

COMMENTS

“An Officer of the House Which Chooses Him, and Nothing More”: How Should *Marsh v Chambers* Apply to Rotating Chaplains?*Jeremy G. Mallory*[†]

INTRODUCTION

The occasions for legislative prayer include the everyday, the farcical, and the momentous. The people delivering legislative prayers have ranged from the traitorous Jacob Duché¹ to the stirring Peter Marshall (who became a celebrity in his own right²), to the thunderous John Brackenridge (who foreshadowed the burning of the Capitol and the White House during the War of 1812³). Many, like the chaplains to Congress, are employed on a continuing basis; others are local ministers called in on a rotating basis to deliver an invocation before the meeting of a legislative body.⁴

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¹ See Jacob Duché to George Washington (Philadelphia, Pa, Oct 8, 1777), in Worthington Chauncey Ford, ed, *The Washington-Duché Letters* 9 (privately printed Brooklyn, NY 1890) (urging General Washington to give up on “the fatal declaration of independency”).

² See Mary Elizabeth Goin, *Catherine Marshall: Three Decades of Popular Religion*, 56 *J Presbyterian Hist* 219, 221 (1978) (observing that by the time of his appointment to the chaplaincy in 1947, “Peter Marshall had become more than a leader in his denomination; he was a recognized spiritual leader for all America”).

³ See Margaret Bayard Smith, *The First Forty Years of Washington Society* 16–17 (Scribner’s Sons 1906) (Gaillard Hunt, ed) (describing Brackenridge’s sermon, made prior to the British attack of the Capitol, which warned, “it is the *government* that will be punished”).

⁴ For example, the chaplaincy at issue in *Simpson v Chesterfield County Board of Supervisors*, 404 F3d 276 (4th Cir 2005), is such a rotating position. See *id* at 279 (noting that instead of choosing a single chaplain, the Board invites religious leaders from various congregations in the county). For the purposes of this Comment, the term “rotating chaplaincy” signifies a legislative prayer practice that does not involve a chaplain hired on a permanent basis by the legislature. A rotating chaplain might even be a private citizen. Further, the term “minister,” both as a noun and as a verb, is used in a broad sense, encompassing diverse forms of pastoral care and types of people who may give it, regardless of denomination, religion, or the particular connotations of the title. The foundational part of both chaplaincy practices is the invocation delivered before a

In *Marsh v Chambers*,⁵ the Supreme Court essentially set aside legislative chaplaincies as exceptions to the Establishment Clause,⁶ but it did not distinguish between these two types of chaplain—situated and rotating. *Marsh* specifically found unobjectionable the chaplaincy practices of the Nebraska State Legislature and the United States Congress (both of which included chaplains as regular employees of the body), but did not address itself to other types of practice.⁷ The Court sustained the practice of legislative chaplaincies based on the “unique history” of the congressional chaplaincies, arguing that the Framers of the First Amendment would not have created such an institution if it violated the amendment they had just written.⁸ The Court then applied the same reasoning to the Nebraska chaplaincy (and by implication other state chaplaincies, whether similar or not).⁹ Later courts have simply referred directly to *Marsh*’s approval of legislative chaplaincies, failing to distinguish between these two species of chaplain.¹⁰ Because the Supreme Court has not had a chance to revisit *Marsh* directly, the precise boundaries of the exception have become

legislative body begins official business. For a rotating chaplain, this is where the job usually ends. For a situated chaplain, the job will also include other types of pastoral care and outreach, including Bible study, individual counseling, and prayer. Further, in this Comment “legislative body” and “legislature” are used generically to refer to any level of government—federal, state, county, local, school district—unless specific reference or context makes clear that it refers to a particular level. Finally, the term “institution” (especially “legislative institution”) is used to indicate the voting body itself as well as all of the officers, employees, and others who comprise a legislative branch of some level of government.

⁵ 463 US 783 (1983) (holding that the Nebraska legislature’s practice of opening each session with a prayer led by a situated chaplain paid with public funds did not violate the Establishment Clause).

⁶ The majority did not explicitly characterize *Marsh* as an exception to the Establishment Clause, but did acknowledge the “unique history” forming the backdrop to the decision. See *id* at 791. The dissent, however, explicitly noted its exceptional nature. *Id* at 796 (Brennan dissenting) (“[T]he Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine.”). Further, this is the characterization that has been adopted by subsequent courts. See, for example, *Lee v Weisman*, 505 US 577, 585 (1992) (affirming a district court decision declining to extend *Marsh* beyond the legislative prayer context); *Snyder v Murray City Corp*, 159 F3d 1227, 1232 (10th Cir 1998) (en banc) (describing the issue in *Marsh* as “a *sui generis* legal question”); *Kurtz v Baker*, 829 F2d 1133, 1147 (DC Cir 1987) (Ginsburg dissenting) (describing *Marsh* as “a special nook—a narrow space tightly sealed off from otherwise applicable first amendment doctrine”).

⁷ See *Marsh*, 463 US at 794 n 18 (mentioning that state practices vary widely with some states using rotating chaplains, but not addressing the legal implications of the diverging practices).

⁸ See *id* at 791 (“This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.”).

⁹ See *id* at 792–95 (noting and rejecting challenges to the Nebraska practice based on the single denomination of the chaplain, his payment from public coffers, and the Judeo-Christian nature of the prayers).

¹⁰ See, for example, *Snyder*, 159 F3d at 1232–33 (interpreting *Marsh* as defining a “genre” of legislative prayer “separate from the particular nuances of the . . . practice there under review”).

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ambiguous. Phrased starkly, chaplains employed by the legislature as counselors are treated under the same rubric as chaplains who deliver a single prayer and leave.

The Fourth Circuit's decision in *Simpson v Chesterfield County Board of Supervisors*¹¹ demonstrates that this ambiguity can mask threats to core Establishment Clause values such as nonhostility.¹² In *Simpson*, a minister was denied a (rotating) opportunity to deliver an invocation before the county board explicitly because of her religion: she was a Wiccan priestess.¹³ The Fourth Circuit deferred to the county board's choice of minister, citing the holding in *Marsh*¹⁴ and dismissing the possible presence of religious hostility in a footnote.¹⁵ The Fourth Circuit did not take seriously a substantial allegation of hostility, giving little consideration to the admonition in *Lynch v Donnelly*¹⁶ that "the Constitution . . . forbids hostility toward any [religion]."¹⁷

There is a looming dispute over whether practices that resemble, but do not duplicate, the situated chaplaincies at stake in *Marsh* should enjoy the same protection from Establishment Clause scrutiny. In *Simpson*, the Fourth Circuit extended *Marsh* to protect a rotating chaplaincy from scrutiny even when a core Establishment Clause value, nonhostility, was allegedly infringed.¹⁸ In *Snyder v Murray City Corp.*,¹⁹ however, from the Tenth Circuit, a concurring opinion questioned whether *Marsh* should be extended to cover anything other

¹¹ 404 F3d 276 (4th Cir 2005).

¹² See *Lynch v Donnelly*, 465 US 668, 673 (1984) ("[The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

¹³ 404 F3d at 280 (noting that the County Attorney told Simpson that the nonsectarian invocations before the board are "traditionally made to a divinity that is consistent with the Judeo-Christian tradition"—a divinity that would not be invoked by Simpson, a Wiccan).

¹⁴ See *id* at 285 (finding the county's clergy selection policy consistent with the types of chaplaincy programs sustained by *Marsh*).

¹⁵ The Fourth Circuit did acknowledge prejudicial comments from members of the Board of Supervisors in a footnote, but did not deem them of constitutional import. *Id* at 285 n 4 (noting that one member of the Board called Simpson's faith "a mockery" in an interview and another said she hoped Simpson was "a good witch like Glenda," then deciding that neither indicated that the county did not "seriously consider[] Simpson's request").

¹⁶ 465 US 668 (1984).

¹⁷ *Id* at 673 (holding that a city did not violate the Establishment Clause by including a nativity scene in its Christmas display). Although other portions of *Lynch* have come into question, this statement of the core value of nonhostility has not. See generally Richard S. Myers, *The Establishment Clause and Nativity Scenes: A Reassessment of Lynch v. Donnelly*, 77 Ky L J 61 (1988) (analyzing lower court complications resulting from *Lynch* and other legal commentary that criticizes *Lynch*, but making no reference to any objections to the nonhostility value).

¹⁸ See *Simpson*, 404 F3d at 287.

¹⁹ 159 F3d 1227 (10th Cir 1998).

than situated, institutionalized chaplaincies.²⁰ The interpretive problem is therefore how far to extend the rationale of *Marsh* to institutions that resemble, but do not duplicate, the specific chaplaincy institutions in question there.

This Comment offers a solution to the interpretive problem: a finer-grained analysis of how rotating chaplaincies fit into the reasoning of *Marsh*. It approaches legislative chaplaincies by examining them from the vantage point of the legislature's actions and the chaplain's prayers. Essentially, an analysis of the legislature's actions is more important for judging whether a rotating chaplaincy violates the Establishment Clause, but the content of the chaplain's prayers will be more relevant for a situated chaplaincy.

Analyzed in terms of the legislature's actions, a rotating chaplaincy program allows a legislature to mask motives, such as a desire for a religious test for office, which would be constitutionally impermissible if acted upon in the context of a situated chaplaincy program. As a result, courts must scrutinize the legislature's proffered motivations more closely where rotating chaplaincies are concerned in order to preserve the core Establishment Clause principle of nonhostility within the *Marsh* exception.²¹

Analyzed in terms of chaplains' prayers, both situated and rotating chaplains are equally able to run afoul of the Establishment Clause by delivering sectarian prayers,²² but rotating chaplains may face a greater temptation to do so because of the nature of the selection process and the lack of ongoing pastoral connection. Nevertheless, delivering sectarian prayers is not inevitable, and a judicious rotating chaplain poses no greater threat than a situated chaplain. A court should be aware of the temptations, however, and should scrutinize the overall rotating chaplaincy program closely to ensure that there is no structural Establishment Clause violation. Because of the

²⁰ *Id.* at 1238 (Lucero concurring) (“[W]hen the person giving a legislative prayer does not speak from an established chaplaincy position, then *Marsh* . . . is inapplicable.”). There is no outright circuit split on this point yet, but one could develop in the future.

²¹ There are, of course, other core Establishment Clause principles, such as neutrality and separation. Justice Brennan examined these in his *Marsh* dissent and found legislative chaplaincies violated both of them. *Marsh*, 463 US at 795–808 (Brennan dissenting). Whether or not Justice Brennan was correct in his argument is an interesting discussion that would take this Comment too far afield. This Comment will focus on nonhostility as a core Establishment Clause value that can easily be lost through blanket applications of *Marsh* to dissimilar facts.

²² See *id.* at 794–95 (majority) (approving of prayers “where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief”). See also *Hinrichs v Bosma*, 440 F3d 393, 399 (7th Cir 2006) (interpreting *Marsh* as forbidding sectarian prayer); *Bacus v Palo Verde School District*, 52 Fed Appx 355, 356 (9th Cir 2002) (finding prayers before school board meetings unconstitutional due to their sectarian content).

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greater temptations and dangers, the level of scrutiny for rotating chaplaincies should be higher than that afforded to situated chaplains.

This Comment will proceed from background to foreground, beginning in Part I with an overview of legislative chaplaincies as they exist today, both in Congress and in the states. Part II examines the relevant legal standards, most notably *Marsh* itself (high deference to legislative choices in structuring chaplaincy programs) and *Lemon v Kurtzman*²³ (low deference, as a matter of background Establishment Clause jurisprudence). Part II goes on to discuss *Marsh*'s progeny, which have taken one of two forms: a challenge to the legislature's administration of the chaplaincy program or to the chaplain's prayers themselves. Part III gives a fine-grained analysis of the characteristics of both types of challenges, illuminating how the different functions of the two types of chaplain impact the legal assessment of the threat to the Establishment Clause. Rotating chaplaincies will call for a greater scrutiny of the legislature's administration of the chaplaincy program, due to the ease of masking impermissible motives within an otherwise-innocuous rotating chaplaincy program, and the lack of structural incentives for a rotating chaplain to minister to a plural congregation. On the other hand, an analysis of the content of prayers is more important in the context of a situated chaplaincy.

I. BACKGROUND: FROM "AN APOSTATE AND TRAITOR" TO "THE MOST POWERFUL MAN IN WASHINGTON"

Legislative chaplaincies have evolved from a history more checkered than that of Congress itself, arriving at a multifaceted institution found in both the federal Congress and the state legislatures. In 1777, John Adams tersely remarked to his wife Abigail, with regard to the first chaplain of the Continental Congress: "Mr. Duché, I am sorry to inform you, has turned out an apostate and traitor."²⁴ Through a series of raucous interludes, such as the brief period of rotating chaplains in Congress,²⁵ the institution took on a more dignified and stately mien. By 1995, columnist Cal Thomas could, with only a little hyperbole, say of retiring Senate Chaplain Richard Halverson, "according to some who know him best, he has been the most powerful man in Washington."²⁶ This history of colorful characters has generated a set of practices on both the state and federal levels that skirts the edges of the

²³ 403 US 602 (1971).

²⁴ John Adams to Abigail Adams (Yorktown, Pa, Oct 25, 1777), in Frank Shuffleton, ed, *The Letters of John and Abigail Adams* 320 (Penguin 2004).

²⁵ See note 149 (discussing this period).

²⁶ Cal Thomas, *Soul of the U.S. Senate Was No Mere Accessory*, Times Union (Albany, NY) A15 (Nov 9, 1994).

Establishment Clause.²⁷ First, this Part will discuss the crucial distinction between situated and rotating chaplaincies, and then will briefly survey the institutions as they have developed.

A. Situated and Rotating Chaplains

The chief difference between situated and rotating chaplains is the nature of their relationship with the legislative body; a situated chaplain has a formalized, ongoing relationship with the legislature, similar to employment, while a rotating chaplain does not. Rotating chaplains deliver invocations both by invitation and as volunteers.²⁸

Situated chaplains are generally viewed as part of the legislative institution itself. According to one judge, “[c]ongressional chaplains, like the chaplain at issue in *Marsh*, are not members of the public invited on some representative or wholly open basis to give legislative prayers. They are officers of the state, who hold official government positions.”²⁹ This would extend, by analogy, to situated chaplains at other levels of government.³⁰ In addition to delivering invocations, situated chaplains take on the general pastoral care of the legislative body. This may include outreach such as Bible study groups, individual counseling, and prayers.³¹

Rotating chaplains, by contrast, are generally only involved with saying an invocation before the beginning of official business.³² They are not usually described as providing any sort of further pastoral

²⁷ The history itself, as alluded to here and in text accompanying notes 1–3, is fascinating, but largely aside from the content of this Comment with only a few exceptions. For a deeper analysis and summary of the history, see generally Robert C. Byrd, *The Senate, 1789–1989: Addresses on the History of the United States Senate* 297–310 (GPO 1991); Jeremy G. Mallory, *If There Be a God Who Hears Prayer: An Ethical Account of the United States Senate Chaplain* 25–94, unpublished PhD dissertation, The University of Chicago (2004).

²⁸ See, for example, *Hinrichs v Bosma*, 440 F3d 393, 395 (7th Cir 2006) (noting that chaplains are sponsored by state representatives); *Simpson v Chesterfield County Board of Supervisors*, 292 F Supp 2d 805, 807 (ED Va 2003) (explaining that the Board places congregations with an established presence in the community on a list from which leaders are invited on a “first-come first-serve basis” to offer an invocation); *Snyder v Murray City Cop*, 902 F Supp 1444, 1447 (D Utah 1995) (“The Murray City Council invites individuals representing a broad cross section of religious faiths to give these opening prayers.”). It should be noted that the distinction between invited and self-selected chaplains is quite thin: the plaintiffs in both *Simpson* and *Snyder* volunteered to receive an invitation. *Simpson*, 404 F3d at 280; *Snyder*, 159 F3d at 1229.

²⁹ *Snyder*, 159 F3d at 1237 (Lucero concurring).

³⁰ See *id.* at 1238 (noting that *Marsh* drew a direct analogy between the situated chaplains in Congress and the situated chaplains in the Nebraska Legislature).

³¹ See, for example, Karen M. Feaver, *The Soul of the Senate*, 39 *Christianity Today* 26, 29 (Jan 9, 1995) (describing the pastoral care provided by Richard Halverson); Byrd, *The Senate* at 303 (cited in note 27) (same).

³² See, for example, *Simpson*, 404 F3d at 278–79 (explaining how a guest chaplain is selected to deliver an invocation); *Snyder*, 159 F3d at 1228–29 (noting a “reverence period” during which a rotating chaplain delivers a prayer).

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care. Any ongoing relationship with a rotating chaplain takes place outside of the chaplaincy context, such as in the case of a rotating chaplain who is also the minister at a specific legislator's church. There may be an ongoing pastoral relationship in such a case, but it takes place outside the chaplaincy, which ends when the chaplain finishes with the invocation.

B. Federal and State Practices

The practice of picking a chaplain in Congress has largely become a formality, although it was once an unseemly competition among the clergy of Washington, D.C.³³ The Chaplain of each chamber is considered an "Officer" under Article I, § 3 of the U.S. Constitution, along with others such as the Secretary and Sergeant at Arms.³⁴ The majority party nominates the chaplain and the election is virtually always pro forma.³⁵ In practice, a congressional chaplain serves for as long as he wishes: only once has a chaplain been deprived of the post against his will.³⁶ The federal congressional chaplains are models of the "situated" type of chaplaincy.

³³ See Senator James Mason's remarks to the Senate, Cong Globe, 35th Cong, 1st Sess 13 (Dec 9, 1857) ("Every Senator, I have no doubt, has had some experience . . . that a sort of competition has grown up by the usage of the Senate in electing a Chaplain."). In the past, individual chaplains were nominated on the floor of Congress and successive votes were taken until one name garnered a majority. See, for example, the multiple ballots in Cong Globe, 34th Cong, 1st Sess 486 (Feb 21, 1856) (detailing the two rounds of votes necessary to elect Daniel Waldo as Chaplain of the House).

³⁴ See Senate Organization Chart, online at http://www.senate.gov/pagelayout/reference/e_one_section_no_teasers/org_chart.htm (visited Oct 16, 2006) (placing the Chaplain position within the "Officers" branch along with the Secretary and Sergeant at Arms). See also the Senate Chaplain's page at <http://www.senate.gov/reference/office/chaplain.htm> (visited Oct 16, 2006) ("The role of the Chaplain . . . has expanded over the years from a part-time position to a full-time job as one of the Officers of the Senate.").

³⁵ See Byrd, *The Senate* at 298–302 (cited in note 27). But see, for example, the wrangling that can take place in the Senate, 80th Cong, 1st Sess, in 93 Cong Rec S 111–13 (Jan 4, 1947) (describing the partisan election of the Senate chaplain and quoting Senator Alben Barkley as insisting that "the chaplaincy . . . ought to be above politics, and . . . be based upon a man's qualifications").

³⁶ See Richard Baker, *The Senate Elects a Chaplain*, Senate Historical Minute (Oct 10, 1942), from the files of the United States Senate Historical Office, online at http://www.senate.gov/artandhistory/history/minute/The_Senate_Elects_A_Chaplain.htm (visited Oct 16, 2006). The debate was particularly rancorous in 1947, leading to charges on both sides of playing politics with the chaplain's office and resulting in the first and only "firing" of a congressional chaplain, Frederick Brown Harris. Instead of naming Harris, the nomination motion had the name of Peter Marshall. The debate ended when Senator Bridges from New Hampshire, a member of the new Republican majority, threatened a nasty retaliation if the debate turned political, and Senator Hill, a disgruntled Democrat, offered a pointed quotation from Ralph Waldo Emerson ("[W]hat you are cries out so loudly I cannot hear what you say."). The amendment returning Harris's name to the motion was defeated and the original motion, nominating Peter Marshall, was passed. See 80th Cong, 1st Sess, in 93 Cong Rec S 111–13 (Jan 4, 1947). After Marshall died in office, Harris

Outside the federal government, the practice varies between situated institutionalized chaplains such as those in Congress and rotating invitational chaplaincies such as those discussed in *Simpson*. Some legislative bodies have members leading the prayer, as in *Wynne v Town of Great Falls*,³⁷ but that practice is rare.³⁸ At other levels of government, the tendency seems to be toward using rotating chaplains.³⁹ Three states will serve as examples of the different ways a legislative body can configure a rotating chaplaincy: Indiana, North Carolina, and Oregon.

Indiana's program is an example of a mainstream rotating chaplaincy. The Rules of both houses of the Indiana General Assembly stipulate that prayer is the second order of business after the call to order and before the Pledge of Allegiance,⁴⁰ but the Rules do not specify who shall give the prayer. Under informal but longstanding practice, members of the local clergy deliver the invocations at the invitation of the Majority Caucus Chair and with the official permission of the Speaker.⁴¹ When a local minister delivers the invocation, the legislature incurs certain nominal costs.⁴² The Seventh Circuit has recently thrown light on Indiana's chaplaincy program in *Hinrichs v Bosma*,⁴³ refusing to stay an injunction against the chaplaincy program in the Indiana House of Representatives.⁴⁴

was reelected and became the then-longest serving chaplain in history. See Baker, *The Senate Elects a Chaplain*.

³⁷ 2003 US Dist LEXIS 21009, at *4 (D SC).

³⁸ The Florida Legislature has a situated chaplain, Fla Leg House Rule 10.3 (2004), but in many cases legislators themselves deliver the opening prayer. See, for example, Journal of the House of Representatives of Florida, Special Sess A 2 (Dec 13, 2004).

³⁹ See, for example, *Simpson*, 292 F Supp 2d at 807–08 (stating that congregations within the community are eligible to be placed on a list from which leaders are invited to offer invocations before the county board); *Wynne*, 2003 US Dist LEXIS 21009, at *4 (describing the city council members delivering prayers); *Snyder*, 902 F Supp at 1447 (noting that the city council invites individuals representing a broad cross section of religious faiths to give opening prayers). Perhaps controversially, this Comment categorizes *Wynne* as a rotating chaplaincy. Although the people delivering the prayers did have an ongoing relationship with the legislature—they were legislators themselves—the relationship was not pastoral in nature. While the *Wynne* program avoided the problem of including or excluding different ministers by not inviting any, it ran afoul of the dangers on the other side of the practice, namely the chaplains' prayers themselves. See Part II.C.2 (discussing challenges to chaplaincies on the basis of the prayers given) and note 133 (addressing the difficulties posed by *Wynne*).

⁴⁰ See Ind House Rule 10.2 (2005); Ind Sen Rule 5(a)(3) (2005).

⁴¹ See *Hinrichs v Bosma*, 400 F Supp 2d 1103, 1105 (SD Ind 2005) (describing the process by which ministers are selected to deliver invocations in the Indiana legislature).

⁴² See *id.* at 1105–06 (listing postage for invitations and thank-you notes, photographs with legislators, and streaming video as cost items associated with clerical invocations).

⁴³ 440 F3d 393 (7th Cir 2006), *affg* 400 F Supp 2d 1103.

⁴⁴ 440 F3d at 403. See *Hinrichs*, 400 F Supp 2d at 1131 (enjoining further legislative prayer as part of the official proceedings of the Indiana House of Representatives because the chaplain's prayers were too sectarian, and the Indiana Legislature effectively ratified them by repeated invitations).

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North Carolina,⁴⁵ by contrast, has a situated chaplain for each house of its General Assembly, listed as officers of the body.⁴⁶ The House Rules stipulate that the chaplain is appointed by the Speaker; the Senate Rules do not mention the chaplain per se, but do indicate that an opening prayer is offered pursuant to an order by the Presiding Officer.⁴⁷ The current House Chaplain, out of respect for the pluralism of the legislators, mentions God but tries to avoid mentioning Jesus. This effort is appreciated by Jewish lawmakers,⁴⁸ but has provoked, in the chaplain's words, "healthy feedback from Christian lawmakers who sometimes feel like [he is] selling out God by not including Jesus."⁴⁹

Oregon's legislature had an unofficial chaplain for many years who took it up as a full time position in 1998 after meeting the chaplain to the Arizona Legislature. The informal, part-time chaplain to the Oregon Legislative Assembly had been undertaking his ministry on his own, as part of his own spirituality. Meeting with the Arizona chaplain (situated) encouraged him to turn a part-time voluntary practice into an institutionalized job.⁵⁰ The position is financed by donations from legislators and others that total to about \$1,500 per month.⁵¹ While the current chaplain is nonpartisan and avoids policy discussions in order to focus on spirituality,⁵² he is also part of the Faith and Freedom Network, a clearly sectarian and evangelical organization, "desir[ing] to

⁴⁵ Unlike Indiana, North Carolina has not seen a challenge to its legislature's chaplaincy practice in the federal courts. It is, however, the only state to have heard a federal case about *judicial* prayer from the bench. See generally *North Carolina Civil Liberties Union v Constangy*, 751 F Supp 552 (WD NC 1990) (holding that a judge's prayers from the bench violated the Establishment Clause), aff'd 947 F2d 1145 (4th Cir 1991).

⁴⁶ See the North Carolina House and Senate leadership webpages at <http://www.ncleg.net/House/houseleadership.html> (visited Oct 16, 2006) (listing Chaplain as a House Officer) and <http://www.ncleg.net/Senate/senateleadership.html> (visited Oct 16, 2006) (listing Chaplain as a Senate Officer).

⁴⁷ See NC House Rule 47 (2005); NC Sen Rule 3 (2005).

⁴⁸ See, for example, Leah Friedman, *Prayer Opens Local Government Meetings*, News & Observer (Raleigh, NC) E6 (Feb 17, 2006). See also John Zebrowski, *Public Meetings, Christian Prayers*, News & Observer (Raleigh, NC) A19 (July 20, 2003) (mentioning a Jewish legislator who said she did not feel excluded by the prayers performed before the Legislature).

⁴⁹ Friedman, *Prayer Opens Local Government Meetings*, The News & Observer (Raleigh, NC) at E6 (cited in note 48).

⁵⁰ Lisa Grace Lednicer, *Capitol Chaplain Gets the Word in Edgewise*, Oregonian C01 (Jan 26, 1999). Ironically, the chaplain to the Arizona Legislature would come out as a homosexual two years later, be stripped of his clergy credentials and ousted from his position, and lead the Arizona Legislature to reconsider a situated chaplaincy entirely. See *Religion Briefs: Gay Chaplain Finds Way to Stay Ordained*, Washington Times C8 (Jan 13, 2001). See also Amanda Scioscia, *Steers and Queers*, Phoenix New Times, Features Section (Feb 15, 2001) ("After Reverend Charlie Coppinger, the recently outed and ousted chaplain to the state Legislature, gives the prayer [at a gay rodeo], cowboy hats go back on and it's time to bring on the bulls.").

⁵¹ Lednicer, *Capitol Chaplain Gets the Word in Edgewise*, Oregonian at C01 (cited in note 50).

⁵² See id (quoting the chaplain as saying that "[t]he fastest way to kill a chaplaincy is to discuss legislation" and that it is "[b]etter for a chaplain to encourage people to seek God's wisdom").

reach out to all legislators regardless of political or religious affiliation, as well as to members of the lobby, and members of the staff.”⁵³ It is the organization’s “mission . . . to share Christ and His Love” and to “enter the Capitol as an Ambassador of Christ.”⁵⁴ The chaplain hopes to become a member of Capitol Ministries, a network started by a former chaplain to the California Assembly focused on placing a volunteer situated chaplain on this same model in all fifty state legislatures.⁵⁵

II. LEGAL STANDARDS: *LEMON*, *MARSH*, AND PROGENY

Legislative chaplaincies are essentially held out as naked exceptions to the Establishment Clause,⁵⁶ “a *sui generis* legal question.”⁵⁷ The Court made legislative chaplaincies an exception to the often-derided three-prong test of *Lemon v Kurtzman*.⁵⁸ Based on the “unique history” of legislative chaplaincies—the Founders created the congressional chaplaincies then voted on the text of the First Amendment in the same week—the Court held such chaplaincies facially inoffensive to the Establishment Clause.⁵⁹ The Court noted areas where a court could step in to scrutinize or strike down a practice, however, giving some potential limits to the practice.⁶⁰ Justice Brennan’s dissent in *Marsh* tried mightily to constrain the boundaries of the exception, calling the Court’s opinion “narrow,” “careful,” and “little threat to the overall fate of the Establishment Clause.”⁶¹

⁵³ See Oregon Chaplain Ministry page, Faith and Freedom Network, online at http://faithandfreedom.us/or_chaplain.html (visited Oct 16, 2006).

⁵⁴ *Id.*

⁵⁵ See Lednicer, *Capitol Chaplain Gets the Word in Edgewise*, Oregonian at C01 (cited in note 50). See also the Capital Ministries homepage at <http://www.capitolministries.org/index.htm>, and the mission statement at <http://www.capitolministries.org/about.htm> (visited Oct 16, 2006) (stating the mission is to “communicate the Gospel of Jesus Christ to every legislator, in every capitol, every year, by placing a full-time, skilled ambassador for Christ in each of America’s 50 state capitols [and to] work to build up the body of Christ within the political people group”).

⁵⁶ See *Marsh*, 463 US at 796 (Brennan dissenting).

⁵⁷ *Snyder*, 159 F3d at 1232.

⁵⁸ 403 US at 612–13 (examining cases for a “secular legislative purpose,” “primary effect . . . neither advanc[ing] nor inhibit[ing] religion,” and “not foster[ing] an excessive government entanglement with religion”) (internal quotations omitted). For a sampling of the derision, see, for example, *Lamb’s Chapel v Center Moriches Union Free School District*, 508 US 384, 398 (1993) (Scalia concurring) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys.”); *Glassroth v Moore*, 335 F3d 1282, 1295 (11th Cir 2003) (“[T]he *Lemon* test is often maligned.”).

⁵⁹ See *Marsh*, 463 US at 790–91.

⁶⁰ See *id.* at 793 (limiting the chaplaincy when an “impermissible motive” motivates the legislature), 794–95 (allowing a future court to examine proselytizing prayers).

⁶¹ *Id.* at 795 (Brennan dissenting) (emphasizing the “limited rationale” of the majority opinion).

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Justice Brennan proved to be partially prophetic.⁶² *Marsh* has borne few direct progeny in the circuits, and none at the Supreme Court level. One of the difficulties surrounding *Marsh*'s progeny is that none of the cases that analyze it on the Supreme Court level actually involve legislative chaplaincies: most of them present different facts which are analogized or compared to legislative chaplaincies.⁶³ Thus, most of the doctrine regarding chaplains arising from *Marsh* has not been developed by the Supreme Court, but rather by circuit courts or in parallel areas of jurisprudence.

The decisions following *Marsh* reveal two aspects of chaplaincies that can potentially pose threats to the Establishment Clause by moving beyond the limits of the exception: the legislature's actions and the chaplain's prayers. A legislature can run afoul of the First Amendment when it appears to adopt an official religion or denomination through its choices of chaplains or its administration of the program.⁶⁴ In the alternative, a chaplain can raise an inference of unconstitutional establishment by seeming to affiliate the government with a particular faith through sectarian prayers.⁶⁵ The cases following *Marsh* generally focus on only one or the other of these aspects, viewing the chaplaincy as a whole and not distinguishing the two different actors involved. How-

⁶² This Comment as a whole is a mild challenge to Justice Brennan's assertion that *Marsh* would not threaten the "overall fate of the Establishment Clause." Id.

⁶³ See for example, *Van Orden v Perry*, 545 US 677, 125 S Ct 2854, 2861–62 (2005) (Rehnquist plurality) (drawing a parallel between the "history and tradition" of legislative chaplains acknowledged in *Marsh* with the "role played by the Ten Commandments in our Nation's heritage"); *McCreary v ACLU*, 545 US 844, 125 S Ct 2722, 2748–49 (2005) (Scalia dissenting) (pointing toward the history of legislative chaplains as support for the constitutionality of Ten Commandments displays at county courthouses); *Lee v Weisman*, 505 US 577, 596–97 (1992) (Kennedy) (insisting upon the "obvious differences" between the legislative chaplaincy at issue in *Marsh* and clergy who offer prayer as part of an official public school graduation ceremony); *Allegheny v ACLU*, 492 US 573, 595 n 46 (1989) (Blackmun plurality) (noting the "unique history" of legislative chaplains as one basis of evaluating the constitutionality of crèche displays on public property); *Wallace v Jaffree*, 472 US 38, 63 (1985) (Powell concurring) (citing *Marsh* while discussing whether a state's school prayer and meditation statute violated the Establishment Clause); *Grand Rapids School District v Ball*, 473 US 373, 401 (1985) (Rehnquist dissenting) ("[O]ne wonders how the teaching of [community education classes in sectarian schools], which is struck down today, creates a greater 'symbolic link' than . . . the legislative chaplain upheld in *Marsh*." (internal citation omitted)); *Lynch*, 465 US at 692–93 (1984) (O'Connor concurring) ("[T]he government's display of the crèche . . . [is] no more an endorsement of religion than such governmental 'acknowledgements' of religion as legislative prayers."). *Marsh* has been applied to legislative chaplaincies in the lower courts. See generally, for example, *Pelphrey v Cobb County*, 410 F Supp 2d 1324 (ND Ga 2006); *Hinrichs v Bosma*, 400 F Supp 2d 1103 (SD Ind 2005); *Simpson v Chesterfield County Board of Supervisors*, 292 F Supp 2d 805 (ED Va 2003); *Snyder v Murray City Corp*, 902 F Supp 1444 (D Utah 1998).

⁶⁴ The legislature's action here would provoke scrutiny under the "impermissible motive" limit on chaplaincies. See *Marsh*, 463 US at 793.

⁶⁵ The chaplain's prayers here would need to be parsed to see if they "proselytize or advance any one, or disparage any other, faith or belief." Id at 794–95.

ever, chaplaincies can be analyzed more clearly by teasing apart the two different sides of the question.

A. *Lemon*

Lemon v Kurtzman is best known for providing a prevalent test for violations of the Establishment Clause:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster “an excessive government entanglement with religion.”⁶⁶

A major modification to the *Lemon* test came in *Lynch v Donnelly*, where Justice O’Connor suggested that endorsement of, as well as entanglement with, religion would constitute a violation of the Establishment Clause.⁶⁷ This new phrasing served to broaden *Lemon*’s entanglement prong so that messages of favor or disfavor, even when not rising to the level of outright proselytization or demonization, would suffice to prove a violation of the Establishment Clause.⁶⁸ While the endorsement prohibition has entered into the evaluation of several cases, it has also failed to command an enthusiastic and consistent majority of the Court.⁶⁹

The *Lemon* test was further modified in *Agostini v Felton*.⁷⁰ The Court essentially collapsed the “entanglement” prong into the “effects” prong and weakened the purpose inquiry by rewording the test. The Court articulated “three primary criteria . . . currently use[d] to

⁶⁶ *Lemon*, 403 US at 612–13 (internal citations omitted). For an analysis of legislative chaplaincies under the *Lemon* standard, see *Marsh*, 463 US at 796–801 (Brennan dissenting).

⁶⁷ *Lynch*, 465 US at 688 (O’Connor concurring) (“The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”). This “endorsement” test was eventually (and controversially) applied by a majority of justices in *Allegheny*, 492 US at 592–94 (“Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion.”).

⁶⁸ See *Lynch*, 465 US at 689 (O’Connor concurring) (arguing that divisiveness alone is not enough to show entanglement, but might be evidence of impermissible endorsement).

⁶⁹ See Adam Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 S Ct Rev 135, 144 & n 43 (citing *Santa Fe Independent School District v Doe*, 530 US 290, 308 (2000), and *Allegheny*, 492 US at 593 (1989), as embracing the endorsement approach).

⁷⁰ 521 US 203 (1997).

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evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.”⁷¹ While entanglement was separate in *Lemon*, here it is one criterion for determining the effect of the government action. The *Lemon* inquiry asks whether there is a “secular legislative purpose,”⁷² but the *Agostini* inquiry asks a seemingly tougher question, whether the government is indoctrinating people. Overall, this seems to make proving an establishment more difficult.

B. *Marsh*

Aside from noting that the Eighth Circuit had based its opinion below on *Lemon*,⁷³ the majority in *Marsh* never again mentioned the word “entanglement” or *Lemon* itself, and never wrote the phrase “separation of church and state.” The majority argued that “this concern [about establishment of religion] is not well founded” with respect to legislative chaplaincies, reassuring the respondent that there is “no real threat ‘while this Court sits.’”⁷⁴

The original suit in *Marsh* was filed under 42 USC § 1983 by a Nebraska state legislator and taxpayer against the state treasurer, alleging that the continued employment of the same chaplain for sixteen years, paid from public funds, violated the Establishment Clause.⁷⁵ The district court held that the chaplaincy itself did not violate the Establishment Clause, but paying for it from public funds did.⁷⁶ The district court examined the chaplaincy according to the *Lemon* criteria and found no violation:⁷⁷ the purpose was primarily secular, the effect was not to advance religion, and there was no significant entanglement on the facts presented.⁷⁸ The court did, however, find that making a law directing pay-

⁷¹ Id at 234 (finding constitutional a federally funded program under which the city sent public school teachers to parochial schools to provide remedial education to disadvantaged children).

⁷² *Lemon*, 403 US at 612.

⁷³ See *Marsh*, 463 US at 786 (noting that the court of appeals applied the *Lemon* three-part test).

⁷⁴ Id at 795, quoting *Panhandle Oil Co v Knox*, 277 US 218, 223 (1928) (Holmes dissenting).

⁷⁵ See *Marsh*, 463 US at 784–85 (alleging a violation of the Establishment Clause for both the existence of the chaplaincy and the use of public funds to support it).

⁷⁶ See *Chambers v Marsh*, 504 F Supp 585, 592 (D Neb 1980) (holding that “prayers may be had . . . but not at public expense,” and noting a parallel recommendation by James Madison).

⁷⁷ The district court applied the *Lemon* criteria as articulated in *Committee for Public Education and Religious Liberty v Nyquist*, 413 US 756 (1973).

⁷⁸ See *Chambers*, 504 F Supp at 588–91. The purpose was to give order to the legislature, and was therefore secular. Id at 588–89. The effect, while generally religious in nature, was neither “primarily” religious nor very pervasive. Id at 589 (“[T]he actual effect of these prayers on religion, I am persuaded by the record made in this case, is virtually nonexistent.”). The court, following a circuit precedent, *Bogen v Doty*, 598 F2d 1110, 1114 (8th Cir 1979), found no entan-

ment of the chaplain constituted an establishment of religion.⁷⁹ Upon appeals by both parties, the Eighth Circuit joined together what the district court put asunder, considering the payment from state funds and the saying of prayers together as part of a single office.⁸⁰ Ultimately, the Eighth Circuit found the whole practice to be unconstitutional.⁸¹

The Court granted review on the question of “whether the Nebraska Legislature’s practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.”⁸² The 6-3 decision, written by Chief Justice Burger with Justices Brennan, Marshall, and Stevens dissenting, was divided into a broader consideration of the general practice of legislative prayer, the practices surrounding the congressional chaplaincies as models, and a specific examination of the practice at stake in Nebraska.⁸³

The consideration of legislative prayer in general began with the observation that it “is deeply embedded in the history and tradition of this country.”⁸⁴ The Court examined the origins of the congressional chaplaincies, which were established three days before the language of the Bill of Rights was finalized.⁸⁵ Based on this history of the practice, the Court noted that “[c]learly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment.”⁸⁶

The majority took this historical origin, so closely coeval with the First Amendment itself, as evidence of the Framers’ intentions regarding both the boundaries of the nascent Establishment Clause and how the Clause applied to the congressional chaplains.⁸⁷ The Court’s major-

element on the record, but recognized that it might exist when “refusing volunteers of one religious persuasion while inviting others to give prayers.” *Chambers*, 504 F Supp at 591.

⁷⁹ See *Chambers*, 504 F Supp at 591–93 (finding the payment of a chaplain representing a single denomination to have a predominantly religious effect).

⁸⁰ See *Chambers v Marsh*, 675 F2d 228, 233 (8th Cir 1982) (“[T]he established practice must be viewed as a whole.”).

⁸¹ *Id.* at 234–35. The circuit court also cited to the warnings in *Bogen*, which was a case involving a county’s unpaid rotating chaplaincy, noting that the state legislature in *Chambers* had gone too far into “the quagmire” by paying the chaplain and keeping one from the same denomination for such a long time. *Id.* at 234. Having the same minister for sixteen years violated all three of the *Lemon* standards. *Id.* at 234–35. Notably, however, the circuit explicitly refrained from declaring unconstitutional all legislative chaplaincies or even all paid chaplaincies, allowing that “some invocation practices can be constitutionally conducted.” *Id.* at 235.

⁸² *Marsh*, 463 US at 784.

⁸³ See *id.* at 786–95 (discussing Nebraska’s practice).

⁸⁴ *Id.* at 786.

⁸⁵ See *id.* at 788.

⁸⁶ *Id.*

⁸⁷ See *id.* at 790 (“[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress.”).

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ity placed great emphasis on the fact that Congress sent the Establishment Clause to the states in the very same week that it approved legislation appointing and paying the first chaplains. The Court reasoned that the Framers would not lightly adopt a measure they thought contrary to the amendment just ratified.⁸⁸

The majority noted that there was indeed debate over the practice during the period of its inception, but found that this disputation strengthened, rather than weakened, the case for its constitutionality. The Court took the debate to indicate that “the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society.”⁸⁹

The Court’s consideration of the specific practices at stake in Nebraska was much shorter by comparison and resulted in the majority’s rejection of all three of the challengers’ objections. First, the Court found it unimportant that a clergyman of one denomination had been selected for sixteen years running.⁹⁰ The Court found the evidence to

⁸⁸ See *id.* (“It can hardly be thought that . . . they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.”). Some have cast doubt on this argument from historical timing by pointing out that the same First Congress also passed the Alien and Sedition Acts, which by today’s standards clearly violate the First Amendment. See, for example, *Van Orden*, 125 S Ct at 2885 n 27 (Stevens dissenting) (insisting that an “interpretive approach would [be] misguided[] [to] give authoritative weight to . . . the fact that the Congress that passed the First Amendment also enacted laws, such as the Alien and Sedition Act, that indisputably violated our present understanding of the First Amendment”). Arguably, however, this is merely a trick of time. Finding the Alien and Sedition Acts contemporarily unconstitutional is relatively easy in hindsight against the background of *Brandenburg v Ohio*, 395 US 444, 449 (1969) (holding that state acts which punished mere advocacy and forbade assembly with others violated the First and Fourteenth Amendments), and *United States v O’Brien*, 391 US 367, 386 (1968) (holding that the First Amendment did not bar the government from convicting the defendant for burning his selective service registration certificate), but far from obvious at the time: the Sedition Act of 1798 expired on its own, but was never overturned on First Amendment grounds even though it drew vehement opposition from Thomas Jefferson and the Democratic-Republican Party. See Kathleen Sullivan and Gerald Gunther, *First Amendment Law* 3–4 (Foundation 2d ed 2003) (noting that “although the Supreme Court did not rule on the [Sedition] Act’s constitutionality at the time, several lower federal courts, partly manned by Supreme Court Justices riding circuit, upheld it”); Thomas Jefferson, The Kentucky Resolution, Nov 10, 1798, in Philip B. Kurland and Ralph Lerner, eds, 5 *The Founders’ Constitution* 131–34 (Chicago 1987). A chaplain, however, was just as facially troubling to the First Amendment then, see James Madison, *Detached Memoranda*, in Elizabeth Fleet, ed, *Madison’s “Detached Memoranda,”* 3 Wm & Mary Q 558–59 (1946) (“Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom? In the strictness the answer on both points must be negative.”), as it is now, see *Marsh*, 463 US at 798 (Brennan dissenting) (“[T]here can be no doubt that the practice of legislative prayer leads to excessive ‘entanglement’ between the State and religion.”). Thus, the fact that it has persisted from that unique historical genesis up to the present without interruption, as the *Marsh* majority points out, *id.* at 788, is indeed remarkable, giving force to the idea that the Framers contemporaneously considered and rejected the idea that chaplains violated the First Amendment.

⁸⁹ *Marsh*, 463 US at 791.

⁹⁰ See *id.* at 793.

show that he had been reappointed “because his performance and personal qualities were acceptable to the body appointing him.”⁹¹ Indicating that it would give only a very low level of scrutiny to the legislative reappointment decision, the Court stated that “[a]bsent proof that the . . . reappointment stemmed from an impermissible motive” it would not conclude that the chaplain’s tenure violated the Establishment Clause.⁹²

Second, the Court found the payment of the chaplain from the public coffers unproblematic. The Court relied almost completely on the historical precedent of paying chaplains from public funds.⁹³ The reasoning followed largely the same path as with the congressional chaplaincies themselves: “remuneration is grounded in historic practice initiated, as we noted earlier, by the same Congress that drafted the Establishment Clause of the First Amendment.”⁹⁴ The Court also noted that both state legislatures and Congress currently paid chaplains.⁹⁵ Because it was initiated by the First Congress contemporaneously with wording the First Amendment and because it had continued since then, payment of legislative chaplains was deemed constitutional.

Third, the Court felt no need to parse the content of specific prayers because “there [was] no indication that the prayer opportunity [had] been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”⁹⁶ Notably, the Court did not distinguish between exploitation by the chaplain, on the one hand, and exploitation by the legislature itself, on the other. Not only could, in theory, the chaplain herself “exploit[] or proselytize,” but the chaplaincy practice itself, as constructed by the legislature, could also exert a similar undue influence.⁹⁷

Of the two dissents written in *Marsh*, Justice Stevens’s is the narrower. Although he did not lay out clear standards for determining when the institutionalization of a practice tacitly agreed to by a majority of legislators might become establishment, he found the Nebraska legislative chaplaincy program to be in clear violation of the Establishment Clause. For Stevens, the sixteen year tenure of Nebraska’s Presbyterian chaplain was a clear indication of denominational pref-

⁹¹ *Id.*

⁹² *Id.* at 793–94.

⁹³ *Id.* at 794.

⁹⁴ *Id.* (internal citation omitted).

⁹⁵ See *id.* See also 2 USC § 61d (2000) (giving compensation for the Senate Chaplain, roughly equivalent to an Assistant Cabinet Secretary, as given in 5 USC § 5315 (2000)); National Conference of State Legislatures Amicus Curiae Brief, *Marsh v Chambers*, No 82-23, *3 (filed Dec 16, 1982) (available on Lexis at 1982 US Briefs 23) (“NCSL Amicus Brief”).

⁹⁶ *Marsh*, 463 US at 794–95.

⁹⁷ See Part I.A (describing the differences between rotating and permanent chaplaincies).

erence.⁹⁸ Stevens concluded that notwithstanding the legislature's benign motivation, the effect of the program was to establish religion.⁹⁹

Stevens also raised the more difficult issue of a silent majority within the Nebraska legislature. By nature, he argued, "the tenure of the chaplain must inevitably be conditioned on the acceptability of [the prayers'] content to the silent majority."¹⁰⁰ Whether or not it is explicit, he argued that the very nature of the chaplaincy would tend to marginalize minority viewpoints by catering to the views of the silent, mainstream majority.¹⁰¹

Justice Brennan's dissent, joined by Justice Marshall, was more comprehensive in scope than Stevens's. He relied more on the principle of government neutrality among faiths implicit in the Establishment Clause to reject legislative chaplaincies, rather than grounding his dissent solely on the specific practices of the Nebraska legislature.¹⁰² Brennan admitted that he had erred in an earlier opinion, in which he had approved legislative prayer in dictum,¹⁰³ and found, in *Marsh*, that the practice of legislative prayer was flatly unconstitutional.¹⁰⁴

Brennan began his dissent by analyzing legislative chaplaincies under the *Lemon* standard. To him, it was a fairly simple question: "I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."¹⁰⁵

⁹⁸ See *Marsh*, 463 US at 822–23 (Stevens dissenting) (dispensing with a subjective inquiry into the permissibility of legislators' motivations and finding that the bare fact of the long tenure was sufficient to establish a violation).

⁹⁹ See *id.* at 823 ("[I]t seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause.").

¹⁰⁰ *Id.* at 824. Ostensibly, given the fact-intensive focus of the rest of his dissent, Stevens was speaking specifically about the Nebraska Legislature, but the argument could still be available in a challenge to another practice.

¹⁰¹ See *id.* at 823 ("I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature.") One of the strengths of a rotating chaplaincy practice (or a guest chaplain program in the context of a situated chaplaincy) is that it is more likely to evade this objection. The greater freedom to diversify, however, also makes exclusion less conspicuous. See Part III.A (describing the greater danger of establishment through legislative actions within a rotating chaplaincy program) and III.B (noting the incentives rotating chaplains have to infringe the Establishment Clause).

¹⁰² See *id.* at 802 (Brennan dissenting) (noting that the First Amendment mandates governmental neutrality between religions).

¹⁰³ See *Abington County School District v Schempp*, 374 US 203, 299–300 (1963) (Brennan concurring) (finding legislative prayer constitutional under the Establishment Clause, because, as compared to school prayer, legislators have more power to exit than do students).

¹⁰⁴ See *Marsh*, 463 US at 769 (Brennan dissenting) (describing Justice Brennan's change of position).

¹⁰⁵ *Id.* at 800–01. Although *Lemon* figured most prominently, Justice Brennan also discussed other tests used to find Establishment Clause violations. For instance, discrimination among religions, or in favor of religion generally, should trigger strict scrutiny, and Brennan would have

Brennan thought the predominantly religious purpose of legislative prayer was “self-evident.”¹⁰⁶ Indeed, he believed that thinking of legislative prayer in merely secular terms would demean the very tradition of the chaplaincy. As he put it, “to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.”¹⁰⁷ Further, Brennan found that the primary effect of legislative prayer was clearly religious—it linked the state’s temporal power (here directly in the context of lawmaking) to a religion and tacitly placed the state’s imprimatur on that religious practice.¹⁰⁸ Even adult legislators (for Establishment Clause purposes, often compared to children in school¹⁰⁹) would have a difficult time not participating in the invocation. It would be impolitic, to say the least, to walk out or not participate.¹¹⁰

Finally, Justice Brennan noted that legislative prayer entangles the state with religion in two ways. First, legislative prayer results in the state “impermissibly . . . monitoring and overseeing religious affairs.”¹¹¹ The legislature must choose a chaplain, specify her duties, and perhaps even monitor the content of the prayers she delivers. Brennan noted that this monitoring is “precisely the sort of supervision that agencies of government should if at all possible avoid.”¹¹² Second, entanglement arises from “the divisive political potential” of a legislative issue, including the selection of a chaplain, splitting along religious lines.¹¹³ Brennan described several events from *Marsh* as well as from

found neither a compelling state interest nor a tight fit between ends and means. *Id.* at 801, citing *Larson v Valente*, 456 US 228, 247 (1982). Justice Brennan also felt that legislative prayer would violate the second and third prongs of the test announced in *Schempp*, which he favored. See *Marsh*, 463 US at 801 (Brennan dissenting), citing *Schempp*, 374 US at 294–95 (holding that the Establishment Clause forbids “those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice”). In the end, Brennan rested his dissent less on *Lemon* than on his more general observation that “[t]he Establishment Clause embodies a judgment, born of a long and turbulent history, that, in our society, religion must be a private matter for the individual, the family, and the institutions of private choice.” *Marsh*, 463 US at 802 (Brennan dissenting) (internal citations and quotation marks omitted).

¹⁰⁶ *Marsh*, 463 US at 797 (Brennan dissenting).

¹⁰⁷ *Id.* at 797–98.

¹⁰⁸ See *id.* at 797.

¹⁰⁹ See, for example, *Engel v Vitale*, 370 US 421, 431 (1962) (finding that official prayers in public schools had a uniquely coercive effect on children and violated the Establishment Clause). See also Brennan’s confession of a change in heart on this subject. *Marsh*, 463 US at 796 (Brennan dissenting) (referring to his concurrence in *Schempp*).

¹¹⁰ *Marsh*, 463 US at 798 n 5 (Brennan dissenting). This argument proved prophetic: a citizen’s attempt to enter a city council meeting late in order to avoid the prayer resulted in her being dropped from the agenda. See *Wynne*, 2003 US Dist LEXIS 21009, at *5.

¹¹¹ *Marsh*, 463 US at 799–98 (Brennan dissenting), citing *Lemon*, 403 US at 614–22.

¹¹² *Marsh*, 463 US at 799.

¹¹³ *Id.* at 799, citing *Lemon*, 403 US at 622.

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congressional history fitting this description (namely, the committee reports of the 1850s and the short-lived switch to a rotating chaplaincy).¹¹⁴ This account included controversies in Congress over the appointment of chaplains, several members of the Oregon Legislature walking out in protest over a prayer by an Indian guru, and a California legislator being called “an irreverent and godless man” by a local clergyman for requesting that the State Senate Chaplain not use the name of Christ.¹¹⁵ Chaplains, he demonstrated, could become a source of religious controversy within the legislature, coupling religious and political fissures in the explosive manner that the Establishment Clause was enacted to prevent.

Beyond the *Lemon* analysis, Brennan attacked legislative chaplaincies on more general grounds—neutrality and separation of church and state, which he saw as “the underlying function[s] of the Establishment Clause.”¹¹⁶ He admitted that these two principles “do not exhaust the full meaning of the Establishment Clause as it has developed,”¹¹⁷ but suggested that none of the recognized exceptions to the Clause pertain to the case of legislative prayer.¹¹⁸ Finally, Brennan rejected the predominantly historical analysis offered by the majority as well as the insinuation that legislative prayer was a *de minimis* violation at worst.¹¹⁹

C. *Marsh*’s Progeny in the Circuits

While *Marsh* has been influential in other areas,¹²⁰ its more direct progeny have followed a fairly predictable line. Most of the legislative prayer decisions following *Marsh* have upheld the chaplaincy practice in question; where the practice has been struck down, it has usually been because of the prayers’ content. Only recently has the practice been enjoined because of a legislature’s actions, and even there it was the legislature’s acquiescence to sectarian prayers that proved problematic.¹²¹

¹¹⁴ See *Marsh*, 463 US at 799–800 & nn 9–10.

¹¹⁵ See *id.* See also note 144 and accompanying text.

¹¹⁶ *Marsh*, 463 US at 802.

¹¹⁷ *Id.* at 809.

¹¹⁸ See *id.* at 809–13 (distinguishing the chaplaincies from recognized exceptions such as religious organizations receiving government aid based on secular criteria, Sunday closing laws, civil religion, tax exemptions for religious institutions, and accommodation of religious free exercise).

¹¹⁹ See *id.* at 813–21.

¹²⁰ *Marsh* has been cited in cases ranging over a wide area of issues other than legislative prayer. For examples, see note 63.

¹²¹ See *Hinrichs*, 440 F3d at 402 (“The House’s current practice is to ask clergy to ‘strive for an ecumenical prayer.’ It is simply the toleration of the failure to follow this practice that has produced this litigation and required the action of the federal court.”) (internal citations omitted).

Overall, the cases can be divided according to whether the challenge was based on the legislature's actions or the chaplain's prayers. The cases following *Marsh* generally have not examined the differing dynamics of these two sides of the question, nor have the holdings distinguished between situated and rotating chaplains.¹²² This Comment will first examine the challenges to the legislature's actions, and second turn to the challenges brought against a chaplain's specific prayers.

1. Challenges to legislative action.

Challenges to a legislature's power to invite, employ, and pay chaplains have been upheld under *Marsh* with minimal scrutiny. Indeed, the first post-*Marsh* challenge to the hiring of congressional chaplains was dismissed per curiam after *Marsh* rendered the constitutional question moot.¹²³

¹²² The analysis in some cases has made such a distinction, but the holdings following *Marsh* have applied a blanket rule and have failed to distinguish between the two types of chaplain. Compare, for example, *Snyder*, 159 F3d at 1228–36 (majority) (characterizing legislative prayers, pursuant to *Marsh*, as a “religious genre” that does not violate the Establishment Clause, even if “this genre of government religious activity cannot exist without the government actually selecting someone to offer such prayers”), with *id* at 1236–43 (Lucero concurring) (arguing that “the city’s choice of [a rotating chaplain] format proscribes regulation of the content of the prayers offered,” lest the city get entangled in supervising chaplains). The majority here downplayed the difference between a situated and rotating chaplain by bringing them both under the cope of the “religious genre” and not placing much weight on the exclusionary aspect of picking chaplains. The concurrence, by contrast, took the distinction seriously and contemplated the ramifications of excluding chaplains on the basis of the content of their prayers.

¹²³ See *Murray v Morton*, 505 F Supp 144, 147 (DDC 1981) (dismissing for lack of standing and because case presented a political question), *revd and remanded as Murray v Buchanan*, 674 F2d 14, 1982 US App LEXIS 21153 (DC Cir 1982) (finding standing, denying that the political question doctrine should force abstention, and remanding for trial on Establishment Clause merits), *vacd and dismissed as Murray v Buchanan*, 720 F2d 689, 690 (DC Cir 1983) (en banc) (per curiam) (“The Supreme Court’s decision in *Marsh v Chambers* is dispositive.”). The chief dispute in the opinion was over justiciability issues, which caused the district court and initial circuit panel to decline to reach the merits because the plaintiffs lacked standing and because it presented a political question. See *Murray*, 1982 US App LEXIS at *23. Judge Ginsburg’s concurrence en banc found the matter justiciable because the Supreme Court decided *Marsh* on the merits. See *Murray*, 720 F2d at 699 (Ginsburg concurring). The en banc per curiam vacatur vitiated those holdings. By contrast, the initial panel’s dissenter reprinted his dissent in the en banc decision, which not only reached the merits but, taking a step beyond *Marsh*, also found the case nonjusticiable as a political question and because it violated the separation of powers doctrine. See *id* at 690–91 (MacKinnon concurring) (arguing, on the merits, that Congress had been entrusted the power to create and fund a chaplaincy, thus “textually committing” the matter in a way that makes it a political question evading judicial scrutiny). Judge Ginsburg designated this argument “novel.” *Id* at 692 n 5. In response to the D.C. Circuit’s opinion in *Murray*, the U.S. House of Representatives unanimously passed a resolution reaffirming its support for congressional chaplaincies. See HR Res 413, 97th Cong H, 2d Sess (Mar 25, 1982), in 128 Cong Rec H 5890–96 (Mar 30, 1982) (“Resolved, That the House of Representatives considers its historic establishment of a chaplaincy to be an appropriate and constitutional exercise of exclusively conferred powers.”).

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The legislature's power to withhold an invitation to be a chaplain or an opportunity for a chaplain to pray before legislative business has likewise been upheld without difficulty. In *Snyder v Murray City Corp.*, the Tenth Circuit held that a city may refuse any citizen the opportunity to deliver a prayer that city officials view as insulting to the institution of legislative prayer.¹²⁴ In that case, a citizen requested to be allowed to deliver a controversial prayer mocking the concept of legislative prayer during the "reverence portion" of the council meeting (a routine period for prayer before business), and was denied the opportunity to do so based on the overtly insulting content of the prayer.¹²⁵ In *Simpson*, the Fourth Circuit upheld the county board's decision not to invite a Wiccan priestess to deliver an invocation because it would only accept prayers "consistent with the Judeo-Christian tradition."¹²⁶ Although the content of the prayer was not directly adverse to the institution of legislative prayer, as in *Snyder*, the legislative body in *Simpson* was allowed to decline to invite a chaplain on the basis of the religious content of her prayer.¹²⁷

The most recent Establishment Clause challenge to legislative chaplains to reach the circuit courts of appeal—*Hinrichs v Bosma*, one of the few to be decided against a legislature—blurs the distinction between challenges to the legislature's action and the chaplain's prayers. The Indiana Legislature's practice of inviting rotating chaplains and paying some incidental costs, such as postage, was held to violate the Establishment Clause when the chaplains' prayers were sectarian.¹²⁸ The legal issue that the court in *Hinrichs* confronted was

¹²⁴ See 159 F3d at 1234 (noting that *Marsh* imposed an impermissible-motive limitation on the legislature's choice of a chaplain, but finding no such motive existed in *Snyder*). The proposed invocation criticized the practice of prayer before council meetings in colorful terms. See *Snyder*, 902 F Supp at 1447 n 2 ("We pray that you prevent self-righteous politicians from misusing the name of God in conducting government meetings."). Judge Lucero, concurring in *Snyder*, notably argued that the en banc majority overextended *Marsh*, which he felt should not apply to rotating chaplaincies. See *Snyder*, 159 F3d at 1236–43 (Lucero concurring) (asserting that *Marsh* involves, and should be limited to, situated chaplaincies—chaplaincies that are so structured that they become an arm or an office of the legislature).

¹²⁵ See *Snyder*, 902 F Supp at 1447–48. The Tenth Circuit found the prayer to be outside the genre of legislative prayer protected by *Marsh* because of its proselytizing effect. *Snyder*, 159 F3d at 1235 (finding that the record failed to demonstrate any evidence to indicate legislative intent to promote or disparage any religion).

¹²⁶ See 404 F3d at 280.

¹²⁷ See *id.*

¹²⁸ See *Hinrichs*, 400 F Supp 2d at 1129 (holding that plaintiffs are entitled to a permanent injunction against the Speaker in his official capacity, barring him from permitting sectarian prayer as part of the official proceedings of the Indiana House of Representatives). See also the description of the Indiana Legislature's practice in Part I.B. *Hinrichs*'s holding is loosely analogous to a Ninth Circuit decision applying similar reasoning to a school board prayer case, thus tying together the school prayer (*Lee*) and the legislative prayer (*Marsh*) lines of cases. See *Bacus v Palo Verde Unified School District Board of Education*, 52 Fed Appx 355, 356 (9th Cir

the extent to which a chaplain—whether situated or rotating—is seen as an agent of the legislature. The Seventh Circuit saw the legislature as implicitly ratifying the chaplains’ prayers through repeated invitations.¹²⁹ Making the legislature responsible for the chaplains’ words here could, like in *Simpson*, forecast an expansion of *Marsh*’s protective aegis to apply to situated and rotating chaplaincies alike. Notably, however, the Seventh Circuit still focused its scrutiny on the legislature’s actions when the chaplain was rotating, even though it was the chaplain’s prayers that were ultimately the problem.

2. Challenges to chaplains’ prayers.

When a complaint has challenged a chaplain’s prayers themselves, the results have been more mixed and sparser on the circuit court level. Generally, where a chaplain can be shown to have given consistently sectarian prayers, the practice is struck down. Where the practice is only inconsistently sectarian, or when the chaplain stops delivering such prayers, the chaplaincy is generally upheld.

Marsh itself has been cited elsewhere as an example of how non-sectarian prayers can vitiate a challenge to a chaplaincy practice.¹³⁰ *Marsh*’s admonition that courts should not parse the content of prayers “where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief” has still allowed courts to strike down practices they viewed as “sectarian.”¹³¹ The Fourth Circuit took this path in *Wynne v Town of Great Falls*,¹³² where the opening and closing prayers for a city council meeting—usually delivered by a member of the council—were almost always given in Jesus’s name.¹³³ Similarly, the

2002) (finding that the prayers in question were clearly unconstitutional under the school prayer line of cases, but also holding that the prayers “in the Name of Jesus” impermissibly advanced Christianity, contrary to *Marsh*). See also *Lee*, 505 US at 598–99 (holding that it is a violation of the Establishment Clause to allow clerical members to deliver prayers as part of an official public high school graduation ceremony); *Coles v Cleveland Board of Education*, 183 F3d 538, 541 (6th Cir 1999) (Merritt concurring) (“The annual graduation exercises here are analogous to the . . . sessions referred to in *Marsh* and should be governed by the same principles.”).

¹²⁹ See *Hinrichs*, 440 F3d at 402.

¹³⁰ See *Pelphrey v Cobb County*, 410 F Supp 2d 1324, 1330 (ND Ga 2005) (finding that the plaintiffs failed to show sectarian references promoted a particular religious view or principles unique to Christianity).

¹³¹ *Marsh*, 463 US at 794–95.

¹³² 376 F3d 292 (4th Cir 2004), affg 2003 US Dist LEXIS 21009.

¹³³ See 2003 US Dist LEXIS 21009, at *1–4 (finding the practice of praying before town meetings invoking the name of Jesus and encompassing both legislators and citizens to violate the Establishment Clause). Notably, the plaintiff in *Wynne* tried to enter the meeting late in order to avoid the prayer but “was not allowed to participate in the meeting although she had signed up to speak at the meeting and was listed on the agenda.” *Id.* at *5. This Comment generally treats legislators delivering prayers as rotating chaplains, see note 39, which makes *Wynne* an

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Ninth Circuit struck down a school board's prayers consistently invoking Jesus's name.¹³⁴

In *Kurtz v Baker*,¹³⁵ by contrast, the complaint was mooted after the chaplain promised to deliver nonsectarian prayers.¹³⁶ A philosophy professor and secular humanist, Dr. Paul Kurtz, alleged that the U.S. Senate Chaplain routinely used his invocation as an opportunity to disparage nonbelievers.¹³⁷ After a court-moderated status conference on this count, the Senate Chaplain, Reverend Richard Halverson, initiated an exchange of letters with Dr. Kurtz, apologizing for the disparagement and promising to rectify the situation.¹³⁸ The district court felt that this reconciliation attenuated the dispute enough to render it moot.¹³⁹

III. ANALYSIS: "THAT SYSTEM HAS FAILED ENTIRELY"

Disentangling the two threads running through the legislative chaplaincies jurisprudence brings to the surface countervailing considerations that make the uniform application of *Marsh* to all forms of

exception to the general rule that a legislature's actions ought to be more closely scrutinized when dealing with a rotating chaplaincy. When a legislator delivers the prayer, the distinction between "legislative action" and "chaplain's prayer" collapses. In such a case, *Wynne* indicates that the content of the prayer is decisive. See *Wynne*, 376 F3d at 301-02 (arguing that the city council unconstitutionally advanced one religion by praying in Jesus's name at the beginning of meetings). Notably, *Wynne* never takes up the "impermissible motive" line of inquiry: the phrase never appears in the opinion.

¹³⁴ See *Bacus*, 52 Fed Appx at 357 ("These prayers advanced one faith, Christianity, providing it with a special endorsed and privileged status in the school board."). As discussed in note 128, the Ninth Circuit struck down the practice following both *Marsh* and a line of school prayer cases. See *Bacus*, 52 Fed Appx at 356.

¹³⁵ There are two district court opinions associated with this case: 630 F Supp 850 (DDC 1986), vacd and remd 829 F2d 1133 (DC Cir 1987), and 644 F Supp 613 (DDC 1986) (dismissing a claim that the Senate Chaplain had disparaged atheists using overly sectarian prayers). The first dismissed the "discrimination against atheists" claim but held over the "disparagement of atheists through sectarian prayer" claim; the second opinion dismissed the disparagement claim as practically moot. Only the first claim from the first suit was appealed to the D.C. Circuit.

¹³⁶ *Kurtz*, 644 F Supp at 617-19.

¹³⁷ *Kurtz*, 829 F2d at 1136 (discussing the plaintiff's contention that the "Senate and House rules require guest speakers to utter a prayer" and therefore "violate[d] the Free Speech, Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution"). Kurtz also alleged that he was being prevented from delivering an invocation because it was "non-theistic," but that claim was ultimately dismissed. Id at 1142-45 (finding insufficient the causal link between the defendant and the claimed injury, thus denying standing under Article III of the U.S. Constitution).

¹³⁸ *Kurtz*, 644 F Supp at 616-17 (describing the exchange of letters).

¹³⁹ See id at 617-19 (acknowledging Kurtz's stipulation that as long as this correspondence was kept public in order to deter future chaplains from disparaging atheists, the court's concerns would be met). Following the policy of *United States v Munsingwear*, 340 US 36, 41 (1950), the court also vacated the jurisdictional holdings of the earlier case because it was found moot before final resolution. See *Kurtz*, 644 F Supp at 619-21 ("Because it is so unlikely that future events will revive this controversy, there is no reason to preserve the jurisdictional holdings in anticipation of that day.").

chaplaincy inapposite. Examining the legislative action side of the question shows that rotating chaplaincy programs pose a greater threat to the Establishment Clause than do situated chaplaincy programs, and therefore warrant closer scrutiny under *Marsh* than many courts have given either to them or to situated chaplaincies. Examining the potential for unconstitutional establishment in the chaplains' prayers, it becomes clear that both situated and rotating chaplains can violate the Establishment Clause in the same ways, but rotating chaplains are more likely to be tempted to recite constitutionally problematic prayers. Even though a rotating chaplaincy may pose a greater Establishment Clause threat on the legislative side and a temptation on the chaplain's side, those dangers can be avoided by a careful legislature, a mindful chaplain, and an observant court.

A. Establishment through Legislative Action

The mere appointment of a chaplain by a legislature has ramifications for the Establishment Clause even absent any consideration of the specific prayers the chaplain delivers. This practice was approved by *Marsh* and, as indicated in *Murray*, rapidly became uncontroversial. Uncontroversial, however, does not mean unthreatening. Examining what *Marsh* allows a legislature to do in the context of a situated chaplain and applying it to the different situation of a rotating chaplain indicates that the latter, perhaps counterintuitively, poses a threat of establishment for which courts ought to be vigilant.

Read narrowly, *Marsh* allows a legislature to hire a chaplain, pay the chaplain's salary out of public money, and even retain the same chaplain for sixteen years "[a]bsent proof that the chaplain's reappointment stem[s] from an impermissible motive."¹⁴⁰ This paraphrasing of the *Marsh* holding gives a high degree of deference to a legislature structuring a situated chaplaincy. It can largely arrange the office and choose its chaplain as it sees fit, so long as it does not exhibit an impermissible motive.¹⁴¹ Given that some courts have been willing to shield the entire process behind political question and separation of

¹⁴⁰ *Marsh*, 463 US at 793 (1983).

¹⁴¹ For a description of how the chaplain's duties have changed over time, see Feaver, 39 *Christianity Today* at 29 (cited in note 31); Byrd, *The Senate* at 301 (cited in note 27). The most notable change described is the transition from a part-time position, charged merely with delivering invocations, to a full-time pastoral job. See Mallory, *If There Be a God* at 83-89 (cited in note 27) (describing Halverson's chaplaincy). See also Jim Castelli, *Senate Republicans Nominate Bethesda Pastor New Chaplain*, *Washington Star* 6 (Dec 1980).

powers deference,¹⁴² it seems unlikely that the impermissible motive inquiry would have much bite absent fairly compelling proof.¹⁴³

In the case of a situated chaplain, this deference is understandable and perhaps necessary. A situated chaplain must establish an ongoing pastoral relationship with the members of the legislature, even with members of different faiths. Ministering to a group that does not all share one's faith can be disconcerting for some, but it is an elemental part of the job.¹⁴⁴ The situated chaplain plays a designated role within the legislative institution. The Senate Judiciary Report of 1854, responding to petitions to abolish the congressional and military chaplaincies, compared the chaplain's tasks to more mundane—but necessary—errands such as carrying notes and depositing checks.¹⁴⁵ In essence, the situated chaplain is internal to the workings of the legislature.¹⁴⁶ This realization was decisive in Judge Lucero's concurrence in *Snyder*: “[T]he nature of the chaplaincy with which *Marsh* deals does not involve people acting as members, leaders, or spokespersons of particular religions. Rather, they are people who are first and foremost

¹⁴² For a discussion of the political question doctrine, see note 123.

¹⁴³ For instance, evidence that a legislature specifically and repeatedly selects sectarian preachers may prove that a legislature prefers some faiths to others. See *Hinrichs*, 440 F3d at 402 (describing the Indiana Legislature's failure to secure ecumenical prayer as part of an “irreparable injury” warranting injunction). This admittedly blurs the distinction between the legislature's actions and the chaplain's prayers, making the analysis of the first dependent upon a parsing of the second. This blurring underscores, however, current courts' unwillingness to pierce the veil of legislative action under *Marsh*. In *Hinrichs*, the Seventh Circuit used the chaplain's prayers as evidence of the legislature's impermissible motive rather than making a more direct inquiry into the behavior of the legislature. Yet notably, the Indiana Legislature uses a rotating chaplaincy system. In imputing the choice of sectarian chaplains to the legislature as an impermissible motive, the Seventh Circuit recognized the greater establishment threat rotating chaplains posed. See *id.* at 402 (noting that the Speaker of the House cut off all prayer rather than comply with “the House's articulated desire that the prayer not be identified with any particular denomination”).

¹⁴⁴ See Feaver, 39 *Christianity Today* at 29 (cited in note 31):

In spite of the sensitive nature of the job, the senators have placed no restrictions on the office of the chaplain. Halverson recalls that early in his tenure a few Jewish senators gently reminded him that they felt excluded when he prayed “in the name of Jesus.” Not wanting to offend them—but also not wanting to compromise his calling—the chaplain has sometimes closed his prayers in the name of Jesus and, at other times, in an analogous title like “the Way, the Truth, and the Life.” And he has often said to his Jewish friends in the Senate, “You know everything about my faith is Jewish, and my best friend [Jesus] is Jewish.”

¹⁴⁵ See Committee on the Judiciary, S Rep No 376, 32d Cong, 2d Sess 2 (1853) (likening chaplains to “messengers who attend to our private business, take checks to the bank for us, receive the money, or procure bank drafts”).

¹⁴⁶ This has extensive ramifications for, among other things, institutional values. For example, the U.S. Senate Chaplain arguably plays a role in helping to sustain the values of probity, wisdom, and deliberation that the Senate is supposed to embody. See generally Mallory, *If There Be a God* at 150–263 (cited in note 27).

acting as officers of the various legislative bodies they serve.”¹⁴⁷ Because of the close and ongoing pastoral relationship between the chaplain and the legislature, *Marsh* justifiably gives high deference to legislatures trying to structure a situated chaplaincy practice, screening only for impermissible motive, and fairly weakly at that.

Rotating chaplaincies, however, do not involve the same sort of ongoing, pastoral relationship. Congress tried to use such a system and found it insufficient for that reason. Not long after both of the congressional Judiciary Committees considered and ignored petitions to abolish the congressional and military chaplaincies,¹⁴⁸ both houses of Congress decided to switch to a rotating chaplaincy.¹⁴⁹ At the beginning of the Thirty-sixth Congress, Senator Henry Wilson of Massachusetts voiced his dissatisfaction with the rotating chaplaincy. He protested that “these clergymen cannot become acquainted with us. We cannot look to them as we should look to a Chaplain of the Senate.”¹⁵⁰ Instead, he called for a Chaplain of the Senate “to whom we can look

¹⁴⁷ *Snyder*, 159 F3d at 1238 (Lucero concurring). This is further underscored by looking closely at the definition of the term “chaplain.” A chaplain is a member of the clergy attached to an institution (whether a specific chapel, prison, hospital, royal court, branch of the armed forces, or legislature). *The American Heritage Dictionary of the English Language* 311 (Houghton Mifflin 4th ed 2000). Notably, these are institutions defined by something other than religious denomination or faith (except for the attachment to a chapel). By definition, a chaplain serves an institution, not a particular denomination or faith. Notably, a rotating chaplain would fit this definition much more awkwardly than a situated chaplain. In the former case, the chaplain’s loyalties are divided between his denomination and his temporary position vis-à-vis the legislature. In the latter case, the chaplain simply serves the legislature, regardless of denominational loyalty. This Comment still treats both as “chaplains,” but the ill fit of the term for rotating chaplains is worth remarking.

¹⁴⁸ See S Rep No 376 (cited in note 145); Chaplains in Congress and in the Army and Navy, HR Rep No 124, 33d Cong, 1st Sess (1854).

¹⁴⁹ See Cong Globe, 35th Cong, 1st Sess 13–14 (Dec 9, 1857) (proposing and adopting a rotating chaplaincy in the Senate). Some sources report that the House’s switch to a rotating chaplaincy lasted for six years, from the Thirty-fourth through the Thirty-sixth Congress. See House Chaplain Website, online at <http://chaplain.house.gov/histInfo.html> (visited Oct 16, 2006) (noting that “from 1855 to 1861 the local clergy in the District of Columbia conducted the opening prayer,” and “[t]hereafter, the House has elected a Chaplain at the beginning of each Congress”); Byrd, *The Senate* at 302 (cited in note 27) (noting that in 1855, the House “decided to discontinue its practice of electing a regular chaplain” and instead “various members of the District of Columbia clergy were invited to take turns opening each session and preaching the sermon on Sundays”). The Congressional Globe, however, indicates that situated chaplains were elected for at least some of this time; only during the Thirty-fifth Congress did the House use a rotating chaplaincy program exclusively. In the Thirty-fourth Congress, the House took up the nominations on February 20 and elected Daniel Waldo as chaplain for the First Session of the Thirty-fourth Congress. Cong Globe, 34th Cong, 1st Sess 486 (Feb 21, 1856). In the Thirty-sixth Congress, the nominations were taken on March 6, 1860, and voted upon that day, electing Thomas Stockton. Cong Globe, 36th Cong, 1st Sess 1015, 1016 (Mar 6, 1860). Throughout the debates in these two Congresses, various proposals to invite the clergy of the District of Columbia were offered, but none succeeded in being adopted.

¹⁵⁰ Cong Globe, 36th Cong, 1st Sess 98 (Dec 12, 1859).

and consider as such; a Chaplain who would become acquainted with us, and who would know the interests and wants of the body.”¹⁵¹ With only a little discussion, the resolution setting an election for the following Thursday was adopted and the Senate turned to discussion of the events at Harper’s Ferry.¹⁵² The House’s reaction, although coming later (March 1860) and wrought with much more parliamentary wrangling,¹⁵³ was tersely summarized by Representative Thomas Florence of Pennsylvania. In response to an offer to repeat the rotating plan of the Thirty-fifth Congress, Florence replied, “Well, but that system has failed entirely.”¹⁵⁴ The fervent objections of some members notwithstanding, the majority ratified his view, and proceeded to an election the next day.¹⁵⁵ The deciding factor for Congress was that a rotating chaplain could not sustain the ongoing pastoral relationships that it sought, but a situated chaplain could.

This difference has ramifications for courts considering the Establishment Clause and legislative chaplaincies. When applied to rotating chaplaincies, the principle of deference to the legislature’s choice as embodied by *Marsh* should be amended due to the different relationship involved. Specifically, there is a higher likelihood of Establishment Clause problems where rotating chaplains are concerned, and courts should be correspondingly more vigilant when evaluating these chaplaincies. It is relatively easy to mask what would otherwise be impermissible motives when there is no ongoing pastoral relationship in part because rotating chaplains’ relationships to the institution are more attenuated. First, this attenuated relationship makes inclusion of some faiths—and the concomitant exclusion of others—less obvious and more harmful than it would be in the context of a situated chaplain. Second, and paradoxically, the rotating chaplain’s location external to the legislative institution makes his position more likely to be seen as an entanglement between church and state.

The lack of an ongoing pastoral relationship in a rotating chaplaincy program may allow a legislature to mask an impermissible motive that would be unacceptable if it arose in a situated chaplaincy program. In *Simpson*, the county board set a blanket exclusion based on faith, inviting only rotating chaplains who would offer a prayer in

¹⁵¹ *Id.*

¹⁵² See Byrd, *The Senate* at 302 (cited in note 27). See also Cong Globe, 36th Cong, 1st Sess 98 (Dec 12, 1859) (adopting the amendment).

¹⁵³ See, for example, Cong Globe, 36th Cong, 1st Sess 992–94 (Mar 5 and 7, 1860) (recording the debate over whether or not electing a chaplain should be considered a privileged motion).

¹⁵⁴ *Id.* at 994.

¹⁵⁵ *Id.* at 1015–16.

the Judeo-Christian tradition.¹⁵⁶ If the same were set as a requirement for employment as a situated chaplain—an officer of the legislature¹⁵⁷—it would clearly be unconstitutional: “no non-Judeo-Christians need apply” would be a religious test for office prohibited by Article VI.¹⁵⁸ Read this way, *Simpson* permits a legislature to take actions in the rotating chaplaincy context that the Establishment Clause would bar it from taking with respect to a situated chaplaincy: the exception *Marsh* “carv[es] out . . . [of] the Establishment Clause”¹⁵⁹ ends up swallowing the rule.

The second problem posed by legislative actions in the rotating chaplaincy context is the location of those chaplains outside the legislative institution. A situated chaplain is “an officer of the house which chooses him, and nothing more.”¹⁶⁰ He is located within the legislative institution, focusing on it and its pastoral needs. In *Marsh*, the Presbyterian chaplain of the Nebraska Legislature “was reappointed because his performance and personal qualities were acceptable to the body appointing him.”¹⁶¹ Thus, an ongoing pastoral relationship gave the legislature some objective indicators of job performance on which to evaluate the chaplain, which in turn satisfied the Court that there was no impermissible motive involved in his sixteen year tenure. A court can more easily evaluate whether a chaplain situated within an institution is doing a good job, and therefore whether the legislature might have an impermissible motive in reappointing him.

A rotating chaplain, by contrast, has a more attenuated relationship to the institution and no ongoing pastoral relationship on which a legislative body could base an objective evaluation. The legislature lacks an adequate basis on which to evaluate performance or to select for certain personal qualities—and therefore so would a court. Most of the criteria involved in selecting a single situated chaplain are simply not in play (or are to a much lesser degree) when it comes to a

¹⁵⁶ See *Simpson*, 404 F3d at 280 (describing the reasons for rejecting *Simpson*’s request to be put on the list of rotating chaplains).

¹⁵⁷ See US Const Art I, § 2, cl 5 (“The House of Representatives shall chuse their . . . other Officers.”); US Const Art I, § 3, cl 5 (“The Senate shall chuse their other Officers.”).

¹⁵⁸ See US Const Art VI, § 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public trust under the United States.”); *Torcaso v Watkins*, 367 US 488, 495 (1961) (striking down a requirement that state public officials swear an oath professing belief in a supreme being).

¹⁵⁹ *Marsh*, 463 US at 796 (Brennan dissenting).

¹⁶⁰ S Rep No 376 at 2 (cited in note 145). Indeed, the Senate Judiciary Committee followed this analysis all the way through, comparing Senate Chaplains to messengers, pages, and other officers: “Where, then, is the impropriety of having an officer to discharge these duties? And how is it more a subject of just complaint than to have officers who attend to the private secular business of members?” *Id.*

¹⁶¹ *Marsh*, 463 US at 793.

rotating chaplaincy. There are fewer objectively available institutional cues a court can read when the chaplain is not situated within an institution. For that reason, courts ought to be more vigilant to ensure that proffered justifications do not manifest impermissible motivations.

Under this heightened standard, *Simpson* was wrongly decided. Applying *Marsh* without taking into consideration the rotating nature of the chaplaincy may have allowed a legislative body to use *Marsh* to protect an otherwise impermissible motivation. The Fourth Circuit therefore extended *Marsh* improperly in arguing that the decision to exclude Simpson was analogous to the decision in *Marsh* to select only a Presbyterian clergyman.¹⁶² The *Marsh* Court did scrutinize the selection process, albeit lightly, and found sufficient grounds in “performance and personal qualities.”¹⁶³ In *Simpson*, no criteria were given except for “Judeo-Christian tradition,” yet the Fourth Circuit read *Marsh* as requiring no scrutiny at all.¹⁶⁴ The lack of remand in *Marsh* is quite consistent with a low level of scrutiny. Based on the record before it, however, the *Marsh* Court was satisfied that there were adequate reasons given for hiring the same minister over sixteen years. The Fourth Circuit misread low scrutiny for no scrutiny, and looked past a facially problematic motivation.

On the other hand, this heightened scrutiny of rotating chaplaincies would not overturn the Tenth Circuit’s decision in *Snyder*. The Tenth Circuit properly concluded that the proposed prayer would disparage another’s faith, and that the town council therefore legitimately excluded it.¹⁶⁵ The Seventh Circuit’s decision not to lift the injunction against legislative prayer in *Hinrichs* was likewise correct. It was properly alert to the possibility that a legislature could mask establishmentarian motivations behind a rotating chaplaincy.¹⁶⁶ The potential problems of holding the legislature responsible for the words of a rotating chaplain might have been avoided, however, by focusing more tightly on the legislature’s actions in repeatedly choosing sectarian chaplains, rather than on the content of the chaplains’ prayers.

Extending *Marsh* to protect the legislature’s freedom to choose rotating chaplains allows a legislature to do under cover of night what it could not do in the daylight: systematically exclude disfavored reli-

¹⁶² See *Simpson*, 404 F3d at 285 (“A party challenging a legislative invocation practice cannot, therefore, rely on the mere fact that the selecting authority chose a representative of a particular faith, because some adherent or representative of some faith will invariably give the invocation.”).

¹⁶³ 463 US at 793.

¹⁶⁴ See *Simpson*, 404 F3d at 285 (noting that the *Marsh* Court did not remand for a factual finding on impermissible motive).

¹⁶⁵ See *Snyder*, 159 F3d at 1236.

¹⁶⁶ See *Hinrichs*, 440 F3d at 401.

gious groups from a chaplaincy. Courts should be careful that legislatures are not using rotating chaplaincies as a way to open up the *Marsh* exception to swallow the Establishment Clause.

Arguably Judge Lucero may be correct in his concurrence in *Snyder*, in which he concludes that *Marsh* simply should not be extended to rotating chaplaincies at all. Instead, Judge Lucero suggested they should be evaluated under *Lemon*.¹⁶⁷ This position fails to recognize, however, that situated chaplaincies may not be the best fit for every legislative body. Granted, Congress decided, rather emphatically, that a rotating chaplaincy did not meet its needs.¹⁶⁸ The history of rotating chaplaincies is just as long, however, if not as glamorous.¹⁶⁹ The historical justifications offered by *Marsh* apply, if with somewhat weaker force, to rotating chaplaincies. It should not be the case that a rotating chaplaincy will always violate the Establishment Clause; courts should merely be more alert to the possibility of violation where rotating chaplaincies are concerned.

B. Establishment through Chaplain Prayers

What the chaplain says as an officer of the legislature can also violate the Establishment Clause. One of the acknowledged limits to the *Marsh* exception is that the prayers, taken as a whole and in context, should not “advance any one, or [] disparage any other, faith or belief.”¹⁷⁰ In a sense, rotating and situated chaplains stand on equal ground here: both of them can breach this limit.¹⁷¹ The difference is that rotating chaplains, because of their location outside the legislative institution, may face a greater temptation to cross this line than situated chaplains.¹⁷²

The integration of a situated chaplain into the life of the legislature itself is significant in this respect. A chaplain who knows that he must frequently minister to people outside of his own faith poses less of a risk of religious favoritism or exclusion than one who knows he is

¹⁶⁷ See *Snyder*, 159 F3d at 1238–43 (Lucero concurring) (emphasizing that “an open prayer system has the potential, in its mere administration, to violate the Establishment Clause”). See also note 124 (discussing Lucero’s argument that *Marsh* should be limited to situated chaplaincies).

¹⁶⁸ See notes 148–55 and accompanying text.

¹⁶⁹ See *Marsh*, 463 US at 788–90; NCSL Amicus Brief at *1–6 (recounting the results of a survey of the ninety-eight state legislative bodies, showing that chaplains’ compensation levels are generally very meager).

¹⁷⁰ *Marsh*, 463 US at 794–95. These are the sentences from *Marsh* that tend to reappear the most frequently, as pointed out by *Pelphrey v Cobb County*, 410 F Supp 2d 1324, 1337 (ND Ga 2006) (noting the “two oft-quoted sentences”).

¹⁷¹ See, for example, *Hinrichs*, 440 F3d at 402 (describing the legislature’s failure to cabin in the prayers of a rotating chaplain); *Kurtz*, 829 F2d at 1134–36 (detailing the exchange of letters between Kurtz and the congressional chaplain, and the latter’s refusal to let Kurtz deliver a lesson that would disparage the chaplain).

¹⁷² See note 147 (discussing the competing loyalties of a rotating chaplain).

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giving an invocation as a representative of his faith. For example, interfaith Bible study groups—including Jewish, Catholic, and Protestant senators—began under Senate Chaplain Richard Halverson. At Halverson’s retirement, Senator Joseph Lieberman called him “a true student of both the Old and the New Testament.”¹⁷³ On the other hand, a Methodist chaplain who knew the next invocation would be delivered by a rabbi might have no incentive to minister to the Jewish legislator herself, preferring to leave that task to the rabbi. The ministers invited in *Simpson* were sent invitations specifically because they were “religious leaders,”¹⁷⁴ not because of any special attachment to personal qualities or job performance. They were necessarily leaders in their own denominations, so the invitations were effectively issued to them as Methodist leaders, Muslim leaders, and Catholic leaders. The plural nature of the situated chaplain’s congregation forces her to take a position that is generally neutral among the competing faiths. A rotating chaplain, by contrast, has precisely the opposite incentive: when invited as a leader in her own denomination, the natural incentive is to speak as a leader of that faith rather than as person situated within the legislative institution itself.

This tension is illustrated by the different resolutions in *Wynne* and *Kurtz*. In *Wynne*, councilors delivered invocations before each town council meeting, naming and including the people of the town in the prayer.¹⁷⁵ A citizen of the town sued, arguing that the invocation of Jesus’s name was an impermissible establishment, and the Fourth Circuit agreed.¹⁷⁶ When confronted with a multid denominational audience, rotating chaplains had no incentive to minister to people outside of their own denomination, and it took a lawsuit ending in an injunction to resolve the problem.¹⁷⁷ *Kurtz*, by contrast, had a happier ending. Because Reverend Halverson had an ongoing pastoral relationship with the Senate, he saw it as important to open a dialogue with Kurtz and deal with the allegations of sectarianism and disparagement.¹⁷⁸ These two cases demonstrate that a rotating chaplain has less of an incentive to deal with the pluralistic nature of her “congregation,” while a situated chaplain has no choice but to do so.

¹⁷³ 104th Cong, 1st Sess in 141 Cong Rec S 3763 (Mar 10, 1995) (Sen Lieberman).

¹⁷⁴ *Simpson*, 292 F Supp 2d at 808.

¹⁷⁵ See 2003 US Dist LEXIS 21009 at *6–7 (noting how the content of the invocation is determined and the its overarching guidelines).

¹⁷⁶ See *Wynne*, 376 F3d at 302.

¹⁷⁷ This Comment classifies the councilors here as rotating chaplains because they do not have an ongoing *pastoral* relationship with the listeners. See note 133 (analyzing the complications posed by *Wynne*).

¹⁷⁸ 829 F2d at 1135.

This is not to say that rotating chaplains will always run afoul of the Establishment Clause in this manner. The Fourth Circuit properly noted “*Marsh’s* insight that ministers of any given faith can appeal beyond their own adherents.”¹⁷⁹ The mere presence of a minister of a particular faith does not mean that the prayers said will necessarily be prejudicial; only the chaplains’ words, over time and taken as a whole, will raise the inference of sectarianism.¹⁸⁰ It should be possible for rotating chaplains to remain sensitive to the needs of the rhetorical occasion at hand and speak from within their own tradition to everyone.¹⁸¹

The Seventh Circuit made the point in *Hinrichs* that evaluating a rotating chaplaincy over time means essentially holding the legislature responsible if that cumulative analysis does indeed show a tendency to advance or disparage a faith.¹⁸² This argument underscores (by way of contrast) the fact that situated chaplains, as institutional officers, are more easily held accountable for a cumulative effect than rotating chaplains, any one of whom may or may not have contributed to the effect. In holding the legislature responsible for the cumulative sectarian effect of the chaplains’ prayers, the Seventh Circuit underlined the greater dangers posed to the Establishment Clause by a rotating chaplaincy, and the concomitant need for a watchful judiciary in this area. Although the prayers of both situated and rotating chaplains can violate the Establishment Clause, it is easier and more tempting for a rotating chaplain to run afoul of its limits, and there are fewer methods of redress short of lawsuit and injunction.

CONCLUSION

The institution of legislative chaplaincies validated by *Marsh* enjoys a historical pedigree that can hardly be matched by other institutions. The chaplains preexisted the Constitution and even the Union itself. Congress tried to do without them, and could not. The states

¹⁷⁹ *Simpson*, 404 F3d at 287.

¹⁸⁰ See *Pelphrey*, 410 F Supp 2d at 1339 (“Where the invocation of sectarian concepts or beliefs, viewed from a cumulative perspective, reaches a certain level of ubiquity and exclusivity, the appearance of a legislative preference for one particular faith may well become constitutionally intolerable.”). This is seen in action in *Hinrichs*, when the Seventh Circuit examined the tenor of the rotating chaplains’ prayers over time and attributed the sectarian tone to the legislature. See *Hinrichs*, 440 F3d at 402.

¹⁸¹ Contrary to Lucero’s concurrence in *Snyder*, this will not require judges to listen to every prayer, “gavel ready,” to parse the wording. See *Snyder*, 159 F3d at 1239 (Lucero concurring) (arguing that expanding *Marsh* beyond situated chaplaincies would result in the need for continued policing and surveillance). As *Marsh* specified, the prayers themselves are examined over time, cumulatively, and in context. See *Marsh*, 463 US at 794–95. See also *Wynne*, 376 F3d at 298, 298 n 4; *Pelphrey*, 410 F Supp 2d at 1339.

¹⁸² See *Hinrichs*, 440 F3d at 402 (emphasizing that the litigation arose because of the Indiana House’s failure to provide the “ecumenical prayer” it ostensibly sought).

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adopted them wholeheartedly, suiting the institution to their own needs individually. As a result, “[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt” of the *Marsh* majority’s somewhat Burkean observation “that the practice of opening legislative sessions with prayer has become part of the fabric of our society.”¹⁸³

“Unambiguous” might be somewhat wishful, however. The decision was ambiguous enough not to specify with precision what institution was being removed from Establishment Clause scrutiny. By blurring the distinction between situated and rotating chaplaincies lower courts have turned *Marsh* into a threat to the Establishment Clause where it was not one before, holding that its deference protects both situated and rotating chaplaincies to the same degree regardless of the potential for hostility or proselytization.

A finer-grained analysis of both sides of the chaplaincy institution—both legislative action and chaplains’ prayers—that reckons with the difference between situated and rotating chaplaincies, however, would clarify *Marsh* and prevent it from threatening the Establishment Clause. Recognizing that rotating chaplaincies pose a greater threat of establishment of religion than situated chaplaincies, a court could extend *Marsh*’s protections to practices that uphold the tradition—“so venerable and so lovely, so respectable and respected”¹⁸⁴—while preventing the unfortunately equally-venerable tradition of religious exclusion.

¹⁸³ *Marsh*, 463 US at 792.

¹⁸⁴ S Rep No 376 at 4 (cited in note 145).