 years.\footnote{The facts that follow come from a number of sources that are scattered across the political and religious spectrum. \textit{See, e.g.}, William Safire, \textit{Protestant Picked Over Catholic, and Hell Breaks Loose}, Mobile Register, Mar. 19, 2000, at D4, available at 2000 WLNR 8907208; Judy Ball, \textit{Helping a Nation Heal Through Prayer}, St. Anthony Messenger, Dec. 31, 2001, at 36, available at 2001 WLNR 4938949; Robert S. Alley, \textit{The Senate Chaplain and God as Ex-Officio Member}, Free Inquiry, Dec. 31, 2001, at 14, available at 2001 WLNR 4658356; Steve Neal, \textit{No Room for Politics in This Pulpit}, Chi. Sun-Times, Mar. 16, 2001, at 35, available at 2001 WLNR 4715151; Alison Mitchell, \textit{Rancor in House on Choice of a Chaplain}, , N.Y. Times, Dec. 2, 1999, at A32, available at 1999 WLNR 3016126; David Waters Scripps, \textit{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, \textit{Skiba Asks House GOP Leaders to Reconsider Rejection of O’Brien}, Milwaukee Journal Sentinel, Feb. 17, 2000, at 5, available at 2000 WLNR 3233890; Steve Benen, \textit{A House Divided: Religious War Erupts Over Selection of Congressional Chaplain}, Church & State, Mar. 31, 2000, at 4, available at 2000 WLNR 4162875.} 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.\footnote{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. \textit{See, e.g.}, Steve Benen, \textit{A House Divided:}}
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.” And several prominent Republican Catholics took O'Brien's side against the Republican leadership – Henry Hyde, a Catholic Republican Congressman from Illinois, was quoted as saying, “I hate to think it is anti-Catholic bias, but I don’t know what other conclusion to draw.” 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. 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,” 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.” 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. George suggested Coughlin, which then led to Coughlin's election.

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Religious War Erupts Over Selection of Congressional Chaplain, CHURCH & STATE, Mar. 31, 2000, at 4, available at 2000 WLNR 4162875 (reporting that Hastert and Armey believed Wright had the “best interpersonal and counseling skills”).

86 For the one person's take on the general attitude of the country, see William Safire, Protestant Picked Over Catholic, and Hell Breaks Loose, MOBILE REGISTER, Mar. 19, 2000, at D4, available at 2000 WLNR 8907208.


Now many have steadfastly denied any discrimination took place, 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.

**E. 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? Some have at times given this a quick response, but the full answer is perhaps a little more complicated and it certainly 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; the last was Ulysses Grant Baker Pierce, who was the Unitarian chaplain of the Senate in 1909.

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. For some time, it was thought that Unitarianism would eventually become the dominant religion of the United States. 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

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92 Father Neuhaus, a well-known conservative and Catholic priest, denies that any discrimination took place – and he, apparently, was in a position to know. See Richard John Neuhaus, *By the Blood of His Cross*, FIRST THINGS, May 2000, at 66 (“For my sins, I was drawn into this dispute [over the selection of chaplains] and spent hours and hours talking with the 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, unfortunately, did not explain the underlying facts that led him to this conclusion.


94 See, e.g., Letter from Thomas Jefferson to James Smith (Dec. 8, 1822), in 15 THE WRITINGS OF THOMAS JEFFERSON 408-09 (Andrew A. Lipscomb ed., 1904-05) (“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 405 (Andrew A. Lipscomb ed., 1904-05) (“That this [Unitarianism] will, ere long, be the religion of the majority from north to south, I have no doubt.”).
nineteenth century Unitarianism was a sermon titled, “Unitarian Christianity,” given by William Ellery Channing (a leading Unitarian theologian) at the ordination of Jared Sparks in May of 1819, which unmistakably tries to situate Unitarianism inside the boundaries of Christianity. Such a conclusion is also consistent with the resolution of the American Unitarian Association, which affirmed Unitarian allegiance to the Christian gospel. But perhaps it is Supreme Court Justice 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.

95 See William Ellery Channing, Unitarian Christianity, in William Ellery Channing Selected Writings 70 (1985).

96 Both Channing and Sparks have direct connections to the congressional chaplaincies. Sparks, again, was the first Unitarian congressional chaplain. He assumed the role of House Chaplain in 1821. William Ellery Channing was uncle to William Henry Channing, who was the second Unitarian House chaplain, assuming his duties in 1863.

97 See, e.g., William Ellery Channing, Unitarian Christianity, in William Ellery Channing Selected Writings 71-72 (1985) (“[W]e 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.”).

98 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 for this association.” Earl Morse Wilbur, A History of Unitarianism, In Transylvania, England, and America 463 (1945) (quoting American Unitarian Association, Twentieth Report (1853)).

99 1 William W. Story, Life and Letters of Joseph Story 441-42 (1851). Joseph Story’s views have become prominent in circles advocating a narrow conception of the Establishment Clause. See, e.g., Joseph Story, 2 Commentaries on the Constitution of the United States 594 (2d ed. 1851) (arguing that the “real object of the [first] amendment was, not to countenance, much less advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects”). 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).
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. In the eyes of many, Unitarianism is now clearly not a Christian denomination. Indeed, Unitarians themselves have changed position on the question of whether they are Christians. In the early nineteenth century, Unitarians thought of themselves as Congregationalist Protestants, but now more Unitarians self-identify as Buddhists than as Christians.

We can thus summarize our conclusions by noting that, vis a vis the chaplaincies, Unitarianism and Catholicism seem to be perfect opposites. In 1850, Unitarian chaplains are standard fare, while Catholic ones are almost inconceivable. By 2000, it is the Unitarian chaplains that have become inconceivable, and Catholic ones are no longer out of the question. In this

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100 A recent student note seems to accurately convey the perceptions of many Christians. See Rachel R. Myers, Note: 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.”).


Understandably then, Unitarianism Universalism has had difficulty as a denomination reconciling their Christian beginnings with the current makeup of their congregations. See id. at 86 (“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.”).

102 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, HOUS. CHRON., May 31, 2004, at A27 (reporting that Carole Keeton Strayhorn, the State Comptroller, denied the
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. It should not surprise us that Congress would choose chaplains with which it feels most religiously compatible, but 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 steadily over throughout the nineteenth century, and by 1850, they were in serious dispute. Throughout this period, there was a flood of petitions, received by both the House and Senate Journals. They are too voluminous 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. See Journal of the House of Representatives 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 (Feb. 1, 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 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 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 330 (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 46 (Dec. 14, 1852); id. at 50 (Dec. 17, 1852); id. at 83 (Dec. 20, 1852); id. at 58 (Dec. 21, 1852); id. at 65 (Dec. 22, 1852); id. at 76 (Dec. 27, 1852); 49
Senate, 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. Ultimately, it is difficult to discern how unpopular the chaplaincy was, but the ubiquitousness of these petitions suggests that opposition to the chaplaincy had become very widespread indeed.

For many groups now found something to object to in the chaplaincies. There were, of course, those that had opposed the congressional chaplaincies from the beginning – religious groups like the Baptists, as well as groups with more secular aims. But by the 1850s, there were a number of new reasons to oppose the chaplaincy. The first was discussed earlier – namely, the rise of Catholicism and the concomitant fear of Protestants that the congressional chaplaincies would be taken over by Catholics. 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.

105 The following is the list of petitions sent to the Senate demanding the abolition of the congressional chaplaincies from January 1, 1850 to January 1, 1855. See 41 JOURNAL OF THE SENATE 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 290 (Mar. 22, 1850); id. at 233 (Mar. 25, 1850); id. at 235 (Mar. 26, 1850); id. at 241 (Mar. 28, 1850); id. at 266 (May 9, 1850); 43 JOURNAL OF THE SENATE 34 (Dec. 4, 1851); id. at 42 (Dec. 9, 1851); id. at 93 (Jan. 5, 1852); 44 JOURNAL OF THE SENATE 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 332 (Apr. 20, 1854).

106 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 227 (Mar. 21, 1850).

107 See, e.g., THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 218-19 (1986); see also Kathleen A. Brady, Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding Religious Expression by the State, 75 NOTRE DAME L. REV. 433, 446 n.55 (1999) (discussing and providing citations to the objections to the chaplaincy made by Baptist preacher John Leland issue).

108 See infra note ___ (referring to the protest votes for Thomas Paine as the first congressional chaplain).

109 See infra notes ___.

110 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 (Feb. 13, 1856) (statement of Rep. Jones of 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.”); Cong. Globe, 34th Cong., 1st Sess. 478 (Feb. 20, 1856) (statement of Rep. Sandidge of 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.”);
Another issue was slavery. Slavery, of course, had by this point grown to be the 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.\footnote{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 or free. See Kansas-Nebraska Act of 1854, § 19 (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”).}

Supporters of the bill were harassed by abolitionist ministers, who preached to them the error of their ways. Senator Butler, sponsor of the Kansas-Nebraska Act, responded to them with choice words, “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.”\footnote{See, e.g., LORENZO D. JOHNSON, CHAPLAINS OF THE GENERAL GOVERNMENT WITH OBJECTIONS TO THEIR EMPLOYMENT CONSIDERED 58 (1856). Here are similar comments from Rep. 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.}

It seems that eventually the congressional chaplaincies 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. 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 pronounced antislavery views. Channing reported that they told him this:

Cong. Globe, 34th Cong., 1st Sess. 479 (Feb. 20, 1856) (statement of Rep. Etheridge of 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.”); Cong. Globe, 34th Cong., 1st Sess. 485 (Feb. 21, 1856) (statement of Rep. Smith of 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 (Dec. 9, 1857) (statement of Sen. Mason from 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.”).
Another minister had been proposed as a 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.\textsuperscript{113}

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 pro-slavery Democrats.\textsuperscript{114}

Thus it was likely the confluence of a number of factors that led Congress into reexamining the congressional chaplaincies. This was done in three committee reports: the Thompson Report done by the House Committee on the Judiciary in 1850,\textsuperscript{115} the Badger Report done by the Senate Judiciary Committee in 1853,\textsuperscript{116} and the Meachum Report done by the House Committee on the Judiciary in 1854.\textsuperscript{117} All three are similar. They are all fairly short, and they all reason that because the chaplaincies are nondenominational and noncoercive, they are thus constitutional.\textsuperscript{118}

But these reports did not resolve much. To be sure, they disposed (at least temporarily) 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 an unusual rotation system where local ministers would come in, unpaid, and offer invocations before congressional proceedings.

\textsuperscript{113} Octavius Brooks Frothingham, Memoir of William Henry Channing 316 (1886); 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 of 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.”).

\textsuperscript{114} Octavius Brooks Frothingham, Memoir of William Henry Channing 316 (1886).


\textsuperscript{118} For a thorough discussion of these reports, which addressed not only the congressional chaplaincies but also the military ones, see Kurt T. Lash, Power and the Subject of Religion, 59 Ohio St. L.J. 1069, 1134-38 & nn. 246-65 (1998).
It was the House that first took this step. The House of the 33rd Congress (like all the Houses before it) had an institutional chaplain. But soon after the 34th 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. The measure passed by a substantial margin, 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. For roughly the next month, the House had local ministers give the invocations preceding its business. But in February, the House considered reinstating the institutional chaplaincy. Long debates were held, and the usual objections to the chaplaincies made. 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. Nevertheless,

119 See 51 JOURNAL OF THE HOUSE OF REPRESENTATIVES 354 (Jan. 23, 1856); see also LORENZO D. JOHNSON, CHAPLAINS OF THE GENERAL GOVERNMENT WITH OBJECTIONS TO THEIR EMPLOYMENT CONSIDERED 35 (1856) (describing the proceedings in the House).

120 See also Cong. Globe, 34th Cong., 1st Sess. 281 (Jan. 23, 1856) (recording a vote of 84-39 in favor).

121 See, e.g., Cong. Globe, 34th Cong., 1st Sess. 281 (Jan. 23, 1856) (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 the praying”).

122 See, e.g., Cong. Globe, 34th Cong., 1st Sess. 298 (Jan. 25, 1856) (“The House was called to order by the Clerk at twelve o’clock, m. Prayer by Rev. Byron Sunderland.”); id. at 300 (Jan. 26, 1856) (“The House was called to order by the Clerk at twelve o’clock, m. Prayer by Rev. Mr. Gurley, of the Old School Presbyterian [sic] church”); id. at 304 (Jan. 28, 1856) (“The House was called to order by the Clerk at twelve o’clock, m. Prayer by Rev. J.G. Butler.”).

123 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., LORENZO D. JOHNSON, CHAPLAINS OF THE GENERAL GOVERNMENT WITH OBJECTIONS TO THEIR EMPLOYMENT CONSIDERED 35 (1856) (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”).


125 See, e.g., Cong. Globe, 34th Cong., 1st Sess. 478 (Feb. 20, 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 contry.”).
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.\textsuperscript{126}

The issue, however, again resurfaced at the start of the 35th 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.\textsuperscript{127} The House quickly did so as well.\textsuperscript{128} This was the most serious departure the House and Senate ever had from the institutional-chaplaincy model. For the whole of the 35th Congress, neither the House nor the Senate had an institutional chaplain.

In turn, this all changed with the election of the 36th 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,\textsuperscript{129} and ultimately selecting Phineas Gurley as their chaplain.\textsuperscript{130} Three months

\textsuperscript{126} 3 ANSON PHelps STOKes, CHURCH AND STATE IN THE UNITED STATES 133 (1950) (discussing Waldo’s age and circumstances); 51 JOURNAL OF THE HOUSE OF REPRESENTATIVES 582 (Feb. 21, 1856) (discussing Waldo’s election).

Some openly suspected that Waldo was selected not because of his religious sensibilities or his oratory proficiency, but rather simply 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 LORENZO D. JOHNSON, CHAPLAINS OF THE GENERAL GOVERNMENT WITH OBJECTIONS TO THEIR EMPLOYMENT CONSIDERED 49 (1856) (“[T]hey voted for Rev. Mr. Waldo more to get rid of a longer debate, than from a conviction of 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 Chaplain.”).


\textsuperscript{127} 49 JOURNAL OF THE SENATE 34-35 (Dec. 9, 1857) ; see also Cong. Globe, 35th Cong., 1st Sess. 13-14 (Dec. 9, 1857) (recording the debate).

\textsuperscript{128} 54 JOURNAL OF THE HOUSE OF REPRESENTATIVES 78 (Dec. 16, 1857).

\textsuperscript{129} For the Senate’s very modest discussion of the issue, see Cong. Globe, 36th Cong., 1st Sess. 97-98 (Dec. 12, 1859); Cong. Globe, 36th Cong., 1st Sess. 162 (Dec. 15, 1859). 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 Cong. Globe, 36th Cong., 1st Sess. 98 (Dec. 12, 1859) (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 for 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 and wants of this body.”).

\textsuperscript{130} 51 JOURNAL OF THE SENATE 12 (Dec. 15, 1859).
later, the House followed suit, also abandoning the local-minister program, and
selected a new permanent institutional chaplain.131 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 at
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.132

Over time, the institutional chaplains have grown more diverse. The
House’s selection in 2001 of a Catholic chaplain, discussed infra, was a prominent
example. 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 (who number more than a thousand).133 His election in the Senate was
extraordinary in two senses. First, he was the first African-American to ever be
a congressional chaplain.134 And second, he was the first Seventh-Day
Adventist.135 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

131 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
to 61, and then adopted the institutional chaplaincy model by a vote of 87 to 35. See Cong.
(Mar. 6, 1860). The House then selected Thomas Stockton as chaplain. See 56 JOURNAL OF THE
HOUSE OF REPRESENTATIVES 462 (Mar. 6, 1860).

132 The House and the Senate both maintain a list of chaplains, with years of service and
denominational affiliations. See UNITED STATES HOUSE OF REPRESENTATIVES OFFICE OF THE
CHAPLAIN, HISTORY OF THE CHAPLAINCY, available at
http://chaplain.house.gov/chaplaincy/history.html (last visited July 2, 2008); UNITED STATES
SENATE, SENATE CHAPLAIN, available at
http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm (last
visited July 2, 2008).

133 See Navy Chaplain Named to Serve United States Senate, CHRISTIAN CENTURY, July 12, 2003, at

134 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.

135 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.
And Seventh-Day Adventists are not just a minority in terms of numbers. They are distinctive from other Christians in other ways, observing Saturday rather than Sunday as their Sabbath, and adhering to certain theological principles not shared by other Christians. Moreover, with the possible exception of the Unitarians, all of the congressional chaplaincies 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.

Yet, while the chaplains have been increasingly diverse (especially of late), there have been limits to this diversity. Perhaps more than any other position in American politics (with the possible exception of the President and Vice-President), 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

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138 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 main-line 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, e.g., Ministerial Ass'n, Gen. Conference of Seventh-Day Adventists, Seventh-Day Adventists Believe: A Biblical Exposition of 27 Fundamental Doctrines 317, 320-322, 324-326, 329 & nn. 29-30 (1988) (discussing the doctrine of the investigative judgment).

139 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, Jan. 6, 2008, at 634, 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.").

three, at this point, seem quite inconceivable.\textsuperscript{140} 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 permit 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) are the largest religious denomination in Congress, and Baptists (many of whom do not ordain women) are the second largest.\textsuperscript{141} 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.\textsuperscript{142}

Perhaps a way of countering that, both the Senate and the House now have guest chaplains – visiting ministers who come for a day and offer prayers.\textsuperscript{143} 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.\textsuperscript{144} One year later, the Senate followed suit, inviting Imam Wallace Mohammed to be the first Muslim Senate guest chaplain.\textsuperscript{145} Both these events were deeply appreciated by the American Muslim community, who rightly saw them as important tokens of

\textsuperscript{140} It is also inconceivable at this point that we would have another Unitarian one. \textit{See infra __-__}.

\textsuperscript{141} For these statistics and others regarding the religious demography of the current Congress, see Jonathan Tilove, \textit{Religious Makeup of New Congress is Groundbreaking}, \textit{Hous. Chron.}, Dec. 30, 2006, at 1, available at 2006 WLNR 22735942.

\textsuperscript{142} As a final point, note having an institutional chaplaincy has meant that groups like the Quakers and Mennonites (who do not ordain paid clergy) simply do not participate. \textit{See, e.g.}, Thomas D. Hamm, \textit{The Quakers in America} 21 (2003) (explaining how Quakers are outside the clerical tradition, believing “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 Garrett, \textit{Madisonian Equal Protection}, 104 Colum. L. Rev. 837, 864 n.129 (2004).

\textsuperscript{143} 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. \textit{See Robert C. Byrd, The Senate 1789-1989} 305 (1991) (noting interactions between Lyndon Johnson, as Majority Leader in the Senate, and guest chaplains).


respect.\textsuperscript{146} There are other similar pioneering examples – the first female guest chaplain,\textsuperscript{147} the first Roman Catholic nun to act as guest chaplain,\textsuperscript{148} the first guest chaplain from a Native American religion.\textsuperscript{149}

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.\textsuperscript{150} 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.”\textsuperscript{151} Indian newspapers picked up on the event as a historic act of American tolerance for Indian culture.\textsuperscript{152} Yet Samuldrala’s 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

\begin{itemize}
  \item \textsuperscript{147} \textit{See} Romaine Kosharksy, Pioneering Senate Guest Chaplain Dies, St. Petersburg Times, June 7, 1999, at 7B (discussing the example of the first female Senate guest chaplain who offered prayer in 1971), \textit{available at} 1999 WLNR 2646041.
  \item \textsuperscript{148} \textit{See} Robert Cohen, Newark Nun Makes History in the House, The Star-Ledger (Newark, NJ), Sept. 13, 2000, at 3 (discussing the example of the first female House nun who was a guest chaplain in 2000), \textit{available at} 2000 WLNR 8706109.
  \item \textsuperscript{149} \textit{See} Robert C. Byrd, The Senate 1789-1989 304 (1991) (describing various guest chaplain invitations offered by the Senate, including one to a eight-three year old Sioux Indian).
  \item \textsuperscript{150} \textit{See} Hindu Priest From Parma to Offer Historic Invocation in D.C., Plain Dealer (Cleveland, OH), Sept. 13, 2000, at 16A, \textit{available at} 2000 WLNR 9044783.
  \item \textsuperscript{151} \textit{See} Tom Diemer, India Meets Washington, Plain Dealer (Cleveland, OH), Sept. 17, 2000, at 5G (quoting Rep. Sherrod Brown of Ohio), \textit{available at} 2000 WLNR 9047451.
  \item \textsuperscript{152} \textit{See} Hindu Priest’s Invocation on House Floor is Prayer for Peace, India Abroad, Sept. 22, 2000, at 12, \textit{available at} 2000 WLNR 7484446; Vajpayee Urges Indo-US Concert Against Terror, Statesman (Calcutta, India), Sept. 14, 2000, \textit{available at} 2000 WLNR 5314735.
\end{itemize}
support did not violate peoples’ consciences and their right to worship.”153 Yet, after protest, the group largely retracted its statement.154

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 allowing a prayer of the wicked, which is an abomination in your sight.” 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.155

This time, the uproar 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, adding that “[t]his is not a religion that has produced great things in the world.”156 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.157 Many condemned these statements along with the acts of the protestors.158

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although some wrote in defense of them.\textsuperscript{159} Foreign newspapers also picked up on the dispute.\textsuperscript{160}

And while some attempts to increase diversity have encountered notable setbacks, there are other unspoken boundaries that neither the House nor Senate have yet ventured to cross. Neither House nor 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.\textsuperscript{161} 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 generally tolerable in the larger society. The guest chaplaincy program thus requires Congress to decide on what is religiously acceptable and what must remain beyond the boundary of religious tolerance.

II. The Chaplaincies and the Constitution: \textit{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 \textit{Detached}

\textsuperscript{159} See, e.g., William Gardoski, \textit{Letters to the Editor: Insulting to Begin Senate with Hindu Prayer}, IDAHO STATESMAN, July 28, 2007, at 16 (“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.”), \textit{available at} 2007 WLNR 14507925.


Memoranda.162 These arguments were forcefully reasserted when Congress was deluged with objections to the chaplaincies in the 1840s and 1850s. Congress tried to definitively resolve those objections by issuing reports on the topic, but it could not stem the controversy. Ultimately, a number of things (including the Civil War) caused the crisis over the chaplaincies to fade in the latter part of the nineteenth century. It would take 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.163

Now there had been earlier judicial challenges to the chaplaincies. In the 1920s, a suit was brought against the chaplaincies, claiming that government-paid clergy constituted an establishment of religion.164 The D.C. Circuit dismissed the claim, not because of the Establishment Clause – but instead on the basis of standing. The Court concluded that taxpayers generally lacked standing to sue over the federal government’s decisions as to how to disburse taxpayer funds.165 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 was such that the mere act of viewing or witnessing the chaplaincy did not constitute a violation.166

In the 1960s, however, the Supreme Court threw out both halves of that analysis. Standing doctrine expanded to permit taxpayer challenges to

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162 See infra ____


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

165 Id. at 997-98. Elliott cited only a single case – the Supreme Court’s earlier decision 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 childrens’ health), and thus lacked standing to challenge it. Standing principles generally require that the litigant allege a particularized sort of injury – merely contributing money to the government action that caused the injury is considered insufficient. See Frothingham, 262 U.S. 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.”).

166 See LEO PFEFFER, CHURCH, STATE, AND FREEDOM 250 (2d ed. 1967) (“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”).
governmental expenditures allegedly in violation of the Establishment Clause. 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. But yet these changes came with warnings – while the chaplaincies could be challenged in federal court, such a challenge could well go nowhere. Eventually, however, such a challenge made it through to the Supreme Court, and was rejected, in the case of *Marsh v. Chambers*.

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. But

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167 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).

168 Sch. Dist. of Abington Township 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); 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).

169 This warning had been offered early. See Zorach v. Clauson, 343 U.S. 306, 312 (1952) (suggesting that “[p]rayers in our legislative halls” were indeed permissible under the Establishment Clause). But when Justice Brennan, a decade later, intimated that the chaplaincies were constitutional, people really took notice. See Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 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”).

170 463 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 standing 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.”).


171 Requiring neutrality between religion and its alternatives was a theme that ran through all of the Establishment Clause cases handled by the Warren and Burger courts. See Douglas Laycock, “Noncoercive” Support of 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. Board of Ed. of Ewing, 330 U.S. 1, 15 (1947). On this point, see infra note ___.

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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 Allegiance172 – in both situations, while precedent clearly led to the conclusion that the government’s action was unconstitutional, political realities made it difficult for the Supreme Court to so hold.

The real surprise of *Marsh*, however, was perhaps not the result, but 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 1787. Thus, it was clear that “the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment.”173 To the Court, these plain historical facts conclusively resolved the constitutionality of the chaplaincies.174 Of course, never before had the Court done this; never before had it taken an entirely originalistic approach to the Establishment Clause.175 Perhaps part of it was that *Marsh* was the first Establishment Clause case where such an approach could so easily resolve the issue;176 Establishment Clause cases tended to resist such easy historical analysis.177 But, in any event, *Marsh* was a complete departure from traditional

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174 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.”).
175 This piece need not foray into an extended discussion of originalism. The basic idea is that the original meaning of the constitutional text – or, perhaps, the original intentions of the framers of that text – exclusively governs contemporary interpretation of that text. See, e.g., South Carolina v. United States, 199 U.S. 437, 448 (1905) (“The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.”). For a recent summary of the literature on originalism and a powerful critique, see Mitchell N. Berman, *Originalism is Bunk* (unpublished manuscript, on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078933.
176 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 originalistic logic. See *Br. for the United States as Amicus Curiae in Support of Petitioners*, in *Marsh v. Chambers*, 463 U.S. 783 (1983), at 7 (“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. Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988) (“We know, far more certainly than we usually know these things, that the framers did not consider legislative chaplains to violate the establishment clause.”).
177 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,
Establishment Clause analysis – the majority opinion did not even mention the then-dominant three-part test of *Lemon v. Kurtzman*.  

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. Justice Stevens argued that the chaplaincies would inevitably disadvantage religious minorities, and thus were unconstitutional in their operation. Other commentators added their critiques. This piece though has looked at the chaplaincies through a historical lens – and through that lens, one can fault Court’s decision in *Marsh* in a number of ways.

First, *Marsh* focuses almost entirely the history of the chaplaincies, but its view of that history is deeply partial – both partial in the sense of being a bit slanted as well as partial in the sense of being incomplete. As regards the history that it does report, *Marsh* tends to minimize the ways in which the chaplaincies were political or denominational or controversial. *Marsh* brings up how legislative prayer began with the Continental Congress, but it says nothing making originalistic 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”).

As many courts have now put it, “*Marsh* is one of a kind.” Doe v. Tangipahoa Parish School Bd., 473 F.3d 188, 211 (5th Cir. 2006); Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003); Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 381 (6th Cir. 1999); Newman v. City of East Point, 181 F.Supp.2d 1374, 1378 (N.D. Ga. 2002).

This again mirrored the first paragraph of the arguments made in Madison’s *Detached Memoranda*. See infra ___.

This again mirrored the second paragraph of the arguments made in Madison’s *Detached Memoranda*. See infra ___.

See, e.g., *Lawrence 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., Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362-63 (1988) (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*”).

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about the political and denominational considerations that entered into why Jacob Duché was selected.\textsuperscript{182} Marsh acknowledges that the Constitutional Convention decided not to have a chaplain, but quickly concludes that the decision was not based on any principle – a conclusion that may or may not be accurate.\textsuperscript{183} Marsh’s most extensive discussion is of that single week in 1787 when Congress approved both the Establishment Clause and the chaplaincies. But, even there, the Court withholds contentious details – it does not mention, for example, the protest votes Thomas Paine and others received to be the first chaplains.\textsuperscript{184}

Yet the more disturbing part of Marsh is all the history that the Court simply leaves out. The Court says virtually nothing about the chaplaincies after the passage of the Bill of Rights in 1787. It says nothing about how political issues intersected with the chaplaincies (such as with slavery),\textsuperscript{185} and says nothing about how religious denomination became an important issue in selecting chaplains (such as with Catholicism and Unitarianism).\textsuperscript{186} The Court’s only stab at nineteenth century history is to report, in a footnote, that Congress suspended the chaplaincies in the 1850s and considered abolishing them.\textsuperscript{187} But the Court offers no context – 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. But that is far from the case. The movement to abolish the chaplaincies was widespread, and it originated precisely because the institution of the chaplaincies had become extraordinarily controversial. And one of the reasons why it had become so controversial, of course, was Catholicism.

And this brings us to the most glaring omission in Marsh’s historical account – namely its failure to even mention Catholicism. Catholicism had

\textsuperscript{182} See Marsh v. Chambers, 463 U.S. 783, 787, 790-91 (1983). For a discussion of those political and denominational considerations, see infra ___.

\textsuperscript{183} See Marsh v. Chambers, 463 U.S. 783, 788 n.6 (1983). For the possible rationales behind the Convention’s decision, see infra ___.

\textsuperscript{184} Those facts were certainly available to the Court. The Court cites Anson Phelps Stokes’s monumental work for its discussion of this timeperiod. See Marsh v. Chambers, 463 U.S. 783, 788 n.6 (1983) (citing 1 ANSON PHILPS STOKES, CHURCH AND STATE IN THE UNITED STATES 455-56 (1950)). On the very next page beyond what the Court cites, Stokes discusses the votes given to Paine. See 1 ANSON PHILPS STOKES, CHURCH AND STATE IN THE UNITED STATES 457 (1950).

\textsuperscript{185} See infra ____ (discussing the intersection of slavery and the chaplaincies).

\textsuperscript{186} See infra ____ (discussing Catholicism); infra ____ (discussing Unitarianism).

radical implications for the chaplaincies in the nineteenth century. Much of Protestant America came to fear Catholicism, and would rather see the chaplaincies destroyed rather than fall into Catholic hands. And through Catholicism, Protestants began to appreciate one of the dangers always inherent in religious establishments – the danger that political power might shift, and those that control the establishment one day will find themselves out of power the next. These realizations – realizations borne of anti-Catholic bias and prejudice – play a large role in the suspension (and the near abolition) of the chaplaincies. Yet of all this, Marsh says nothing. The Court never so much as mentions Catholicism, let alone discusses what happened to Charles Constantine Pise.

One consequence of Marsh’s narrow view of history is that it often makes grand overarching assertions about the chaplaincies that are not entirely true. Marsh claims an “unambiguous and unbroken history of more than 200 years” behind legislative prayer, which proves that it creates “no real threat to the Establishment Clause.” Marsh boldly asserts that people “did not consider opening prayers . . . as symbolically placing the government’s official seal of approval on one religious view,” and it casually refers to the chaplaincies as “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”

But these statements do not completely square with the history of the chaplaincies. 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 and movements 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” – that

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188 In some ways, this resembles 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 – and when the possibility of a Unitarian established church became real – 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 DePaul L. Rev. 567, 569 (1992) (“[T]he Congregationalists realize[d] that establishment was not very pleasant, if you were no longer the established church.”).


190 Marsh v. Chambers, 463 U.S. 783, 791 (1983). The Court later repeated this, when it concluded that there was “no real threat while this Court sits.” Id. at 795 (citations and quotations omitted).


was precisely why it became so important to prevent Catholic priests from becoming congressional chaplains. 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." 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 wants the chaplaincies to seem sterile, but this requires disinfecting large swatches of the relevant history.

There is one final mistake that Marsh made that cannot be ignored. Marsh justifies its decision to look only at a tiny sliver of history (the history from the Continental Congress to the passage of the Bill of Rights) by tacitly adopting an originalistic methodology. The Court assumes, as originalistic decisions do, that the meaning of a constitutional provision is fixed as of the date it is ratified and that post-ratification history is irrelevant to constitutional interpretation. But even assuming the validity of that premise, Marsh still missed the boat.

For Marsh, it must be remembered, was a Fourteenth Amendment case. It was a challenge not to the federal congressional chaplaincies directly, but rather to Nebraska's state chaplaincy. The issue in Marsh therefore should not have been whether the congressional chaplaincies were considered constitutional in 1787 – the year the Establishment Clause was passed. Instead, the issue 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 has explained this point clearly, albeit in a different context. Lash 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." This was not true, Lash pointed out, because the Framers of the Fourteenth Amendment might well have come to see the Establishment Clause quite differently from the way the Framers of the First Amendment saw it. To put it other words, the Establishment Clause might well have evolved from 1787

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to 1868, and that evolved Establishment Clause is what matters, because that is what was incorporated against the states by the Fourteenth Amendment.\(^{197}\)

This difference in timing – the difference between 1787 and 1868 – is indeed significant. In 1787, there is admittedly some controversy regarding the chaplaincies. Some, like Jay and Rutledge, had opposed Duché’s early prayers; Thomas Paine received several votes to be one of the first chaplains. But by 1868, a number of factors (including, most strikingly, Catholicism) had made the chaplaincies many times more controversial. This is not to say that the Framers of the Fourteenth Amendment clearly believed the chaplaincies were unconstitutional.\(^{198}\) But it does suggest that the constitutional question in \textit{Marsh} was far closer than the Court made it out to be. And it also means that the Court clearly erred in failing to consider the nineteenth century history of the chaplaincies.

III. 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 indispensible 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 surrounded them. They were not, as the \textit{Marsh} court believed, “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”\(^{199}\) They were, and are, much, much more than that.

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\(^{197}\) Lash’s thoughts are valuable here, although he was writing for a different purpose. He was not concerned directly with \textit{Marsh} or with legislative chaplains, but instead was seeking to defend the general incorporation of the Establishment Clause. His basic point was that, to the Framers of the First Amendment in 1787, the Establishment Clause may not have been the sort of clause that could, conceptually speaking, be incorporated against the states. But this had changed by the time of the Fourteenth Amendment. For by 1868, Lash explained, the Establishment Clause had come to be seen like the other parts of the First Amendment – an individual right that could coherently be incorporated against the states. \textit{See generally} Kurt T. Lash, \textit{The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle}, 27 Ariz. St. L.J. 1085 (1995).

\(^{198}\) Again, some of the opposition that had grown up around the chaplaincies in the nineteenth century had little to do with the constitutionality of the chaplaincies and nothing at all to do with Catholicism. And Congress did ultimately choose to continue its institutional chaplaincies.

Yet, of course, Congress’s decision to retain the chaplaincies does not necessarily mean that it saw the chaplaincies as constitutionally appropriate. \textit{See, e.g.,} Lee \textit{v.} Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring) (noting that “the Framers [often] did not share a common understanding of the Establishment Clause, and . . . they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next”).

\(^{199}\) \textit{Marsh} \textit{v.} Chambers, 463 U.S. 783, 792 (1983).
The congressional chaplaincies have had a remarkable and fascinating history – a history that would be worth telling, even if 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 only more frequent and intense. This is not the place to comprehensively evaluate those disputes. 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 piece 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 piece has tried to offer what no one has thus far offered – a comprehensive history 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 solve the related conflicts of today.

See infra notes __-__. 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, Marsh v. Chambers Revisited: The Second Generation of Legislative Prayer Cases (unpublished manuscript, on file with author) (forthcoming Spring 2009).