

JAMES MADISON AND LEGISLATIVE CHAPLAINS

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INTRODUCTION

Intentionally or not, governments in the United States often demonstrate some religious preference or belief. The demonstrations may be verbal, as when the U.S. Congress adopted the national motto “In God We Trust,”¹ or they may take the form of nonverbal symbols or actions, as when a city adopts a seal containing a Latin cross.² But verbal or nonverbal, purposeful or incidental, they all demonstrate someone’s religious belief or preference. In the past, the governments have claimed that the religious beliefs are their own; but more often nowadays, governments claim they are merely “acknowledging” or “reflecting” the beliefs of their citizens or employees. These demonstrations are not often “coercive”—that is, they do not usually force anyone to share the religious belief upon pain of imprisonment or forfeiture of property—and the beliefs demonstrated may be widely shared in the relevant community.

The U.S. Supreme Court has sometimes said that the Establishment Clause of the First Amendment forbids governmental endorsements of any religious viewpoint, requiring government to remain strictly neutral on all issues of religious doctrine and belief.³ If this is so, even noncoercive governmental demonstrations of widely supported religious beliefs might be held to violate the Establishment Clause—at least in the case where a particular demonstration, in context, leaves the impression of governmental endorsement rather than mere acknowledgment of the beliefs of citizens.⁴

¹ See 36 U.S.C. § 302 (2000) (Supp. IV 2005).

² See *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991). The court in this case found two cities’ seals, each containing a cross, to be unconstitutional. *Id.* at 1415. Both cities separately appealed to the U.S. Supreme Court, which denied certiorari in both cases. See *City of Zion v. Harris*, 505 U.S. 1229 (1992); *City of Rolling Meadows v. Kuhn*, 505 U.S. 1218 (1992).

³ See *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8–9 (1989) (plurality opinion); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222, 225 (1963); see also *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

⁴ I am assuming *arguendo* that a distinction between “endorsement” and “mere acknowledgment” can logically be maintained for the sorts of demonstrations under discussion. Several members of the Supreme Court have viewed such a distinction as not only possible, but important and perhaps controlling. See, e.g., *County of Allegheny*, 492 U.S. at 601, 611–12 (Blackmun, J.); *id.* at 615–20 (Blackmun, J.); *id.* at 623, 625–26, 631, 635–36 (O’Connor, J., concurring); *id.* at 657–59, 662–64, 678–79 (Ken-

Many of these governmental demonstrations have come before the courts, challenged as violations of the Establishment Clause. The results have been mixed. When the governmental action has occurred in the context of a public elementary or secondary school, it has most often been struck down.⁵ When the governmental action has occurred in other contexts, however, the courts usually have been more deferential to the government,⁶ although invalidations of such demonstrations are not hard to find.⁷ Meanwhile, the task of unifying these disparate precedents and ex-

nedy, J., concurring in part and dissenting in part); *Lynch v. Donnelly*, 465 U.S. 668, 674, 677–78, 683, 686 (1984) (Burger, C.J.); *id.* at 692–94 (O’Connor, J., concurring); *id.* at 714–17 (Brennan, J., dissenting). But one might be pardoned for doubting. Except in comparatively rare situations where the government somehow demonstrates multiple beliefs that are necessarily mutually exclusive, or where the government frames its demonstration of a particular belief by explicitly *disclaiming* any endorsement of the belief, a demonstration “acknowledging” a belief would seem to connote endorsement of it. Indeed, choosing to “acknowledge” one particular belief rather than remain silent or “acknowledge” a competing belief is a process one might reasonably assume to be influenced by and indicative of the chooser’s own beliefs and preferences.

⁵ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316–17 (2000) (holding a school-orchestrated scheme for continuing the long-standing practice of public prayer before home football games unconstitutional); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (plurality opinion) (finding school-scheduled invocation and benediction prayers at graduation ceremonies unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985) (holding amending of state statute so as to encourage students to use the mandatory moment of silence for the purpose of “voluntary prayer” had no secular purpose and was unconstitutional); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (finding posting a copy of the Ten Commandments in classrooms unconstitutional); *Schempp*, 374 U.S. at 225–26 (holding daily Bible readings unconstitutional without comment); *Engel*, 370 U.S. at 430 (finding daily prayer recitations in schools unconstitutional).

⁶ See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (plurality opinion) (upholding an outdoor monument to the Ten Commandments displayed on the park grounds of the state capitol, where the grounds contained other secular monuments as well); *County of Allegheny*, 492 U.S. at 617–18 (upholding the city’s display during the Christmas and Chanukah seasons of a privately owned eighteen-foot Chanukah menorah on city property, where the menorah was flanked by a forty-five-foot Christmas tree and a sign reading “Salute to Liberty”); *Lynch*, 465 U.S. at 684–85 (upholding a city-owned nativity scene displayed during Christmas season in a privately owned park located in a busy shopping district, where the nativity scene was flanked by nonreligious elements such as a Santa Claus house and a Christmas tree); *Marsh v. Chambers*, 463 U.S. 783, 792–93 (1983) (upholding paid legislative chaplains); *McGowan v. Maryland*, 366 U.S. 420, 444 (1961) (upholding laws requiring business closings on Sundays); *Katcoff v. Marsh*, 755 F.2d 223, 237 (2d Cir. 1985) (upholding paid military chaplains).

⁷ See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 880 (2005) (striking down governmental display of the Ten Commandments alongside arguably secular historical documents inside county courthouses); *County of Allegheny*, 492 U.S. at 598–602 (striking down a county-owned nativity scene displayed during Christmas season on county courthouse steps, where the nativity scene was accompanied only by a frame of flowers and evergreen trees and a banner reading, “*Gloria in Excelsis Deo*”); *Texas Monthly*, 489 U.S. at 25 (plurality opinion) (striking down a state sales tax exemption granted only to publications that were religious); *Wynne v. Town of Great Falls*, 376 F.3d 292, 302 (4th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005) (striking down the practice of opening town council meetings with prayers invoking Jesus Christ).

tracting some binding legal rule has become a Herculean labor, if not altogether impossible.⁸

Thus serious questions remain about the constitutionality of noncoercive governmental demonstrations of religious beliefs. Perhaps because of this uncertainty, there has been an increased interest in discovering what the Founding generation, including those who framed and ratified the First Amendment, understood the Establishment Clause to forbid. This concern with the original intent behind the Establishment Clause is not new,⁹ nor is it confined to those who would call themselves “originalists” in matters of constitutional interpretation.¹⁰ But as time has passed and precedent has ac-

⁸ The difficulty is well illustrated by the confused holdings of the two Establishment Clause cases decided most recently by the U.S. Supreme Court, appearing in separate decisions issued on the same day in 2005. Both cases involved governmental displays of the Ten Commandments on non-school governmental property. In one case the display was inside a government building and included arguably secular historical documents. See *McCreary County*, 545 U.S. at 854–57. In the other case, the display was an outdoor monument to the Ten Commandments that stood alone in a government park (although the park contained other, secular monuments scattered over twenty-two acres, at an average density of fewer than two per acre). See *Van Orden*, 545 U.S. at 681 (plurality opinion). The decision was 5-4 to uphold the outdoor, solitary display, although there was no majority opinion. *Id.* at 679 (plurality opinion). But the decision was 5-4 to strike down the indoor, multifaceted display. *McCreary County*, 545 U.S. at 848. Only one member of the Court, Justice Breyer, voted with the majority in both cases, and he refused to join the plurality opinion regarding the outdoor display. *Van Orden*, 545 U.S. at 702–05 (Breyer, J., concurring in judgment). Divergent results like these, issued simultaneously in two cases that involved the same type of noncoercive governmental action and even the same biblical text, must surely puzzle observers trying to discern what the Court believes the Establishment Clause requires.

⁹ Right from the beginning of the Supreme Court’s Religion Clause jurisprudence, the Justices drew heavily on historical evidence of the intent of the Framers, especially James Madison. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–16 (1947) (majority opinion); *id.* at 31–45 (Rutledge, J., dissenting); *Reynolds v. United States*, 98 U.S. 145, 162–64 (1878). The history discussion was continued, expanded, and used as supporting evidence in many subsequent Establishment Clause opinions. See, e.g., *McCreary County*, 545 U.S. at 876–80; *id.* at 881–85 (O’Connor, J., concurring); *id.* at 885–89, 893–99 (Scalia, J., dissenting); *Van Orden*, 545 U.S. at 685–88 (plurality opinion); *id.* at 721–31 (Stevens, J., dissenting); *id.* at 737 (Souter, J., dissenting); *Lee*, 505 U.S. at 590 (plurality opinion); *Wallace*, 472 U.S. at 91–106 (Rehnquist, J., dissenting); *Engel*, 370 U.S. at 425–36; *McGowan*, 366 U.S. at 460–61, 463–66 (Frankfurter, J., concurring). See generally Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court’s Use of History in Religion Clause Cases*, 85 OR. L. REV. 563 (2006) (collecting data on uses of history in Religion Clause opinions).

¹⁰ Members of the Supreme Court who have analyzed the historical record at some length to draw conclusions about the original intent behind the Establishment Clause include, among others, Chief Justice Warren and Justices Brennan, Blackmun, Souter, and Stevens. See, e.g., *Van Orden*, 545 U.S. at 721–31 (Stevens, J., dissenting); *Lee*, 505 U.S. at 600–01, 605–06, 608 (Blackmun, J., concurring); *id.* at 612–16 (Souter, J., concurring); *Schempp*, 374 U.S. at 232–41, 296–300 (Brennan, J., concurring); *McGowan*, 366 U.S. at 431–34, 437–42 (Warren, C.J., majority opinion). Likewise, several leading commentators who have rejected originalism (at least in some contexts) as a means of defining constitutional law have nevertheless sought to understand the intent of those who wrote and ratified the Establishment Clause. See, e.g., LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 94–145, 239 (2d ed., rev. 1994); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-3, at 1158–60 (2d ed. 1988); Mark V. Tushnet, *The Origins of the Establishment Clause*, 75 GEO. L.J. 1509 (1987) (book review).

cumulated, both judges¹¹ and commentators¹² have shown an increased level of interest in the Framers' attitudes about church and state.

If one hopes to discover what the Framers *thought* about church and state, one should at least consider what they *did* about it. In fact, several Justices of the Supreme Court have signaled that, in the context of governmental demonstrations of religious belief, they view the practices of the Framers while holding political office as practically determinative of the Establishment Clause's meaning.¹³ And indeed, there is some historical evi-

¹¹ Members of the Supreme Court who have recently canvassed historical records to discover the Founders' attitudes about church and state include Chief Justice Rehnquist and Justices Thomas, Stevens, Souter, O'Connor, and Scalia. See, e.g., *Van Orden*, 545 U.S. at 686–88 (Rehnquist, C.J.) (plurality opinion); *id.* at 721–31 (Stevens, J., dissenting); *McCreary County*, 545 U.S. at 876–82 (Souter, J.) (majority opinion); *id.* at 881–84 (O'Connor, J., concurring); *id.* at 885–89, 893–99 (Scalia, J., dissenting); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–54 (2004) (Thomas, J., concurring).

¹² There is a vast scholarly literature in this area of legal history, and much has been written even within the past five years. Among these works, the scholarship addressing Establishment Clause issues includes DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002); NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002); DAVID LOWENTHAL, *PRESENT DANGERS: REDISCOVERING THE FIRST AMENDMENT* (2d rev. ed. 2003); WILLIAM LEE MILLER, *THE FIRST LIBERTY: AMERICA'S FOUNDATION IN RELIGIOUS FREEDOM* (rev. ed. 2003); JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* (2d ed. 2005); THE FOUNDERS ON GOD AND GOVERNMENT (Daniel L. Dreisbach et al. eds., 2004); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002); Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 15–24 (2005); James J. Knically, "First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?, 52 DRAKE L. REV. 171 (2004); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003); Gabriël A. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. REV. 535, 537–39; Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73 (2005); Steven H. Shiffirin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9 (2004); John Witte, Jr., *From Establishment to Freedom of Public Religion*, 32 CAP. U. L. REV. 499 (2004); Symposium, *The (Re)turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697 (2006) (including articles by Steven K. Green, Marci A. Hamilton, and Rachel Steamer; Douglas Laycock; Steven D. Smith; and Lee J. Strang).

¹³ See, e.g., *Van Orden*, 545 U.S. at 686, (Rehnquist, C.J., plurality opinion) (joined by Scalia, Thomas, and Kennedy, J.J.) ("[I]n dealing with the sort of passive monument that Texas has erected on its Capitol grounds . . . our analysis is driven [not by the *Lemon* test but] by the nature of the monument and by our Nation's history. As we explained in [*Lynch*], 'There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.'"); *id.* at 686–90 (listing governmental practices, acknowledgements, and displays that are presumptively valid, despite having some religious component, because of "the role played by the Ten Commandments in our Nation's heritage" and "the rich American tradition of religious acknowledgements"); *McCreary County*, 545 U.S. at 892 (Scalia, J., dissenting) (joined by Rehnquist, C.J., and Thomas, J.) (arguing that "the antiquity of the [governmental] practice at issue . . . would be a good reason for finding the neutrality principle a mistaken interpretation of the [Establishment Clause of the] Constitution" and for upholding the practice); *id.* at 885–893 (citing various governmental practices and acknowledgements of religion throughout American history to show that the "principle that the government cannot [constitutionally] favor religion over irreligion" is "demonstrably false"); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in

dence of this sort to find; one can point to a few national governmental practices during the Founding era that might qualify as demonstrations of support for a religious belief.

Perhaps the most striking of these is the legislative chaplaincy,¹⁴ which is worthy of study as an ongoing demonstration of religious belief by the national government, one that has existed from the Founding until the present—from the 1770s forward—without any significant break.¹⁵ As defined

part and dissenting in part) (joined by Rehnquist, C.J., and Scalia and White, J.J.) (“Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. . . . Any approach less sensitive to our heritage would border on latent hostility toward religion.”); *id.* at 662–63 (“In determining whether there exists an establishment, or a tendency toward one, we refer to the other types of church-state contacts that have existed unchallenged throughout our history, or that have been found permissible in our case law. . . . Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.”); *id.* at 669 (“I take it as settled law that, whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence.”); *id.* at 670 (“Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion. . . . A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.”); *id.* at 671–74 (listing several examples of longstanding governmental practices and arguing that they should not be held to violate the Establishment Clause despite their endorsement of religion); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (Burger, C.J., majority opinion) (joined by White, Blackmun, Powell, Rehnquist, and O’Connor, J.J.) (“[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—their actions reveal their intent. . . . It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.”); *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.”); *id.* at 792 (“In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. . . . [and] is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment.”); *id.* at 794 (“Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature’s chaplaincy; remuneration is grounded in historic practice initiated . . . by the same Congress that drafted the Establishment Clause of the First Amendment.”); *id.* at 795 (“The unbroken practice for two centuries in the National Congress, and for more than a century in Nebraska and in many other states, gives abundant assurance that there is no real threat.”).

¹⁴ See 2 U.S.C. §§ 61d, 84-2 (2000) (providing salaries for the Chaplain of the Senate and the Chaplain of the House of Representatives).

¹⁵ As Canon Stokes noted in 1950: “Except for one or two brief periods when there were no elected chaplains and when local clergy of different denominations officiated in turn during the 35th Congress (1858–59), this custom of having regular chaplains open the daily sessions [of Congress] with prayer has been followed for over a century and a half. The long break referred to seems to have been due to the fact that the chaplaincy had fallen into disrepute because the elections were marred by politics.” 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 457 (1950).

Military chaplaincies also date from the same early period. See *id.* at 267–72. These are said by some to constitute a governmental endorsement of religion. They were not chosen for direct study in

by various colonial, state, and national legislatures of this country, the duty of legislative chaplains generally has consisted of beginning meetings of the legislature by offering public prayers in the assembly hall; legislators are invited to attend and silently join the prayers.¹⁶ Legislative chaplains are usually members of the local clergy who are paid for their sacred services from public funds, and thus the legislative chaplaincy is remarkably coercive relative to most other religious endorsements by our national government. From the Founding era onward, the congressional chaplaincy scheme has provided for payment of the chaplains from general tax revenues, with no tax exemption allowed for religious objectors.¹⁷

But the congressional chaplaincy is worthy of study for another reason as well: its longstanding history has influenced the Supreme Court, causing the Court to retreat from the relatively stringent *Lemon* test¹⁸ in several Establishment Clause cases involving noncoercive governmental demonstrations of religious belief, providing justification for increased judicial deference to the government in such cases. The retreat began with the 1983 case of *Marsh v. Chambers*,¹⁹ in which the Court upheld the practice of the legislative chaplaincy based solely on its acceptance by the Framers of the Establishment Clause.²⁰ *Marsh* then provided the earliest support for the Court to incrementally and selectively abandon the *Lemon* test, beginning

this Article, however, for two reasons: (1) the coercive nature of military service presents serious questions, not presented by legislative chaplaincies, whether the government might be required under the Free Exercise Clause to accommodate the religious rights and needs of those served by the chaplains—as well as questions whether, given those circumstances, the national government may plausibly be said to be endorsing anything; and (2) there is clear and well-known evidence of James Madison’s involvement in creating the institution of legislative chaplaincies, but not military chaplaincies, at the national level. For Madison’s actions relative to military chaplains, see *infra* Part III.B. See also *infra* notes 243–44 and accompanying text (discussing Madison’s writings opposing military chaplaincies).

One other continuing federal practice with Founding-era origins is governmental proclamations recommending, but not requiring, days of national thanksgiving or fasting. See 1 STOKES, *supra*, at 451–54, 486–92. Obviously these are endorsements of religion and religious practice by someone, but there may be some question whether the endorsement issues from the government or from the speaker in his individual, private capacity. Moreover, proclamations are significantly less coercive even than chaplaincies because no taxation or other governmental compulsion is necessary for a proclamation. Madison did not set the precedent for such proclamations, although he did issue a handful of them as President, during the War of 1812. See *infra* note 252.

¹⁶ See 1 STOKES, *supra* note 15, at 448–51, 456–58; *Marsh*, 463 U.S. at 786–89; Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2104–06 (1996).

¹⁷ See *Marsh*, 463 U.S. at 787–88; ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 113 (1988); LEVY, *supra* note 10, at xiv; *supra* notes 14–15.

¹⁸ Announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under this test, to survive an Establishment Clause challenge the governmental action must satisfy three independent requirements: (1) “it must have a secular legislative purpose”; (2) “its principal or primary effect must be one that neither advances nor inhibits religion”; and (3) it “must not foster an excessive governmental entanglement with religion.” *Id.* at 612–13 (internal citations and quotation marks omitted).

¹⁹ 463 U.S. 783.

²⁰ *Id.* at 787–95; see also *id.* at 796–97 (Brennan, J., dissenting) (criticizing the majority for failing to apply the *Lemon* test).

the next term with *Lynch v. Donnelly*, a case challenging governmental displays of nativity scenes during the Christmas season.²¹ *Marsh* and *Lynch* have, in turn, formed the core of the Court's precedential support for a selective abandonment of both the strict scrutiny and the *Lemon* tests in Establishment Clause cases²²—most recently in the Court's 2005 plurality opinion in *Van Orden v. Perry*.²³ Similarly, the long practice of the legisla-

²¹ 465 U.S. 668 (1984). The Court thus wasted no time in putting the *Marsh* precedent to use. The majority opinion in *Lynch* purported to apply the *Lemon* test, but only as viewed through the lens of the *Marsh* opinion (which did not apply the *Lemon* test). The *Lynch* Court concluded that the display at issue did not have the primary effect of advancing religion (thus satisfying *Lemon*'s second prong), and also was not an endorsement of religion (thus satisfying *Lemon*'s third prong); but the rationale for both of these findings was that to find otherwise would call into question, inter alia, the legislative chaplaincy upheld a year earlier in *Marsh*. *Id.* at 681–82.

Chief Justice Burger, the author of the opinions of the Court in both *Lemon* and *Marsh*, wrote for the majority in *Lynch* that “we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.” *Id.* at 679. But whatever the Court had previously “emphasized,” either prior to *Lemon* or subsequently in dicta, since the *Lemon* decision the Court had failed to apply the *Lemon* test in exactly one Establishment Clause case: *Marsh v. Chambers*. *Lee v. Weisman*, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring) (“Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of *Marsh v. Chambers*, has the court not rested its decision on the basic principles described in *Lemon*.”).

In fact, as examples of post-*Lemon* Establishment Clause opinions in which the Court had not applied *Lemon*, the *Lynch* Court cited only two cases: *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Larson v. Valente*, 456 U.S. 228 (1982). *Lynch*, 465 U.S. at 679. *Larson* was a weak example at best. In *Larson* the Court had concluded that “application of the *Lemon* test is not necessary to the case before us” but had gone on to apply it anyway, discussing it at length and concluding that the state had violated the third prong—the entanglement prong—of the test. *Larson*, 456 U.S. at 251–55. Even if the application of *Lemon* in *Larson* were dictum, the more rigorous strict scrutiny test was the alternative test the *Larson* Court had applied to the state action at issue, on the ground that the state had benefited some religious denominations over others. It is debatable whether the *Lynch* opinion applied even the *Lemon* test in any serious way; but it is at least clear that the *Lynch* Court did not apply strict scrutiny. The *Lynch* opinion followed *Marsh* and not *Larson* in applying a more deferential test than strict scrutiny and upholding the state practice at issue.

²² In *County of Allegheny*, Justices Blackmun and O'Connor refused to apply the *Lemon* test; their reasoning was based on the so-called endorsement test, which came from Justice O'Connor's concurring opinion in *Lynch* and its sympathetic representation of the holding in *Marsh*. See *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592–98, 601–05, 614–16, 621 (1989) (Blackmun, J.); *id.* at 625–27, 630–31, 637 (O'Connor, J., concurring in part and concurring in judgment). Four other Justices likewise disclaimed any intent to advocate or adopt the *Lemon* test as their “primary guide in this difficult area,” preferring instead to rely on *Marsh*'s teaching that practices acknowledging religion that are “accepted in our national heritage” are presumptively valid. *Id.* at 655, 662–63 (Kennedy, J., concurring in part and dissenting in part) (joined by Rehnquist, C.J., and White and Scalia, J.J.). Subsequently, several Justices have criticized or abandoned *Lemon*. See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399–400 (1993) (Scalia, J., concurring) (joined by Thomas, J.); *Lee*, 505 U.S. at 586–87 (plurality opinion).

²³ 545 U.S. 677 (2005). As the Court once again considered a noncoercive governmental demonstration of religious belief, the plurality used the *Marsh* precedent as a justification for abandoning *Lemon*. See *id.* at 684–87, 689–90 (plurality opinion) (concluding that the Court was not bound to follow *Lemon* because Establishment Clause precedents did not show uniform application of *Lemon* test (citing *Marsh*, 463 U.S. 783 (upholding paid legislative chaplaincy))). Justice Breyer, who concurred in the result in *Van Orden* but did not join the plurality opinion, nevertheless agreed that the *Lemon* test

tive chaplaincy has been used by many outside the Supreme Court, from a very early date, to argue for a relatively narrow interpretation of the Establishment Clause.²⁴ When it comes to noncoercive governmental demonstrations of religious belief, then, perhaps no aspect of American history—other than the debates surrounding the framing of the First Amendment itself—exerts more influence on current Establishment Clause jurisprudence than does the history of the legislative chaplaincy.

Historical analysis of the Framers' views of the practice has tended to focus on James Madison, who wrote a good deal about the First Amendment.²⁵ A principal Founding Father, Madison's influence on our nation's highest law was so great that he is popularly termed the "Father of the Constitution."²⁶ It was he who proposed the first version of the Bill of Rights, including what would become the First Amendment, to the First Congress that met under the federal Constitution.²⁷ It was he above all others who sponsored and shepherded the proposed amendments through Congress, staking his personal reputation on the outcome and repeatedly hounding

should not necessarily control the outcome in this case or other Establishment Clause cases. *See id.* at 698–700 (Breyer, J., concurring) (relying on constitutional validity of legislative chaplaincy and other examples of governmental demonstrations of religious belief). Thus in *Van Orden*, Chief Justice Rehnquist and Justices Breyer, Scalia, Thomas, and Kennedy all refused to apply *Lemon*, reasoning largely from *Marsh* and its progeny.

But in *McCreary County*, decided on the same day, a majority did apply *Lemon* to strike down a noncoercive demonstration of religious belief. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 858–59, 862–63, 879–80 (2005) (holding county's display unconstitutional because it violated the purpose prong of the *Lemon* test). As a result, it remains unclear whether such governmental demonstrations will be judged under the *Lemon* test (with skeptical inquiries into governmental purpose) or some more deferential standard. As of now, four of the current Justices (Justices Scalia, Thomas, Kennedy, and Breyer) have indicated they will at least sometimes feel free not to apply *Lemon*, while three others (Justices Ginsburg, Souter, and Stevens) seem to view it as controlling; the two newest Justices (Chief Justice Roberts and Justice Alito) have not decided an Establishment Clause case since joining the Court. *See also supra* note 22.

²⁴ In fact, as early as 1811 the twenty-two-year history of the legislative chaplaincy in the federal Congress was invoked by a House member to prove that "a bill for regulating the funds of a religious society" could not be, as President Madison was claiming in his veto message, a violation of the First Amendment (although in the end, the House did not come close to overriding Madison's veto). *See infra* notes 218–21 and accompanying text. And by 1853, the U.S. Senate reasoned that the legislative chaplaincy and similar governmental endorsements of religious belief could not be unconstitutional because, *inter alia*, the Congress that had written the First Amendment had engaged in the legislative chaplaincy practice. *See Marsh*, 463 U.S. at 788–89 n.10; *Murray v. Buchanan*, 720 F.2d 689, 696–97 & n.10 (D.C. Cir. 1983) (MacKinnon, J., dissenting) (quoting S. REP. NO. 32-376, at 4 (1853)).

²⁵ *See supra* note 9; *infra* note 30.

²⁶ *See, e.g.*, 7 THE NEW ENCYCLOPAEDIA BRITANNICA MICROPAEDIA 656–57 (15th ed. 1998). The high view of Madison's influence was apparently shared by many of his contemporaries. At the time of Madison's death, Henry Clay, John Quincy Adams, and James Barbour each eulogized him as deserving of more credit for the existence of the Union than any other individual who had ever lived, except perhaps George Washington. IRVING BRANT, THE FOURTH PRESIDENT: A LIFE OF JAMES MADISON 642 (1970).

²⁷ 1 THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 448–53 (Joseph Gales & W.W. Seaton eds., 1834) (June 8, 1789) [hereinafter ANNALS OF CONG.].

Congress until it reluctantly agreed to consider the amendments.²⁸ And Madison, to a greater degree than any other Founder, explicitly considered the legislative chaplaincy in light of the Establishment Clause and principles of religious liberty.²⁹ Thus, Madison is uniquely important to the originalist enterprise with respect to the First Amendment, and it is no surprise that he is quoted extensively in contemporary debates over both the legislative chaplaincy specifically and the meaning of the Establishment Clause more generally. But in the case of legislative chaplains, it is no mean feat to discover exactly what Madison thought the Establishment Clause permitted.

The difficulty stems from Madison's supposed change of mind, or hypocrisy, which is said to be revealed by comparing his actions as a national government official with his writings after he left office. Most judges and commentators comparing Madison's actions in office to his later writings have concluded that Madison was inconsistent, either bending his strict separationist principles earlier in life or else developing those stricter principles only later, well after the First Amendment was ratified.³⁰

The historical facts are indeed confusing and seemingly contradictory. On the one hand, during his tenure in the first House of Representatives, Madison was appointed to a House committee responsible for creating rules to regulate the appointment of chaplains, and he also voted for a bill authorizing payment of congressional chaplains.³¹ If Madison did these things while the First Amendment was being considered by Congress, the argument goes, surely he did not understand the Establishment Clause to prohibit Congress from enacting laws to appoint and pay congressional chaplains. On the other hand, after Madison left the presidency, he wrote explicitly on at least two separate occasions—in personal memoranda³² and in a private letter to Edward Livingston³³—that the legislative chaplaincy in Congress was a violation of the Establishment Clause. In the Livingston letter he also claimed that he had never approved of the practice while he

²⁸ See MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 72–73 (2002); BRANT, *supra* note 26, at 231–36; Wallace v. Jaffree, 472 U.S. 38, 92, 97–98 (1985) (Rehnquist, J., dissenting).

²⁹ See *infra* Part IV.

³⁰ See, e.g., McCreary County v. ACLU of Ky., 545 U.S. 844, 879 n.25 (2005); *id.* at 895–96 (Scalia, J., dissenting); Lee v. Weisman, 505 U.S. 577, 624–25 n.6 (1992) (Souter, J. concurring); CORD, *supra* note 17, at 30–31, 36; HAMBURGER, *supra* note 12, at 183–84; LEVY, *supra* note 10, at 120–21, 124; LEO PFEFFER, CHURCH, STATE, AND FREEDOM 247–49 (rev. ed. 1967); 1 STOKES, *supra* note 15, at 456; TRIBE, *supra* note 10, at 1165–66 n.57.

³¹ See *infra* Part II.A–B.

³² James Madison, Detached Memoranda, in Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 536–59 (1946) [hereinafter Madison, Detached Memoranda]. Madison's spelling of "Detached" is maintained throughout this Article in referring to these Madisonian papers.

³³ Letter from James Madison to Edward Livingston (July 10, 1822), in 5 THE FOUNDERS' CONSTITUTION 105–06 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Letter from Madison to Livingston].

was a member of Congress.³⁴ Did Madison simply change his mind, and then lie (or forget) about the way he used to feel? Or is it possible that Madison's later recollections were accurate and that he held consistent views on the legislative chaplaincy throughout his life?

The answer may be particularly crucial for the Supreme Court as it considers whether the Establishment Clause applies to various noncoercive governmental endorsements of religious beliefs. The Court's recent selective toleration of noncoercive endorsements is largely founded on *Marsh* and the historical practice of legislative chaplains—a practice the majority in *Marsh* found to have been accepted by all of the Framers of the Establishment Clause. If *Marsh* itself rests on a flawed understanding of the views of the principal Framer of that Clause while he was in Congress, then a reconsideration of *Marsh* and its progeny may be in order. In other words, if Madison always thought legislative chaplains were a violation of the Establishment Clause and of the natural right of religious liberty, even the strictest originalist³⁵ may rightly question the permissibility of various governmental practices of “ceremonial deism.”³⁶

This Article argues that Madison is best understood as having consistently opposed legislative chaplaincies throughout his life.³⁷ Moreover, this Article shows that Madison's views on this subject were thoroughly contemplated in light of the disestablishmentarian principles embodied in the First Amendment.³⁸ Thus, for originalists, Madison ought to stand as a singularly persuasive authority on the proper application of the Establishment Clause to the legislative chaplaincy; most of his contemporaries, as far as

³⁴ *Id.*

³⁵ To be clear, I do not intend to take any position here on the propriety of originalism or historical inquiry by judges in Establishment Clause cases, nor do I mean to express an opinion about whether (and how much) Madison's views, as opposed to the views of other Framers or ratifiers, should inform that process. I merely mean to say that inasmuch as many Justices and commentators do in fact rely on the Framers' intentions (including Madison's) as they interpret the Clause, we should want to know whether their conclusions about those intentions are justifiable on their own terms, in light of all the historical evidence.

³⁶ For a definition of “ceremonial deism,” see Epstein, *supra* note 16, at 2094–95. According to Epstein's definition, “ceremonial deism” includes

all practices involving: (1) actual, symbolic, or ritualistic; (2) prayer, invocation, benediction, supplication, appeal, reverent reference to, or embrace of, a general or particular deity; (3) created, delivered, sponsored, or encouraged by government officials; (4) during governmental functions or ceremonies, in the form of patriotic expressions, or associated with holiday observances; (5) which, in and of themselves, are unlikely to indoctrinate or proselytize their audience; (6) which are not specifically designed to accommodate the free religious exercise of a particular group of citizens; and (7) which, as of this date, are deeply rooted in the nation's history and traditions.

Id. For a discussion of the history of ceremonial deism in federal and state governments, see *id.* at 2099–2124.

³⁷ See *infra* Part V.

³⁸ See *infra* Part IV; *infra* notes 260–65, 334–37, 363 and accompanying text.

the historical record shows, never considered this particular question at any length.³⁹

This Article proceeds chronologically, examining the historical record of Madison's life and writings for clues that indicate how he felt about legislative chaplains. Part I examines selected incidents in Madison's early life and career, from his college graduation to the meeting of the First Congress under the new Constitution in 1789. In Part II, the Article explores Madison's years as a member of Congress, from 1789 to 1797. Part III surveys his years as President, from 1809 to 1817. Part IV discusses his writings after retirement from public office in 1817. Part V examines alternative explanations of the historical record and suggests an understanding of Madison that makes sense of the record as a whole. Part VI offers a concluding summation.

I. BEFORE 1789

A. *Young James Madison and the Baptists*

In 1772 a young James Madison, newly graduated from the College of New Jersey (now Princeton), was at home in Virginia, recovering from exhaustion after finishing the College's four-year program of study in just two years.⁴⁰ He had not yet become involved in politics, but already showed a deep interest in the issues surrounding governmental dealings with religion. In 1773 he asked his college friend William Bradford of Pennsylvania to send him an explanation of the origin and principles of the Pennsylvania Constitution and "particularly the extent of your [Pennsylvania's] religious toleration."⁴¹ The following January, at just twenty-two years of age, Madison wrote to Bradford:

Union of Religious Sentiments begets a surprizing confidence and Ecclesiastical Establishments tend to great ignorance and Corruption all of which facilitate the Execution of mischievous Projects. . . . [Here in Virginia] Pride ignorance and Knavery [prevail] among the Priesthood and Vice and Wickedness among the Laity. This is bad enough But It is not the worst I have to tell you. That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their Quota of Imps for such business. This vexes me the most of any thing whatever. There are at this [time] in the adjacent County not less than 5 or 6 well meaning men in close Gaol for publishing their religious Sentiments which in the main are very orthodox. I have neither patience to hear talk or think of anything relative to this matter, for I have squabbled and scolded abused and ridiculed so long

³⁹ See *infra* Parts III.A, V.D.3; *infra* notes 342–44, 363 and accompanying text.

⁴⁰ BRANT, *supra* note 26, at 10–16.

⁴¹ Irving Brant, *Madison: On the Separation of Church and State*, 8 WM. & MARY Q. 3, 4 (1951).

about it, to so little purpose that I am without common patience. So I [leave you] to pity me and pray for Liberty of Conscience [to revive among us].⁴²

Madison thus passionately decried “Ecclesiastical Establishments” and the toll they took on “Liberty of Conscience” even before he entered the political arena. On this occasion Madison was reacting to the imprisonment of six Baptists in Culpeper County, Virginia.⁴³ Madison had been baptized as an infant in the Anglican Church, which was the legally established church in Virginia.⁴⁴ However, Baptists were a strong presence in areas near his home. Culpeper County was adjacent to Madison’s home county of Orange. And just three years before in Orange County, Baptists had attracted a crowd of 4000—the largest mass meeting ever held in Virginia to that date—to their Blue Run Church to protest a sheriff’s flogging of a Baptist preacher in nearby Caroline County.⁴⁵

B. The Precedent of a Chaplaincy for National Assemblies: Jacob Duché

Later in 1774, while Madison was still at home in Virginia, the Continental Congress met for the first time. This earliest of our national assemblies incorporated prayer by an invited clergyman, although he was not initially paid or given the title of chaplain. On the second day of its first session in 1774, at the prodding of a Massachusetts Congregationalist, the Continental Congress resolved that the Reverend Jacob Duché be requested to “open the Congress tomorrow morning with prayers.”⁴⁶ John Jay and John Rutledge both opposed the motion to invite a clergyman to open the assembly’s session with a prayer; Jay and Rutledge argued that such a proposal was bound to violate some member’s conscience because of the diversity of religious sentiments represented in the Congress.⁴⁷ The proposal was ultimately adopted, however, and Reverend Duché accordingly presided over a prayer service in Congress the next day.⁴⁸

Samuel Adams was the Congregationalist who had nominated Reverend Duché.⁴⁹ The reverend was a rector in the Anglican Church, known for its ties to the crown of England.⁵⁰ Adams was careful to note in the nomi-

⁴² Letter from James Madison to William Bradford (Jan. 24, 1774), in JOHN T. NOONAN, JR. & EDWARD M. GAFFNEY, JR., *RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT* 159 (2001).

⁴³ NOONAN & GAFFNEY, *supra* note 42, at 160.

⁴⁴ *Id.* at 158; THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 105, 134–35 (1986).

⁴⁵ NOONAN & GAFFNEY, *supra* note 42, at 160.

⁴⁶ 1 *JOURNAL OF THE CONTINENTAL CONGRESS, 1774–1789*, at 26 (Sept. 6, 1774) (Worthington C. Ford et al. eds., 1904–37) [hereinafter *J. OF THE CONT’L CONG.*]; see 1 STOKES, *supra* note 15, at 448.

⁴⁷ 1 STOKES, *supra* note 15, at 449.

⁴⁸ *Id.* at 450.

⁴⁹ *Id.* at 449.

⁵⁰ *Id.*

nating speech that Duché was “a friend to his country,”⁵¹ a characterization that surely spoke to the Anglican rector’s political rather than religious qualifications for this duty. Adams seemed to hope that Duché’s prayers would accomplish the political goals of encouraging more Anglicans to support the Revolution and encouraging non-Anglican revolutionaries with the knowledge that some Anglicans supported their cause. Writing three days after the event, Adams defended his choice of Duché this way: “As many of our warmest friends are members of the Church of England, [I] thought it prudent, as well on that as on some other accounts, to move that the service should be performed by a clergyman of that denomination.”⁵²

Duché’s presence and prayers seemed to have the desired effect. Duché read a psalm petitioning God to “fight . . . against them that fight against me.”⁵³ Samuel Adams’s cousin John Adams wrote that the service stirred warm patriotic feeling in those present and that it generally “had an excellent effect upon everybody here.”⁵⁴ Joseph Reed of Pennsylvania, another delegate to that Congress, pronounced the appointment of Duché (and the prayer service itself) to be not a needed spiritual support for the fledgling country, but a “masterly stroke of policy.”⁵⁵

By July 1776, Duché was officially appointed the first and sole chaplain of Congress.⁵⁶ In October, however, Congress was informed that Duché had resigned, and they voted to pay him \$150 for the services he had already rendered as chaplain. Within a year after that he had defected to the British.⁵⁷

C. Earliest Dual Chaplaincy in Congress

In December 1776, two months after being informed of Duché’s resignation, Congress resolved to appoint two chaplains instead of one.⁵⁸ Within two days, Congress had elected Patrick Allison and William White to fill these posts.⁵⁹ Allison refused to serve, however, so Congress had only one

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 450.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 5 J. OF THE CONT’L CONG., *supra* note 46, at 530 (July 9, 1776); *see* 1 STOKES, *supra* note 15, at 450.

⁵⁷ *See* 6 J. OF THE CONT’L CONG., *supra* note 46, at 886–87 (Oct. 17, 1776); 1 STOKES, *supra* note 15, at 450–51 (noting John Adams wrote his wife that Duché had “turned out an apostate and traitor” because Duché had written Washington advising him to “represent to congress the indispensable necessity of rescinding the hasty and ill-advised Declaration of Independence”); Martin J. Medhurst, *From Duché to Provoost: The Birth of Inaugural Prayer*, 24 J. CHURCH & ST. 573, 581 (1982) (noting that a year after his resignation from Congress, Duché “restored the prayers for the king to the divine service,” and later in that year wrote his “‘infamous’ letter to Washington”).

⁵⁸ 6 J. OF THE CONT’L CONG., *supra* note 46, at 1033 (Dec. 21, 1776).

⁵⁹ *Id.* at 1034.

chaplain.⁶⁰ This situation persisted for over nine months, until Congress appointed George Duffield, and reappointed William White, to the chaplaincies.⁶¹ Although the Congresses of the Revolution and the Confederation never adopted a rule requiring that the two chaplains be of differing denominations, this was in fact the practice from 1777 until early 1784, during the unbroken tenure of Chaplains White and Duffield.⁶²

But in the days before the new Constitution was ratified, the number of congressional chaplains varied. Despite the resolution passed in December 1776 requiring two chaplains, there were not always two chaplains actually holding office in Congress simultaneously, even after 1784.⁶³ The chaplaincies, however, were likely paid positions; over the next few years, Congress voted several times to pay congressional chaplains for their services.⁶⁴

D. Virginia Constitutional Convention of 1776

As the Continental Congress was appointing Duché as the first congressional chaplain (and approving the Declaration of Independence) in summer 1776, Madison was serving in the Virginia Constitutional Convention in Williamsburg, which had convened in May.⁶⁵ Although Madison's work at the convention reveals little about his stance on legislative chaplaincies in particular, his involvement there in helping to draft the Virginia Declaration of Rights demonstrates a continuing interest in disestablishment of religion.

At the first meeting of the Virginia Constitutional Convention, an order was entered "that the reverend mr. *Thomas Price* be appointed chaplain to this Convention, and that he read prayers every morning at nine o'clock."⁶⁶ There was no recorded vote or discussion, and thus no way to know how Madison felt about it. Most other delegates, at any rate, were probably not troubled. The Anglican Church was still "the church by law established" in Virginia at this time, so the delegates felt free to use some of their time in

⁶⁰ 8 J. OF THE CONT'L CONG., *supra* note 46, at 756 (Oct. 1, 1777).

⁶¹ *Id.*; 1 STOKES, *supra* note 15, at 450–51.

⁶² 1 STOKES, *supra* note 15, at 451; 21 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 302–03 n.1 (Ronald M. Gephart & Paul H. Smith eds., 1976–2000) [hereinafter LETTERS OF DELEGATES].

⁶³ See DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS, 1774–1789: CONTRIBUTIONS TO ORIGINAL INTENT 76 (2000); see also 21 LETTERS OF DELEGATES, *supra* note 62, at 302–03 n.1 (appointment of Rev. Daniel Jones to the congressional chaplaincy in the absence of Chaplains Duffield and White).

⁶⁴ See 11 J. OF THE CONT'L CONG., *supra* note 46, at 561 (June 2, 1778); 13 *id.* at 95 (Jan. 20, 1779); 15 *id.* at 1171 (Oct. 14, 1779).

⁶⁵ BRANT, *supra* note 26, at 29.

⁶⁶ *Proceedings of the Convention of Delegates, Held at the Capitol, in the City of Williamsburg, in the Colony of Virginia, on Monday the 6th of May, 1776*, at 8 (May 6, 1776), microformed on Early American Imprints: First Series No. 15198 (Evans Readex Digital Collection). Mysteriously, a week later the Virginia Constitutional Convention ordered the prayers to begin at seven o'clock each morning. *Id.* at 28 (May 13, 1776).

the convention to order their chaplain to preach at a local church on a day of fasting,⁶⁷ and to change the wording of the Anglican litany to be used in Virginia in ways that made it less friendly to the British Crown.⁶⁸ There is no record of how Madison felt about these orders either.

In his committee work, however, Madison demonstrated strong views on church-state relations. Early in the Virginia convention, after the delegates voted to declare the colony's independence from Great Britain, they began to write a constitution for the new state. Madison was appointed to the important committee charged with drafting the Declaration of Rights. George Mason, who was twenty-five years older than Madison and much better known at this time, drafted all but three or four of the sixteen articles of the Declaration.⁶⁹ But the convention agreed to Madison's amendment of Mason's draft of the article on religious liberty; Mason had written "all men should enjoy the fullest toleration in the exercise of religion," but Madison insisted that the article should guarantee "the full and free exercise of religion"—a phrase that ultimately found its way into the First Amendment of the U.S. Constitution.⁷⁰ Madison's amendment implied a distinction between the idea that the government should graciously tolerate religious minorities and the idea that each individual possesses a natural right of freedom of religion. The difference is a vitally important one.

Moreover, it seems likely that Madison tried to use this opportunity to push establishmentarian ideas like "toleration" back even further. Another proposal Madison made in the course of drafting this article specified that "no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges."⁷¹ This was rejected by the convention, however, because of a well-founded fear by the delegates that such a guarantee would disestablish the Anglican Church in Virginia.⁷² According to

⁶⁷ *Id.* at 13 (May 8, 1776).

⁶⁸ *See id.* at 183–84 (July 5, 1776) (replacing references to the king, the king's majesty, the king's authority, and the royal family in morning and evening prayers and in the communion service with references to the "commonwealth"). For a description of the rise and fall of religious establishment in Virginia, including a discussion of the Anglican Church's privileged status as "the church by law established," see McConnell, *supra* note 12, at 2116–20.

⁶⁹ BRANT, *supra* note 26, at 34.

⁷⁰ Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1443 (1990); *see also* BRANT, *supra* note 26, at 33–35 (describing Mason's draft and the significance of Madison's amendment stipulating that "all men are equally entitled to the free exercise of religion"); CURRY, *supra* note 44, at 135 (quoting Mason's draft and Madison's proposed revisions to show that "in 1776 . . . Virginia rejected toleration as an acceptable framework for Church and State"); NOONAN & GAFFNEY, *supra* note 42, at 162–63 (quoting Mason's original draft and Madison's proposal to protect "the full and free exercise of [religion] accordg to the dictates of Conscience," as well as Madison's additional proposal to disestablish the Anglican Church).

⁷¹ CURRY, *supra* note 44, at 135; NOONAN & GAFFNEY, *supra* note 42, at 163.

⁷² CURRY, *supra* note 44, at 135; Lance Banning, *James Madison, the Statute for Religious Freedom, and the Crisis of Republican Convictions*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 112–13 (Merrill D. Peterson & Robert C. Vaughan eds., 1988); Brant, *supra* note 41, at 6.

Thomas Jefferson, the Anglican clergy was a powerful force in early Virginia legislative assemblies, even though, by his estimation, a religious minority in Virginia at the time.⁷³ As Jack Rakove notes, although Madison's disestablishment proposal was defeated in the convention, the adoption of his "free exercise" amendment "laid the intellectual basis for disestablishment" nonetheless.⁷⁴

E. Virginia Legislature, 1776

Madison's election to the state constitutional convention qualified him for membership in the first House of Delegates of Virginia's new legislature, called the General Assembly, which met in fall 1776. When Madison was seated in the House in October, he met Thomas Jefferson for the first time.⁷⁵ The two eventually became close friends, and Jefferson's interest in effecting disestablishment of religion seems to have begun around the time of their first association.⁷⁶ Apparently Madison was already well known for having an interest in this area. Upon his arrival at the Virginia legislature, Madison was immediately appointed to the committee on religion, on which Jefferson also served.⁷⁷ One of the committee's first jobs was to consider a petition from citizens of Prince Edward County that characterized Madison's "free exercise of religion" guarantee in the Declaration of Rights as "the rising sun of religious liberty" and asked that "without delay, all church establishments might be pulled down, and every tax upon conscience and private judgment abolished."⁷⁸ From accounts like this, one can infer that much of Madison's political reputation at this early point in his career derived from his activities with respect to religious freedom and disestablishment of religion.

Once again, however, the record of Madison's service in the House sheds little light on his attitude toward the particular practice of the legislative chaplaincy. The House of Delegates adopted the legislative chaplaincy practice for itself as a matter of course and without debate. At its first meeting, on October 7, 1776, an order was entered "that the chaplain attend to read prayers every morning at seven o'clock . . ."⁷⁹ Madison may have

⁷³ NOONAN & GAFFNEY, *supra* note 42, at 169 (citing Thomas Jefferson, *Autobiography*, in 1 WRITINGS OF THOMAS JEFFERSON 58 (Albert E. Bergh ed., 1907)).

⁷⁴ JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 13 (1990).

⁷⁵ BRANT, *supra* note 26, at 39; ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 3 (reprint 1972) (1950).

⁷⁶ BRANT, *supra* note 26, at 39. It is interesting to note that Jefferson was not elected to the Continental Congress until 1775, and therefore (like Madison) was not present there in 1774 when it was first proposed to invite a clergyman into Congress to say prayers. See 26 LETTERS OF DELEGATES, *supra* note 62, at xlv.

⁷⁷ BRANT, *supra* note 26, at 39; RAKOVE, *supra* note 74, at 14.

⁷⁸ BRANT, *supra* note 26, at 39.

⁷⁹ *Journal of the House of Delegates of Virginia* 3 (Oct. 7, 1776), microformed on Early American Imprints: First Series No. 15204 (Evans Readex Digital Collection) [hereinafter *J. of the H.D.*].

been present on this date, but there is no recorded vote and thus no way to assess his feelings about the order. Nor is there any way to know how many delegates could actually be expected to arrive by seven o'clock each morning of the session. Then as now, seven o'clock in the morning was a very early start for any legislative body. If few delegates would be present so early for daily prayers, the chaplaincy order looks less like an attempt by the House to invoke the blessings of the Almighty and more like an attempt to move prayers out of the way in order to make more room in the schedule for conducting the worldly business of lawmaking.

Madison's first tenure at the House of Delegates was short-lived. Bidding for reelection to the House of Delegates the following spring, Madison refused to follow the custom of setting up barrels of free whiskey in the courthouse square; angry voters responded by electing someone else to his seat.⁸⁰ So Madison left the Virginia legislature for a time.

F. Continental Congress and Confederation Congress, 1780–1783

The record of Madison's service in Congress during the Revolutionary War, and during the early years of the Confederation, is likewise silent as to his feelings about legislative chaplains. Certainly nothing in this record indicates that he supported the practice.

Prior to the final ratification of the Articles of Confederation, Madison sat in the Continental Congress in 1780–1781, as the Revolutionary War continued.⁸¹ By this time the chaplaincy tradition had continued in Congress for several war-torn years. Soon after Madison arrived, Congress resolved again to pay the congressional chaplains.⁸² There was no recorded vote in this instance, however, and no further record on this date of how Madison felt about the chaplaincy.

During the Confederation, Madison sat in Congress from 1781 to 1783 (as he would again from 1787 to 1788). After the Articles of Confederation were ratified by the thirteenth and final state on March 1, 1781, the two previously appointed chaplains for the Continental Congress continued in their congressional duties without any new resolution regarding their appointment or the creation or continuation of their offices.⁸³ This was not an aberration; the offices of doorkeeper and messenger of Congress, for example, were treated the same way by Congress before and after ratification of the Articles.⁸⁴

⁸⁰ BRANT, *supra* note 26, at 40.

⁸¹ 26 LETTERS OF DELEGATES, *supra* note 62, at xlvi.

⁸² 18 J. OF THE CONT'L CONG., *supra* note 46, at 822 (Sept. 13, 1780).

⁸³ *Cf.*, e.g., 15 *id.* at 1171 (Oct. 14, 1779); 18 *id.* at 822 (Sept. 13, 1780); 23 *id.* at 572–74 (Sept. 12, 1782).

⁸⁴ *Cf.*, e.g., 17 J. OF THE CONT'L CONG., *supra* note 46, at 676 (July 28, 1780); 18 *id.* at 822 (Sept. 13, 1780); 19 *id.* at 251–52 (Mar. 10, 1781) (continuation in office of the same messenger after ratifica-

Of the resolutions in the Confederation Congress between 1781 and 1783 on the subject of legislative chaplains, only one seems to have been passed on a date when Madison might have been in attendance.⁸⁵ It did not involve the question whether Congress would have chaplains or the question whether they would be paid. Rather, it authorized and recommended to the people of the United States a particular publication of the Bible, which had been approved by the chaplains of Congress upon referral to them by a congressional committee on which Madison did not sit.⁸⁶ Again, there is no recorded vote on this resolution and no way to know whether Madison supported it.

G. Virginia Legislature, 1784–1787: The Fight Over Payment of Ministers

Between Madison's departure from Congress in 1783 and his return in 1787, he again sat in the Virginia House of Delegates. During this time, the House of Delegates had retained the legislative chaplaincy according to a standing order of the House. At each session Reverend Benjamin Blagrove was appointed to this position by House order, without recorded vote.⁸⁷

Once again the orders regarding chaplains tell us little of what Madison thought about the practice. But other aspects of Madison's service in the House of Delegates are recorded in great detail, and are much more revealing. During this time period, a series of events transpired in Virginia that thrust Madison to the forefront of the fight for religious disestablishment in Virginia's legislature. These events are worthy of notice here because of their perceived importance (both contemporaneously and subsequently) to the cause of religious disestablishment. They are also noteworthy because they may provide insight into Madison's general attitude toward the payment of public money for the support of clergymen in their ministerial functions.

In 1784, the House of Delegates considered a "Bill Establishing a Provision for Teachers of the Christian Religion," chiefly sponsored by Patrick Henry. The bill required all persons subject to property taxes in the state to pay a small annual tax to fund the teaching of Christianity, and each taxpayer was allowed to earmark his or her own payment for ministers in the Christian church of his or her choice.⁸⁸ James Madison led the opposition to this measure in the General Assembly. To this end, he wrote the now-famous *Memorial and Remonstrance Against Religious Assessments*, one of

tion of the Articles of Confederation); 21 *id.* at 1149 (Dec. 3, 1781) (replacement doorkeeper was not appointed until December 1781 and did not assume duties until October 17, 1781).

⁸⁵ See 23 *id.* at 572–74 (Sept. 12, 1782).

⁸⁶ *Id.*

⁸⁷ See *J. of the H.D.*, *supra* note 79, at 4 (May 12, 1784) (Evans no. 18860); *id.* at 3 (Oct. 30, 1784) (Evans no. 19353); *id.* at 2 (Oct. 24, 1785) (Evans no. 20106); *id.* at 4 (Oct. 23, 1786), 155 (Jan. 11, 1787) (Evans no. 20840); *id.* at 3 (Oct. 15, 1787) (Evans no. 21556).

⁸⁸ PFEFFER, *supra* note 30, at 109–10.

a number of opposition petitions widely circulated in Virginia in summer 1785.⁸⁹ The thrust of the petition's argument was the disestablishmentarian, separationist position "that in matters of Religion, no man[']s right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."⁹⁰ The *Memorial and Remonstrance* has rightly been termed "probably the fullest and most thoughtful exposition of the disestablishmentarian thinking at the time of the founding, as well as the reasoning of the principal author of the Bill of Rights"⁹¹

In this petition Madison was arguing most directly against a small government expenditure to pay the salaries of clergymen for their ministerial services. But he grounded his opposition in broad arguments about religious liberty. "The Religion [of] every man," Madison wrote, "must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."⁹² Moreover, Madison wrote that the state should not violate this right by requiring anyone to pay for the religious services of any minister, even a minister of his own choosing, because "[it] is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him."⁹³ Such measures could not be justified even if they enjoyed the support of a majority of the public, according to Madison; although admittedly there is ultimately no other rule than majority rule for deciding societal differences of opinion, he wrote, "it is also true that the majority may trespass on the rights of the minority."⁹⁴ To those who asserted that this trespass was minimal, involving only a very small tax and allowing the taxpayer to choose his own beneficiary, Madison responded tersely that "it is proper to take alarm at the first experiment on our liberties. . . . Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"⁹⁵

Thus, as early as 1785 Madison was vigorously opposing a government payment for the religious services of clergymen as an "establishment" of religion. To him such establishments, however small or great, were violations of the natural right of religious liberty, condemned by both human experience and the Christian faith. He noted that:

⁸⁹ *Id.* at 110–11, 113; 1 STOKES, *supra* note 15, at 389–92. For further discussion of the circumstances surrounding Henry's proposal and Madison's reaction to it, see *infra* note 304 and accompanying text.

⁹⁰ James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in NOONAN & GAFFNEY, *supra* note 42, at 173 [hereinafter Madison, *Memorial and Remonstrance*].

⁹¹ MCCONNELL ET AL., *supra* note 28, at 62.

⁹² Madison, *Memorial and Remonstrance*, *supra* note 90, at 173.

⁹³ *Id.*

⁹⁴ *Id.* at 174.

⁹⁵ *Id.*

[the] Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.⁹⁶

When the legislature finally rejected Henry's assessment bill in the fall of that year, Madison guided through the House of Delegates a revised version of Jefferson's Bill for Establishing Religious Freedom.⁹⁷ That Bill was approved late in 1785 and became law in January 1786.⁹⁸ The preamble of that law argues that:

even forcing [a person] to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor [of his choice], and is withdrawing from the ministry those temporal rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind⁹⁹

Madison had longed for disestablishment of religion in Virginia ever since he had graduated from college and had written to William Bradford about the evils of establishment.¹⁰⁰ He had suffered a temporary defeat at the Virginia convention of 1776 in the drafting of the Declaration of Rights,¹⁰¹ but now, as he achieved passage of the Bill for Establishing Religious Freedom, he saw his dream fulfilled. Virginia had committed itself to disestablishment of religion. What the coming national government would do about religion, however, remained to be seen.

H. Congressional Land Grants During the Confederation

While Madison was in Virginia serving in the state legislature, he tried to keep up with events in the Confederation Congress as best he could. As he was writing the *Memorial and Remonstrance* in summer 1785, he was shocked to hear that Congress was considering legislation that granted territorial land for religious purposes. In May he wrote a letter to his friend James Monroe, criticizing an early version of what would become Congress's Land Ordinance of 1785 because the bill set aside certain public lands for the support of religion in general, though without specifying a par-

⁹⁶ *Id.* at 175.

⁹⁷ NOONAN & GAFFNEY, *supra* note 42, at 178, 180; PFEFFER, *supra* note 30, at 113; 1 STOKES, *supra* note 15, at 392.

⁹⁸ 1 STOKES, *supra* note 15, at 392.

⁹⁹ A Bill for Establishing Religious Freedom (Va. 1786), in MCCONNELL ET AL., *supra* note 28, at 70.

¹⁰⁰ See *supra* notes 41–43 and accompanying text.

¹⁰¹ See *supra* notes 71–74 and accompanying text.

ticular denomination.¹⁰² With regard to the religious set-aside, Madison complained, “How a regulation, so unjust in itself, so foreign to the Authority of Congs. so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Committee is truly [a] matter of astonishment.”¹⁰³ To Madison’s relief, the religious grant provision was ultimately deleted on a motion to amend the bill and was not enacted into law.¹⁰⁴

During this time Congress considered many other laws and contracts regarding western land. Perhaps several members of Congress shared Madison’s views on religious set-asides, because in the end Congress did not often grant land parcels specifically for religious uses. For example, the Land Ordinance of 1785 was a precursor to the Northwest Ordinance enacted by Congress in 1787,¹⁰⁵ which likewise contained no provision setting aside public land specifically for religion.¹⁰⁶ Although two of the Confederation Congress’s land contracts did contain a set-aside of public land for religious purposes (without authorization under Congress’s land ordinances), these contractual set-asides were approved by Congress before the new Constitution had been ratified or the First Amendment written.¹⁰⁷ In any event, Madison almost certainly opposed the set-asides.¹⁰⁸ On a later

¹⁰² See LEVY, *supra* note 10, at 129–30; see also PFEFFER, *supra* note 30, at 120; McConnell, *supra* note 12, at 2151. The religious set-aside contained in the original proposal is found at 28 J. OF THE CONT’L CONG., *supra* note 46, at 254–55 (Apr. 12, 1785).

¹⁰³ Letter from James Madison to James Monroe (May 29, 1785), in 8 THE PAPERS OF JAMES MADISON 286 (Robert A. Rutland et al. eds., 1973).

¹⁰⁴ 28 J. OF THE CONT’L CONG., *supra* note 46, at 293–96 (Apr. 23, 1785); see also PFEFFER, *supra* note 30, at 120; Thomas Nathan Peters, Note, *Religion, Establishment, and the Northwest Ordinance: A Closer Look at an Accommodationist Argument*, 89 KY. L.J. 743, 761–63 (2001).

¹⁰⁵ McConnell, *supra* note 12, at 2151.

¹⁰⁶ *Id.*; Peters, *supra* note 104, at 763–65. The Northwest Ordinance stipulated: “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Northwest Ordinance art. III (July 13, 1787), in 1 THE FOUNDERS’ CONSTITUTION, *supra* note 33, at 28. While this language praises both religion and education, it commits the government only to the support of education, not religion; and even as to education, the Northwest Ordinance, unlike the Land Ordinance of 1785, included no provision specifically anticipating or allocating land grants for schools. Peters, *supra* note 104, at 752 & n.51.

¹⁰⁷ The first contract was with the Ohio Company. Peters, *supra* note 104, at 765; see 32 J. OF THE CONT’L CONG., *supra* note 46, at 276 (May 9, 1787); *id.* at 311–12 (July 10, 1787); 33 *id.* at 399 n.3, 400 (July 23, 1787).

The second contract was with John Cleave Symmes. Peters, *supra* note 104, at 765, 768 n.171; see 33 J. OF THE CONT’L CONG., *supra* note 46, at 509 n.2 (Sept. 20, 1787); *id.* at 512 & n.4 (Sept. 21, 1787); *id.* at 593–94, 593 n.3 (Oct. 2, 1787).

¹⁰⁸ There is no evidence that Madison favored the religious set-aside in the Ohio Company contract. On the same date the Parsons memorial was presented to Congress on behalf of the company, Madison was appointed to a committee charged with evaluating the memorial. 32 J. OF THE CONT’L CONG., *supra* note 46, at 276 n.2 (May 9, 1787). But Madison was appointed in his own absence; he had already left Congress several days before bound for Philadelphia, to participate in the Constitutional Convention drafting the new national Constitution. Peters, *supra* note 104, at 769–70. He did not return to Congress until September 24, well after the Ohio Company sale was completed. *Id.* at 770.

occasion, a three-member committee of the Confederation Congress, responding to another memorial, proposed a new grant of territorial land containing another set-aside for religious uses (again before the First Amendment had been written), but the full Congress never adopted the proposal.¹⁰⁹

There is likewise no evidence of Madison's approval of the terms of the Symmes contract. He was never appointed to the committee considering the Symmes memorial, which was presented to Congress during his absence. See 33 J. OF THE CONT'L CONG., *supra* note 46, at 512 n.4 (Sept. 21, 1787). Although he was likely present in Congress on October 2 when the committee reported back and the sale was approved, there was no recorded vote. See *id.* at 593–94, 593 n.3 (Oct. 2, 1787); 26 LETTERS OF DELEGATES, *supra* note 62, at xlvi.

While there is no evidence to suggest that Madison supported the religious set-asides in either of these early land contracts, there is considerable evidence that he would have opposed them on principle, with or without a binding First Amendment. Despite Madison's nominal membership on the committee that proposed the religious set-aside in the Ohio Company contract, he appears to have had nothing to do with it, and indeed support for this set-aside would be difficult to reconcile with the letter he wrote to James Monroe just two years earlier, in which he expressed pointed opposition to an identical committee recommendation. See *supra* notes 102–03 and accompanying text; see also Peters, *supra* note 104, at 765–71. And as President he reiterated his opposition to such set-asides when he cited the Establishment Clause in vetoing a bill that would have granted a parcel of federal land for the use of a Baptist church. 7 JOURNAL OF THE HOUSE OF REPRESENTATIVES, 1789–1873, at 602 (Feb. 28, 1811) [hereinafter J. OF THE H.R.]; see also *infra* notes 222–23 and accompanying text.

¹⁰⁹ The memorial was one of several filed by Bartholomew Tardiveau on behalf of certain French and American inhabitants of the western territorial lands. Tardiveau presented to Congress a large number of documents supporting one of these memorials on February 25, 1788. 34 J. OF THE CONT'L CONG., *supra* note 46, at 60 n.2 (Feb. 25, 1788). Several congressional committees were appointed to evaluate this and similar successive Tardiveau memorials. See, e.g., *id.*; *id.* at 304 n.1 (July 8, 1788); *id.* at 327–28 n.4 (July 15, 1788). James Madison was not appointed to any of these committees until September 17 of the same year, when Madison, along with Abraham Clark and Hugh Williamson, was named to the committee evaluating a new memorial filed by Tardiveau on that date. *Id.* at 538 n.2 (Sept. 17, 1788). On September 25, that committee reported favorably on Tardiveau's memorial, proposing, among other things, that Congress donate certain tracts to the memorialists for the support of schools, and certain other tracts for the support of religion. *Id.* at 540–42 (Sept. 25, 1788). However, this committee report was never brought to a vote in either the Confederation Congress or subsequent Congresses. Indeed, the Confederation Congress conducted very little business after September, anticipating within months the meeting of the First Congress under the new Constitution, which by now had been ratified by the required number of states to bring it into force according to its terms. See BRANT, *supra* note 26, at 220 (New Hampshire's ratification on June 21, 1788, bringing the new Constitution into effect among nine states); 34 J. OF THE CONT'L CONG., *supra* note 46, at 572–601 (Oct. 1–10, 1788) (fewer than ten resolutions passed by Congress during October 1–10, 1788); *id.* at 599 n. 2 (Oct. 10, 1788) (October 10 was last date on which the Confederation Congress achieved a quorum for conducting business); 11 THE PAPERS OF JAMES MADISON, *supra* note 103, at xxv (same).

Madison's participation on the Tardiveau committee is puzzling, at least at first blush. There are several plausible explanations, however, that do not suggest a change of Madison's opinion on the question of religious set-asides. One obvious possibility is that he was simply outvoted by Clark and Williamson in the committee of three. This explanation is all the more plausible given his undoubtedly strong opposition, demonstrated both before and after this time, to religious set-asides of land by the national government. See *supra* note 108.

Another possibility is that he was so preoccupied with other matters that he did not fully participate on the Tardiveau committee. It is true that Madison was sitting in Congress during September and October of 1788. JAMES MADISON: WRITINGS 898 (Jack N. Rakove ed., Penguin Putnam 1999) [hereinaf-

Regarding the Confederation Congress's land grants and contracts, then, the evidence shows that Congress rarely specified that certain land should be used for religious purposes. When Congress did make such religious grants, the evidence from this time shows that Madison almost certainly opposed these provisions—a position perfectly consistent with his prior and concurrent legislative efforts opposing religious establishments.

I. *Constitutional Convention in Philadelphia*

During 1787, Madison once again sat in the Confederation Congress, but the major event in his life was undoubtedly the Constitutional Convention in Philadelphia that produced a new national Constitution. In neither of these venues do we find evidence that Madison supported legislative chaplains; indeed, the record of the proceedings in Philadelphia suggests that the practice of inviting clergymen to lead prayers in national conventions was still being debated.

In 1787, Madison returned to the Confederation Congress, but only from February until April or May. On February 2, Congress elected two legislative chaplains, without recorded vote.¹¹⁰ Madison, however, was not present for this vote, as he did not take his seat until February 12.¹¹¹ By the time Madison left in the spring for the Constitutional Convention in Philadelphia, chaplains had not been considered again.

ter MADISON WRITINGS]; 26 LETTERS OF DELEGATES, *supra* note 62, at xlvi. Undoubtedly, however, his attention was focused elsewhere; he had recently returned from Virginia, having achieved a slender victory for the Federalists in the Virginia ratifying convention over the summer. His letters during this time, never mentioning Tardiveau's memorial or the committee evaluating it, are instead full of concerns and predictions about ratification of the new Constitution by the various states and the composition and work of the new federal government, scheduled to begin operations for the first time the following spring. See various letters of James Madison, in 11 THE PAPERS OF JAMES MADISON, *supra* note 103, at 247–321 (Sept.–Oct. 1788). Under these circumstances it would not be surprising if he neglected some of his committee duties, especially if he expected the work of the committee to be ignored by an essentially lame-duck Congress anyway. In fact, the last date on which the Continental Congress achieved a quorum for conducting business was October 10. 26 LETTERS OF DELEGATES, *supra* note 62, at xxv.

A third possibility is that, while he did not approve of the religious set-aside, he supported the proposal as a whole for other reasons. He was probably eager to ingratiate Congress to the inhabitants of the territories, in order to induce these inhabitants to remain favorably disposed to eventual statehood and participation in the Union. Under that assumption, he may have reluctantly voted for the Tardiveau land grant proposal as a whole because a significant number of territorial inhabitants had requested it and stood to benefit from it.

Probably we will never know with certainty what Madison thought of Tardiveau's proposal or the committee report regarding it, since Madison seems never to have discussed either; but any of the three explanations above seems more credible than the conclusion that Madison opposed religious set-asides in 1785 (the date of his letter to James Monroe), then supported them in 1788, and then opposed them again by 1811 (the date of his veto of a religious set-aside on religious liberty grounds). See *supra* notes 102–03 and accompanying text; *supra* note 108; *infra* note 222 and accompanying text.

¹¹⁰ 32 J. OF THE CONT'L CONG., *supra* note 46, at 11–12 (Feb. 2, 1787).

¹¹¹ *Id.* at 29–30 (Feb. 12, 1787).

In the national Convention in Philadelphia, chaplains were conspicuously absent. The delegates to the Constitutional Convention of 1787 never appointed a chaplain, and as far as we know, no prayers were offered aloud in that assembly. Only after a month of meetings was the subject even discussed. At the end of June 1787, the state delegations had been for some time evenly divided on the question of representation in the new Senate; more populous states wanted proportional representation in the Senate, while less populous states insisted on equal representation for each state, creating a stalemate Madison described as “not only distressing, but seriously alarming.”¹¹² On June 28, 1787, during one particularly heated session, Benjamin Franklin proposed that one or more of the clergy of Philadelphia be asked to officiate at daily prayers in the Convention. Franklin’s motion was debated. The debate ended in adjournment without any vote on the motion, and the motion was never brought up again.¹¹³ Franklin’s private assessment of the situation was that “the Convention, except three or four persons, thought Prayers unnecessary.”¹¹⁴

J. Confederation Congress, 1787–1788

After the Constitutional Convention in Philadelphia, Madison once again resumed his seat in the Confederation Congress, from September 1787 until early March 1788.¹¹⁵ In late February 1788, Paine Wingate of New Hampshire, a Congregationalist minister and planter, moved “[t]hat

¹¹² Letter from James Madison to Jared Sparks (Apr. 8, 1831), in 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 499 (Max Farrand ed., 1911); see also 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 444–50, 453–58 (June 28, 1787).

¹¹³ See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 112, at 450–52, 457–58. The record of the reaction to Franklin’s motion is scant. What we know of the debate on the motion comes primarily from James Madison’s journal. There Madison notes that Roger Sherman of Connecticut, Edmund Randolph of Virginia, and “others” spoke in favor of daily prayers, while Alexander Hamilton of New York, Hugh Williamson of North Carolina, and “several others” opposed them. *Id.* at 452. Madison also records that there were “several unsuccessful attempts for silently postponing the matter by adjourning,” before “the adjournment was at length carried, without any vote on the motion.” *Id.*

¹¹⁴ In the copy of Madison’s journal found among Franklin’s papers, a marginal note, which seems to be in Franklin’s own hand, records Franklin’s assessment of the majority’s attitude toward his prayer proposal. *Id.* at 452 n.15; see also LEVY, *supra* note 10, at 81; E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1236–37 (1994). Undoubtedly more was said by the delegates than Madison recorded, but there is no record of any reaction whatsoever by any of the eight men in attendance who would later be sitting in the Senate on April 7, 1789, when chaplains were first mentioned by the new federal Congress. One might speculate that those eight must have had no strong objections to daily prayers—even that some of them may have been among the “others” who spoke in favor of the practice on this occasion—but this is sheer guesswork. In any event, those in the Philadelphia Convention who “thought prayers unnecessary” were successful in getting an adjournment and thereby won the day on June 28, 1787, even if their sentiments did not prevail later among the twelve senators who were present in 1789 when an order was entered, without a motion or debate, to establish a committee to set rules for appointing chaplains for the new Congress. See *infra* notes 138–41 and accompanying text; *infra* note 347.

¹¹⁵ MADISON WRITINGS, *supra* note 109, at 897–98.

two chaplains be appointed for Congress whose salaries shall not exceed three hundred dollars each per Annum to commence from the day of their appointment.”¹¹⁶ Prior to this, the chaplains’ annual salaries had been four hundred dollars each.¹¹⁷ Madison was present and voted in favor of this motion, and the motion passed.¹¹⁸ Congress elected Doctor Provost and Doctor Rogers for the positions.¹¹⁹

K. Meeting with John Leland

A few days later as Madison was en route home to Virginia, he received a letter from Captain Joseph Spencer, a Baptist and Revolutionary War veteran who earlier had been imprisoned during the Virginia persecutions Madison had witnessed as a young college graduate in areas near Orange County.¹²⁰ The letter encouraged Madison to hasten home to Orange County to campaign for election to the Virginia constitutional ratifying convention, and on the way to try to gain the support of influential Baptist leader John Leland, “as Mr. Leeland Lyes in your way home from Fredricksburg to Orange”¹²¹ Spencer reported that although the Baptists “pretend to” have other objections, their principal objection to the new Constitution was their fear that, despite Article VI’s prohibition of religious tests for public office, religious liberty was not sufficiently protected.¹²² Leland himself was well known as an ardent supporter of religious liberty and an opponent of all vestiges of religious establishment.¹²³

Madison almost certainly met with Leland in March 1788 as Spencer had recommended, convincing Leland on the brink of the elections to support both Madison and the new Constitution.¹²⁴ No record of the meeting survives, but given Leland’s principal objections and interests, Madison’s arguments surely dwelt at some length on religious liberty, including freedom from religious establishment. Leland had been a candidate himself,

¹¹⁶ 34 J. OF THE CONT’L CONG., *supra* note 46, at 71 (Feb. 29, 1788).

¹¹⁷ The higher salary had been determined by resolution of Congress eight years earlier. *See* 18 *id.* at 822 (Sept. 13, 1780). It apparently was still in effect at the time of Wingate’s proposal in 1788.

¹¹⁸ 34 *id.* at 71 (Feb. 29, 1788).

¹¹⁹ *Id.*

¹²⁰ L.H. Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 PROC. AM. ANTIQUARIAN SOC’Y 155, 185 (1952). For information about the persecutions and what Madison knew of them, see *supra* notes 42–45 and accompanying text.

¹²¹ Letter from Captain Joseph Spencer to James Madison (Feb. 28, 1788), *quoted in* Butterfield, *supra* note 120, at 186.

¹²² *Id.*

¹²³ 1 STOKES, *supra* note 15, at 353–55; Butterfield, *supra* note 120, at 156–58; *infra* notes 314–16 and accompanying text.

¹²⁴ RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 251 (1971); *see also* Butterfield, *supra* note 120, at 185–96 (describing circumstances surrounding the meeting and noting that, although evidence of the meeting is only circumstantial, the meeting later became “celebrated in local history and in Baptist annals,” and that in any event Madison and Leland certainly reached an “understanding” around this time).

but withdrew from the race after “securing Madison’s pledge that if [the new Constitution] were ratified he would work earnestly for an amendment containing the desired guarantee of religious freedom”¹²⁵ Within a year of this meeting, Madison had promised to support a bill of rights, including a guarantee of religious liberties, as amendments to the new Constitution, silencing his opponents’ claims among the Baptists that he had “ceased to be a friend to the rights of conscience.”¹²⁶

This meeting in March 1788 may not have been Madison’s first meeting with Leland; the two had been neighbors in Orange County since Leland first moved there to preach, probably in 1778, and Leland remained there for fourteen years, until 1791.¹²⁷ The two surely knew each other, and each may well have influenced the thinking of the other regarding church-state issues. In any case, Madison succeeded in convincing his Orange County neighbor to support the new Constitution. To secure this support, Madison promised to work for some future religious freedom guarantees, which would ultimately take the form of the Establishment and Free Exercise Clauses.¹²⁸

L. Virginia Ratifying Convention

Having won a narrow victory in the March 1788 election, Madison attended the Virginia ratifying convention in summer 1788. The Virginia convention commenced on June 2. The first order of business that day was the election of a secretary and a president of the convention, but soon after, Delegate Paul Carrington moved that Reverend Abner Waugh be elected chaplain. The convention record states that Reverend Waugh “was unanimously elected chaplain, to attend, every morning, to read prayers, immediately after the bell shall be rung for calling the Convention.”¹²⁹ However, Madison did not take his seat in the convention until June 3, so he was not present for the motion or vote with regard to a chaplain.¹³⁰ At the close of the convention on June 26, upon motion, it was ordered that the chaplain

¹²⁵ 1 STOKES, *supra* note 15, at 354.

¹²⁶ BRANT, *supra* note 26, at 222–24.

¹²⁷ Butterfield, *supra* note 120, at 168; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1498–1501.

¹²⁸ After these Clauses had been proposed to the states, Leland, still living in Virginia, clearly interpreted the Clauses to forbid legislative chaplains. Before the Bill of Rights had been ratified by the states, and only two years after his meeting with Madison, Leland published a pamphlet claiming that legislative chaplains, military chaplains, and Sunday closing laws amounted to an establishment of religion and violated the Bill of Rights as proposed by Congress. *See infra* note 316 and accompanying text. In light of the evidence regarding the association between the two men, it is certainly plausible that Leland’s interpretation of the Establishment Clause was influenced by Madison’s representations about disestablishment and the First Amendment.

¹²⁹ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 1 (Jonathan Elliot ed., 1901) [hereinafter ELLIOT’S DEBATES].

¹³⁰ MADISON WRITINGS, *supra* note 109, at 898.

(along with the president, secretary, doorkeepers, and other officers of the convention) should be paid a fee for his services.¹³¹ There was no recorded vote and no way to know Madison's opinion of it.¹³²

After the Virginia convention Madison returned to the Confederation Congress, sitting from July to December 1788.¹³³ But no bills or resolutions regarding chaplains were discussed during this time. The record of the Virginia ratifying convention shows that this convention, unlike the national one that had met in Philadelphia a year earlier, appointed a chaplain and paid him. There is no evidence, however, that Madison supported these orders by the Virginia convention.

II. YEARS IN THE FEDERAL CONGRESS (1789–1797)

A. *House Committee on Chaplaincy Rules*

While the Virginia convention was meeting in June 1788, New Hampshire became the ninth state to ratify the Constitution, bringing the federal government plan into legal effect and necessitating elections for representatives and senators in the ratifying states.¹³⁴ Congressional elections were held in February 1789, and despite Patrick Henry's attempt to engineer a defeat for Madison by gerrymandering Orange County into a much larger congressional district dominated by Antifederalist voters, Madison defeated the Antifederalist candidate James Monroe, largely because of Madison's promise to Virginia Baptists that he would support amendments to the Constitution guaranteeing religious liberty and disestablishment.¹³⁵ He first took his seat in the new House of Representatives in March 1789,¹³⁶ although the House could not conduct business until the next month, when it had achieved a quorum.¹³⁷ Once Congress had achieved a quorum under the new Constitution, the Senate immediately decided both houses needed chaplains. On April 7, 1789, the Senate, without recorded debate, ordered a five-member committee to meet with a similar committee to be appointed from the House, for the purposes of proposing rules governing conference committees and regulating the appointment of chaplains.¹³⁸ As mentioned, this was only the second day that the Senate had been able to conduct business. Chaplains had not been mentioned in the Senate Journal up to this point, and the suggestion was not attributed to any senator. But it surely

¹³¹ 3 ELLIOT'S DEBATES, *supra* note 129, at 657.

¹³² *Id.*

¹³³ MADISON WRITINGS, *supra* note 109, at 898.

¹³⁴ BRANT, *supra* note 26, at 220.

¹³⁵ *Id.* at 222–24.

¹³⁶ 1 ANNALS OF CONG., *supra* note 27, at 99 (Mar. 11, 1789).

¹³⁷ *Id.* at 100 (Apr. 1, 1789).

¹³⁸ 1 JOURNAL OF THE SENATE, 1789–1875, at 10 (Apr. 7, 1789) [hereinafter J. OF THE SEN.]; 1 ANNALS OF CONG., *supra* note 27, at 18 (Apr. 7, 1789).

would have seemed a matter of course to many present, given that the predecessor national assemblies—the Confederation Congress, and the Continental Congress before that—had both used a chaplain. Of the twelve senators present for the April 7 order regarding chaplains, seven had served as members of the Confederation Congress, and six had been delegates to the pre-Confederation Congress. The Senate’s newly elected President pro tempore, John Langdon of New Hampshire, had been a delegate to both.¹³⁹

Two days later, on April 9, the Senate reported its action to the House and asked that the House appoint its own counterpart committee. The House accordingly created the committee and appointed members to it; it was this five-member committee that was ordered, in consultation with the Senate’s committee, to propose rules governing conference committees and to regulate the appointment of chaplains.¹⁴⁰ Madison was one of the five House members elected by ballot to this committee.¹⁴¹

On April 15, committee member Elias Boudinot reported to the House that the committee had met with its Senate counterpart and that the two committees had jointly produced a report regarding both the conference committee rules and the chaplaincy rules.¹⁴² That report was then read into the record and ordered to lie on the table, postponing any action on it until another day.¹⁴³

The Senate acted on the joint report first. On April 17, the Senate informed the House that the Senate had agreed to the joint committee’s report, adopting the two provisions and entering it as a Senate order. The House then immediately voted to adopt the same provisions the Senate had adopted. One provision set rules for conference committees to be appointed, and the other provision related to chaplains.¹⁴⁴ The chaplaincy provision mandated:

¹³⁹ For the twelve senators sitting on April 7, see *infra* note 347. For the six of these who had sat in Congress before Cornwallis’s surrender at Yorktown, see *infra* note 348. Seven of the twelve senators had also served at some time in the Confederation Congress; these included Paine Wingate of New Hampshire, William Samuel Johnson of Connecticut, and five of the six who had sat in the pre-Confederation Congress (Robert Morris excepted). See 26 LETTERS OF DELEGATES, *supra* note 62, at vi, xi, xix, xxi, xxii, xxiv, xxv, xxxvi, xlvi; *infra* note 349. But note that eight of the twelve senators, including John Langdon, had also attended the Philadelphia Convention of 1787, which had never appointed chaplains and failed to act on Benjamin Franklin’s motion to have prayers said in the Convention. For a description of Franklin’s motion and the delegates’ reactions, see *supra* notes 113–14 and accompanying text. For a listing of delegates who attended the Philadelphia Convention, see FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 295–97 (Univ. Press of Kansas 1985).

¹⁴⁰ 1 ANNALS OF CONG., *supra* note 27, at 109 (Apr. 9, 1789).

¹⁴¹ *Id.*

¹⁴² 1 J. OF THE H.R., *supra* note 108, at 15 (Apr. 15, 1789).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 16 (Apr. 17, 1789).

That two Chaplains, of different denominations, be appointed to Congress for the present session; the Senate to appoint one, and give notice thereof to the House of Representatives, who shall thereupon appoint the other; which Chaplains shall commence their services in the Houses that appoint them, but shall interchange weekly.¹⁴⁵

On April 25, the Senate notified the House that the Senate had chosen the Reverend Doctor Provost as the Senate chaplain.¹⁴⁶ On April 27, the House resolved to vote for its own chaplain on May 1.¹⁴⁷ On May 1, the House voted by secret ballot and selected its chaplain, Reverend William Linn.¹⁴⁸ There is no indication of how Madison voted, if indeed he did. At this point, compensation for the chaplains had not been provided, nor was it discussed.

B. Bill Providing Payment for Congressional Chaplains

Although chaplains were appointed in April and May, months passed before Congress decided to pay them. The compensation bill grew out of a report recommending amounts for the compensation of the President, Vice President, and members of the House and Senate, though it did not initially address compensation for chaplains or other officers. This compensation report came from a committee of twelve House members, which included Madison, after being referred to them on May 25 by a Committee of the Whole considering the need to provide compensation to the U.S. President and other federal officers.¹⁴⁹ It appears that this committee of twelve first reported its recommendations to the full House on July 13, 1789, when one of the committee members, Mr. Vining, “call[ed] the attention of the House to . . . the report of a committee on the subject of compensation to be made to the President, Vice President, the members of the Senate and House of Representatives, for their services.”¹⁵⁰ This report included no chaplaincy provision whatsoever, although the House had selected its chaplain over two months earlier, on May 1. Madison spoke in favor of the report on that day, saying that he “did not think the report interfered with either the spirit or letter of the constitution, and therefore was opposed to any alteration”¹⁵¹

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 20 (Apr. 25, 1789).

¹⁴⁷ *Id.* at 21 (Apr. 27, 1789).

¹⁴⁸ 1 ANNALS OF CONG., *supra* note 27, at 242 (May 1, 1789).

¹⁴⁹ 1 J. OF THE H.R., *supra* note 108, at 40–41 (May 25, 1789); 1 ANNALS OF CONG., *supra* note 27, at 657–62 (July 13, 1789).

¹⁵⁰ 1 ANNALS OF CONG., *supra* note 27, at 657 (July 13, 1789).

¹⁵¹ *Id.* at 660 (July 13, 1789).

When the report came up again on July 16, the House discussed and amended it, without adding any reference to chaplains.¹⁵² Congressmen Burke, Stone, and Moore were appointed as a committee of three responsible for bringing in “a bill or bills . . . pursuant thereto.”¹⁵³ The House instructed the committee to make sure the bill provided compensation for the Secretary of the Senate and the Clerk of the House of Representatives.¹⁵⁴

Mr. Burke, on behalf of the committee of three, presented the committee’s bill regarding the President and Vice President on July 22. Without recorded debate, the committee was ordered to amend its other bill still in process—the one regarding compensation for members of the Senate and House—by “making compensation to the Serjeant-at-Arms, Messengers, and Door-keepers of the two Houses, for their services.”¹⁵⁵ On August 4, Mr. Burke introduced the committee’s “bill for allowing a compensation to the members of both Houses, and to their respective officers.” It was read into the record. Still there was no reference to chaplains.¹⁵⁶

Shortly thereafter, probably on August 6, the House of Representatives amended the compensation bill to add a provision granting compensation to one chaplain for each house.¹⁵⁷ There is no evidence that Madison sup-

¹⁵² 1 J. OF THE H.R., *supra* note 108, at 61 (July 16, 1789); 1 ANNALS OF CONG., *supra* note 27, at 668–84 (July 16, 1789).

¹⁵³ 1 J. OF THE H.R., *supra* note 108, at 61 (July 16, 1789); 1 ANNALS OF CONG., *supra* note 27, at 684 (July 16, 1789).

¹⁵⁴ 1 J. OF THE H.R., *supra* note 108, at 61 (July 16, 1789); 1 ANNALS OF CONG., *supra* note 27, at 684 (July 16, 1789).

¹⁵⁵ 1 ANNALS OF CONG., *supra* note 27, at 691 (July 22, 1789).

¹⁵⁶ *Id.* at 701–702 (Aug. 4, 1789).

¹⁵⁷ The chaplain pay provision was added to the bill by the House sometime between August 4 and August 10, 1789; the most likely date is August 6. As of August 4, the bill specified compensation for House members, Senate members, and a number of congressional officers like “Serjeant-at-arms,” “Door-keeper,” and various clerks, but still did not include any reference to chaplains. *Id.* at 701–702 (Aug. 4, 1789). But something happened in committee on August 6. According to the House Journal entry for that day, the House went into a Committee of the Whole in order to consider the compensation bill. 1 J. OF THE H.R., *supra* note 108, at 73 (Aug. 6, 1789). The Speaker left the chair and Mr. Boudinot, who, along with Madison, had been on the committee of twelve that had produced the original compensation report, assumed chairmanship of the Committee of the Whole. The proceedings in the Committee of the Whole are not recorded, but the next entry for the day records that the Speaker resumed the chair, and Mr. Boudinot reported that the Committee of the Whole had “gone through the same [i.e., the bill], and made several amendments thereto; which he delivered in at the Clerk’s table, where the same were read, and some agreed to, and others disagreed to.” *Id.* Without further explanation or discussion, it was then ordered “[t]hat the said bill, with the amendments, be engrossed, and read the third time to-morrow.” *Id.* In the House debates that followed on that day and the next, which are recorded in the *Annals of Congress*, there is no discussion of chaplains, and there were no further amendments other than a change in the salary allowed to doorkeepers. See 1 ANNALS OF CONG., *supra* note 27, at 706–14 (Aug. 6–7, 1789); see also 1 J. OF THE H.R., *supra* note 108, at 73–74 (Aug. 6–7, 1789). After August 7, there were apparently no further floor debates on this bill in the House. The bill was approved on August 10, without further amendment but including the unspecified amendments added on August 6, and sent to the Senate. 1 J. OF THE H.R., *supra* note 108, at 75–76 (Aug. 10, 1789); 1 ANNALS OF CONG., *supra* note 27, at 714–15 (Aug. 10, 1789). Between August 10 and August 28,

ported this amendment; in fact, he had already stated that he was opposed to any amendments.¹⁵⁸ However, Madison was part of a House majority that subsequently voted in favor of the whole bill, including the chaplain compensation provision, on August 10.¹⁵⁹

That amended version of the bill arrived in the Senate on August 10,¹⁶⁰ but was not amended there until August 28. On that day the Senate amended an existing chaplain compensation provision by reducing the rate from \$500 per year to \$400 per year.¹⁶¹ This reduction, however, was not ultimately enacted into law. On September 2, the House disagreed with the Senate's amendment and insisted on their original figure of \$500 per year;¹⁶² the Senate agreed to this term on September 7.¹⁶³ After a series of compromises between the House and the Senate, both houses approved the amended bill on September 12 and sent it to the President,¹⁶⁴ who signed it into law on September 22, 1789.¹⁶⁵ It included a provision of \$500 per year for each chaplain: one for the House, and one for the Senate.¹⁶⁶

there is no mention in the Senate records of any provision for compensating congressional chaplains. But on August 28, while considering the compensation bill it had received from the House, the Senate amended a chaplain compensation provision that was already present. 1 J. OF THE SEN., *supra* note 138, at 67 (Aug. 28, 1789); *see also* 1 ANNALS OF CONG., *supra* note 27, at 75 (Aug. 28, 1789). It stands to reason that the chaplain provision was in place by August 10, when the Senate first received the bill. And the evidence indicates that the provision was most likely put into the bill by the House (in the Committee of the Whole) along with other amendments, on August 6, without recorded debate and without any recorded vote on the chaplain provision itself.

¹⁵⁸ *See supra* note 157 and accompanying text; *see also supra* note 151 and accompanying text.

¹⁵⁹ 1 ANNALS OF CONG., *supra* note 27, at 714–15 (Aug. 10, 1789). Surprisingly, Leonard Levy has claimed that, “[c]ontrary to . . . the Supreme Court, we do not know that Madison ‘voted for the bill authorizing payment of chaplains.’” LEVY, *supra* note 10, at 120 (quoting *Marsh v. Chambers*, 463 U.S. 783, 788 n.8 (1983)); *see also id.* at 120 n.14. In fact, the *Annals of Congress* report that Madison voted for a compensation bill on August 10. That bill almost certainly contained a provision for chaplain compensation. *See supra* note 157.

¹⁶⁰ 1 ANNALS OF CONG., *supra* note 27, at 62 (Aug. 10, 1789).

¹⁶¹ 1 J. OF THE SEN., *supra* note 138, at 67 (Aug. 28, 1789).

¹⁶² 1 ANNALS OF CONG., *supra* note 27, at 867 (Sept. 2, 1789).

¹⁶³ *Id.* at 77–78 (Sept. 7, 1789).

¹⁶⁴ 1 J. OF THE SEN., *supra* note 138, at 79 (Sept. 12, 1789); 1 J. OF THE H.R., *supra* note 108, at 107–09 (Sept. 11–12, 1789); 1 ANNALS OF CONG., *supra* note 27, at 923–26 (Sept. 11–12, 1789).

¹⁶⁵ Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 71. Besides providing compensation for members of the Senate and the House of Representatives, and for the chaplain of each house, the bill as enacted also provided compensation for a Secretary of the Senate, a Clerk of the House of Representatives, one principal clerk and one engrossing clerk for each house as needed, a sergeant-at-arms, doorkeepers of the Senate and House of Representatives along with their “necessary laborers” as needed, and assistant doorkeepers to each house. *Id.* §§ 1–7, 1 Stat. at 70–72.

¹⁶⁶ The Act specified that it would continue in force until March 4, 1796, and no longer. *Id.* § 7, 1 Stat. at 72. However, a successor compensation act with an identical chaplain compensation provision was signed into law on March 10, 1796; this statute, too, was an omnibus act providing compensation for members of Congress and “certain officers of both Houses.” Act of Mar. 10, 1796, ch. 4, § 3, 1 Stat. 449. This successor act, unlike the act it replaced, contained no sunset provision. James Madison, who was still a member of the House of Representatives at that time, may have voted in favor of the 1796 act, but this is impossible to know because the individual votes on that bill were not recorded. 5 ANNALS OF

C. Sponsorship and Drafting of the Establishment Clause

As Congress was drafting and approving the omnibus bill providing compensation for members of Congress and their staffs, Madison was shepherding through Congress a list of possible amendments to the Constitution, a list that, with some modifications, would become the Bill of Rights. These amendments had been demanded by some states in ratification debates, and Madison had promised to introduce them in Congress.¹⁶⁷ True to his word, on June 8, 1789, Madison introduced in the House of Representatives twelve proposed amendments to the Constitution.¹⁶⁸ One of these specified: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”¹⁶⁹ This is the proposal from which the Establishment Clause of the First Amendment was derived. The record of the Clause’s progress and ultimate approval in Congress sheds some additional light on Madison’s desire to effect disestablishment, in this case at the national level.

After debating the timing of the proposed amendments and the proper venue for their further consideration, the House referred them to a committee composed of one member from each state and charged the committee to report back a recommendation to the full House.¹⁷⁰ Madison was Virginia’s representative on this committee.¹⁷¹ There is no record of the committee’s debate, but regarding the religion and “rights of conscience” proposal, the committee ultimately recommended to the House on August 15 the following wording: “[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed.”¹⁷² By this time, Madison had already cast his vote in favor of the omnibus bill providing compensation for House and Senate members and their staffs, including legislative chaplains.¹⁷³

The proposal on establishment and the rights of conscience was debated on the floor of the House that day, with several House members expressing reservations or suggesting alternate wording. According to the *Annals of Congress*, “Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”¹⁷⁴ Benjamin Huntington of Connecticut

CONG., *supra* note 27, at 381 (Feb. 29, 1796); *see also* 2 J. OF THE H.R., *supra* note 108, at 456–57 (Mar. 4, 1796); 5 ANNALS OF CONG., *supra* note 27, at 423 (Mar. 4, 1796). Madison did not stand for reelection in the 1796 elections and left the House of Representatives in March 1797.

¹⁶⁷ *See supra* notes 125–26 and accompanying text.

¹⁶⁸ 1 ANNALS OF CONG., *supra* note 27, at 451 (June 8, 1789).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 690–91 (July 21, 1789).

¹⁷¹ *Id.* at 691 (July 21, 1789).

¹⁷² *See id.* at 757 (Aug. 15, 1789).

¹⁷³ *See supra* note 159 and accompanying text.

¹⁷⁴ 1 ANNALS OF CONG., *supra* note 27, at 758 (Aug. 15, 1789).

answered that “he feared . . . that the words [of the committee’s proposal] might be taken in such latitude as to be extremely hurtful to the cause of religion.”¹⁷⁵ The reason, according to Huntington, was that federal courts might refuse to enforce state or local religious assessment taxes owed to churches—such taxes being a common practice in Connecticut, where the Congregationalist church was established—because federal courts might construe the assessment to be “a religious establishment.”¹⁷⁶ Huntington went on to make clear that he opposed any provision whatsoever preventing establishments. “By the charter of Rhode Island, no religion [can] be established by law,” said Huntington, adding sarcastically that

he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, that the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.¹⁷⁷

In other words, Huntington said that forbidding religious establishments, as Rhode Island did, invariably harmed religion and essentially catered to those who professed no religion at all.

This point of view represented what Madison had been fighting against in his opposition to establishments of all kinds. Rather than taking Huntington to task over state establishments, however, Madison proposed to Huntington that, to prevent the evil Huntington feared in the federal courts, the House might reinsert the word “national,” which the committee had removed, and so “satisfy the minds of honorable gentlemen.”¹⁷⁸ Madison believed the proposed amendment was rooted in the people’s fear that “one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform.”¹⁷⁹ The phrase “national religion,” Madison said, would still prevent these evils, while also making it clear that federal courts would not be violating the amendment even if they enforced a clear state establishment.¹⁸⁰

To satisfy Huntington, Madison proposed to reinsert the word “national,” rather than proposing to define “establishment” so as not to include religious assessments. That choice suggests that Madison, like the federal courts Huntington hypothesized, regarded religious assessment taxes as religious “establishments.” Another possibility, not inconsistent with the first, is that Madison preferred not to define “establishment” in any way that would exclude any particular arrangement from that definition, leaving the

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*; see also LEVY, *supra* note 10, at 100–01 (explaining Huntington’s remarks as referring to religious assessment taxes required by state or local laws).

¹⁷⁷ 1 ANNALS OF CONG., *supra* note 27, at 758 (Aug. 15, 1789).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *id.* at 758–59 (Aug. 15, 1789).

term as broad as possible. In any case, he did not further elaborate on the meaning of “establishment” at this time. Five years before in the *Memorial and Remonstrance*, however, he had repeatedly called the proposed religious assessment in Virginia an “establishment.”¹⁸¹ And later in the *Detached Memoranda*, he stated clearly that the attempted assessment in Virginia in 1785 was a violation of the principle of “separation between Religion & Govt,” and that this was the same principle that was encoded for the national government in the First Amendment.¹⁸² Thus, Madison likely viewed the terms “national establishment” and “national religion” broadly enough to include at least nondiscriminatory religious assessments and similar aids to religion, which he would forbid Congress from imposing.

Judging by their actions, most House members, like Madison, did not share Huntington’s point of view about the pernicious effects of disestablishment, at least at the national level. No more time was spent discussing Huntington’s objection or the virtues of religious establishments. Upon hearing an objection to the word “national” on the ground that it suggested the new government was “national” and “consolidated” rather than “federal,” Madison withdrew his motion to insert “national,” while also noting that he did not think the word would have implied such a thing.¹⁸³ The House then, without discussion, approved a substituted wording previously proposed by Samuel Livermore of New Hampshire: “Congress shall make no laws touching religion, or infringing the rights of conscience.”¹⁸⁴ A few days later, without recorded debate, the House reconsidered the proposal and approved yet another substituted wording, this time submitted by Fisher Ames of Massachusetts: “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.”¹⁸⁵ This new wording probably came from Madison, who commonly submitted his proposals through another. This assumption is supported by the facts that Fisher Ames was apathetic about the Bill of Rights, he had just written a letter saying the religious guarantee in particular was useless, and the wording is comprised of phrases Madison had used often before.¹⁸⁶ If it did come from Madison, it is evidence that he wanted to ensure the amendment used the word “establishment,” likely because that

¹⁸¹ See, e.g., Madison, *Memorial and Remonstrance*, *supra* note 90, at 175 (referring to the assessment by calling it “the establishment proposed by the Bill” and “the establishment in question”).

¹⁸² Madison, *Detached Memoranda*, *supra* note 32, at 555; *infra* Part IV.A.

¹⁸³ 1 ANNALS OF CONG., *supra* note 27, at 759 (Aug. 15, 1789).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 796 (Aug. 20, 1789).

¹⁸⁶ See BRANT, *supra* note 26, at 235 (“Ames had just written, privately, that the religious guarantee was a ‘prodigious great dose’ of useless medicine . . .”); Brant, *supra* note 41, at 15.

was the word the disestablishmentarians who sought the amendment would be looking for.¹⁸⁷

From there the proposal went to the Senate for consideration. The Senate was a smaller body that included the influential Episcopalian Richard Henry Lee, who five years earlier had fought against Madison to try to establish a religious assessment in Virginia.¹⁸⁸ No record of the Senate debate exists, but the record does show that three motions were made in the Senate to revise the wording of the amendment.¹⁸⁹ The first attempted revision stated: “Congress shall make no law establishing one religious sect or society in preference to others, or to infringe the rights of conscience.”¹⁹⁰ This language could be embraced by friends of nonpreferential religious assessments and grants, such as the assessment bill in Virginia, because the evil it aimed at was discrimination rather than state involvement in religious matters; it narrowed the forbidden governmental practices to those that explicitly preferred one sect over another. This language, however, was rejected by the Senate.¹⁹¹ A motion was then made, incredibly, to strike the amendment altogether; that motion failed as well.¹⁹²

The next attempted revision read: “Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.”¹⁹³ The “rights of conscience” language was no problem for the senators; the sticking point was the clause regarding establishments. But this proposed revision also failed.¹⁹⁴ Next it was proposed that the amendment read: “Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.”¹⁹⁵ This too was rejected by the Senate.¹⁹⁶ The version the Senate finally agreed to accept was the original House version without the phrase “nor shall the rights of conscience be infringed,” which they may have regarded as superfluous in light of the establishment and free exercise provisions.¹⁹⁷ But this agreement was short-

¹⁸⁷ See LEVY, *supra* note 10, at 101–02 (noting that “[a]pparently the House believed that the draft of the clause based on Livermore’s motion might not satisfy the demands of those who wanted something said specifically against establishments of religion”).

¹⁸⁸ See Brant, *supra* note 41, at 15–16 (“when the clause reached the United States Senate it passed into the hands of enemies,” including Richard Henry Lee); *supra* notes 88–96 and accompanying text (Madison’s fight over religious assessments in Virginia); *infra* note 351 and accompanying text (Lee’s stance on issues of establishment).

¹⁸⁹ 1 J. OF THE SEN., *supra* note 138, at 70 (Sept. 3, 1789).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

lived. Six days later the Senate reconsidered the amendment and agreed to the following substitution: “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.”¹⁹⁸ The Senate’s linguistic arrangement “bore all the earmarks of a combination between the established churches of North and South” in that “it protected religious creeds but left the way open to federal financial aid to religion.”¹⁹⁹

The House refused to go along with this revision, however, so the House and Senate appointed members to a conference committee to work out a compromise version.²⁰⁰ Madison was chairman of the three House members on the six-member conference committee,²⁰¹ and “there can be little or no doubt that Madison shaped the final draft which came from the committee and became a part of the Constitution.”²⁰² Redacting the language about articles of faith or modes of worship, Madison’s conference committee ultimately reported back this suggested wording: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”²⁰³ The House agreed to this language on September 24,²⁰⁴ and the Senate concurred on September 25.²⁰⁵ After ratification by the states, these words became the first clauses of the First Amendment.

The record of the drafting of the Establishment Clause demonstrates Madison’s deep continuing interest in disestablishment as he sat in the First Congress, and equally that his interest was well known among his fellow congressmen. It also indicates that during this period Madison continued to struggle against those, like Richard Henry Lee and some of the New England Congregationalists, who approved milder forms of governmental funding, such as nonpreferential assessments, for religious purposes. While the record of the drafting leaves many questions and is open to differing interpretations, the weight of evidence suggests that Madison wished to use the phrase “no law respecting an establishment of religion” to close the door on such funding at the national level.

¹⁹⁸ *Id.* at 77 (Sept. 9, 1789).

¹⁹⁹ Brant, *supra* note 41, at 16.

²⁰⁰ 1 ANNALS OF CONG., *supra* note 27, at 939 (Sept. 21, 1789); 1 J. OF THE H.R., *supra* note 108, at 115–16 (Sept. 21, 1789); 1 J. OF THE SEN., *supra* note 138, at 86–87 (Sept. 24, 1789).

²⁰¹ 1 J. OF THE H.R., *supra* note 108, at 116 (Sept. 21, 1789); 1 ANNALS OF CONG., *supra* note 27, at 939 (Sept. 21, 1789); Brant, *supra* note 41, at 16.

²⁰² Brant, *supra* note 41, at 16; *see also* 1 STOKES, *supra* note 15, at 547 (“we can be reasonably sure . . . that Madison played the leading part” in drafting the conference committee’s language, which was enacted as the Establishment Clause).

²⁰³ 1 J. OF THE SEN., *supra* note 138, at 86 (Sept. 24, 1789).

²⁰⁴ 1 ANNALS OF CONG., *supra* note 27, at 948 (Sept. 24, 1789).

²⁰⁵ 1 J. OF THE SEN., *supra* note 138, at 88 (Sept. 25, 1789).

D. Census Bill of 1790

In 1790 Congress was in its second year, and was considering a bill providing for a nationwide census. Congressman Madison rendered an early interpretation of the constitutional power of the new federal government in religious matters. He threw his support behind the census bill despite calls for amendments to require more particular enumeration of citizens' occupations. In successfully defending the bill against those who criticized its failure to provide for enumeration of members of the "learned professions," Madison argued that while he might support enumeration of "learned professions" as a single category, more particular occupational classifications might offend the Constitution. Specifically, "[a]s to those who are employed in teaching and inculcating the duties of religion there may be some indelicacy in singling them out, as the General Government is proscribed from interfering, in any manner whatever, in matters respecting religion; and it may be thought to do this, in ascertaining who, and who are not ministers of the Gospel."²⁰⁶ This interpretation of the constitutional power of the federal government was rendered after the First Amendment had been proposed to the states but before it had become binding, while the states were still considering its ratification. The House ultimately passed the census bill without any provision for the enumeration of ministers.²⁰⁷

E. Dolley Madison

One additional event during this time period in Madison's life is worth mentioning. In spring 1794, while Congress was meeting in Philadelphia, Aaron Burr introduced Madison to Dolley Payne Todd, a Quaker and the widow of a Quaker.²⁰⁸ By September they were married, although the marriage caused Dolley to be expelled from the Friends church because Madison was not a Quaker.²⁰⁹ Reverend Alexander Balmain, an Episcopalian churchman from Winchester whose wife was Madison's cousin, performed the marriage ceremony.²¹⁰

²⁰⁶ 1 ANNALS OF CONG., *supra* note 27, at 1146 (Feb. 2, 1790); *see* LEVY, *supra* note 10, at 130.

²⁰⁷ 1 ANNALS OF CONG., *supra* note 27, at 1168–70 (Feb. 8, 1790).

²⁰⁸ *See* BRANT, *supra* note 26, at 275–79.

²⁰⁹ *Id.* at 278–79.

²¹⁰ *Id.* at 278; Inventory of Christ Episcopal Church Records, Handley Regional Library, Winchester-Frederick County Historical Society (Feb. 2007), <http://www.hrl.lib.state.va.us/handley/archives/inventory%20index.htm> (follow hyperlink "Christ Episcopal Church Records"). The choice of clergyman makes sense because Balmain was a relative, because he belonged to the same denomination as Madison's family, and because a Quaker clergyman would not likely have agreed to perform the service. But it is noteworthy that, had James and Dolley married just fifteen years earlier, they might have been forced into this choice. Only within the past fifteen years had Virginia law allowed marriages to be performed by Quakers, Mennonites, and other non-Anglican ministers without a state license. *See* SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 494 (Cooper Square Publishers 1968) (1902); *see also* 1 STOKES, *supra* note 15, at 371–73; John Leland, *The Virginia Chronicle* (1790), *in* THE WRITINGS OF JOHN LELAND 112 (reprint 1969) (L.F. Greene ed., 1845); LEVY,

It is revealing, and perfectly consistent with his reputation and character, that Madison would choose for his lifelong partner a member of a religious minority so well known for its dissenting views.²¹¹ Although Dolley's family may not have experienced direct persecution, Madison was no doubt aware that the Quaker sect had been all too recently a persecuted minority in Virginia and many other colonies.²¹² Prejudice against Quakers continued in many regions even as Madison and Dolley married.²¹³ Madison's reputation at this point in his career for making common cause with religious dissenters may well have contributed to his appeal in the eyes of the Quaker widow Dolley. Certainly the dissenting religious traditions of her family's faith did not render her less attractive to him. A lifelong opponent of religious establishments himself, who argued that they threatened not only natural rights but the purity of true religion,²¹⁴ Madison had chosen to marry a member of one of the most outspoken antiestablishmentarian religious groups of his day.

III. YEARS AS PRESIDENT (1809–1817)

A. *Vetoes Grounded in the Establishment Clause*

In 1796, Madison determined that he would not seek or accept reelection to Congress in the fall elections; accordingly, he moved back to Virginia in spring 1797.²¹⁵ His next tenure in national office was as Thomas Jefferson's Secretary of State, from 1801 until he became President. Having been a well-known national political figure for over two decades, Secretary of State Madison won his first presidential term in the fall elections of 1808, handily defeating the Federalist Charles Cotesworth Pinckney and the incumbent Vice President George Clinton.²¹⁶

supra note 10, at 60 (discussing repealed laws criminalizing all but the "Anglican mode of worship"); McConnell, *supra* note 12, at 2175.

²¹¹ Although they were frequently persecuted, Quakers were rarely silent sufferers. See CURRY, *supra* note 44, at 81–82, 131.

²¹² See COBB, *supra* note 210, at 89–91; PFEFFER, *supra* note 30, at 77–78; see also CURRY, *supra* note 44, at 21–25, 81–82, 89–90; LEVY, *supra* note 10, at 17–24. In 1785, Virginia Quakers had filed their own memorial, alongside those of many Baptists and Madison himself, in protest of Patrick Henry's bill for nonpreferential religious assessments, which they viewed as a denial of religious liberty and a regression toward the systematic religious persecutions of the past. LEVY, *supra* note 10, at 66.

²¹³ For example, one article opposing ratification of the 1787 Constitution, published originally in 1788 in the *New York Daily Advertiser* and then reprinted in Connecticut, New Hampshire, and Massachusetts, argued that the "no religious tests" clause of Article 6 would allow offices in the new national government to be occupied by, inter alia, "Quakers, who will make the blacks saucy, and at the same time deprive us of the means of defence" ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION 33 (2005) (quoting article appearing in *New York Daily Advertiser*, Jan. 1788).

²¹⁴ See, e.g., *supra* notes 93, 96 and accompanying text.

²¹⁵ BRANT, *supra* note 26, at 289–92.

²¹⁶ *Id.* at 397.

Two years into his first term, in February 1811, President Madison issued two vetoes on Establishment Clause grounds. Both of the vetoes evidently surprised Congress;²¹⁷ perhaps most members had never seriously considered such bills in light of the disestablishmentarian principles embodied in the Establishment Clause. In any case, after hearing Madison's veto messages, Congress did not muster even a bare majority in support of either bill.

One of the bills was entitled "An Act Incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia." Madison's objections stemmed from the fact that "the bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated This particular church, therefore, would so far be a religious establishment by law," contrary to the Establishment Clause.²¹⁸ On a broader scale, Madison opined, "the bill exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions" ²¹⁹ It appears that many House members were stunned by the veto,²²⁰ after learning of Madison's constitutional objections, a majority of the House voted against the bill they had previously passed.²²¹

The other veto, cast one week later, defeated a bill that granted federal land for the use of a Baptist church, which in Madison's view would "[comprise] a principle and precedent for the appropriation of funds of the United States, for the use and support of religious societies; contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment."²²² Again, a majority of House members refused to support the bill after considering Madison's veto message and the import of the Establishment Clause.²²³

²¹⁷ See *infra* notes 220–23 and accompanying text.

²¹⁸ 22 ANNALS OF CONG., *supra* note 27, at 983 (Feb. 21, 1811).

²¹⁹ *Id.* at 982 (Feb. 21, 1811).

²²⁰ See *id.* at 983–85 (Feb. 21, 1811).

²²¹ The bill was initially passed by a majority in the House without debate and without a record of the ayes and nays. *Id.* at 832 (Jan. 28, 1811). But almost three-fourths of the House members actually voted against the bill on reconsideration, after hearing Madison's veto message and re-reading the bill and the First Amendment. *Id.* at 997–98 (Feb. 23, 1811). There is a clear implication that many House members had never considered whether this bill might violate the Establishment Clause, and upon contemplation, decided that it might. Interestingly, the minority who continued to support the bill even after the veto message seemed to believe that if this bill violated the Establishment Clause, then so did the paid chaplaincy, an institution they were apparently unwilling to question. See *id.* at 984–85 (Feb. 21, 1811) (remarks of Congressman Wheaton). But the point is, only a minority continued to support the bill once the House members actually considered the implications of the Establishment Clause.

²²² 7 J. OF THE H.R., *supra* note 108, at 602 (Feb. 28, 1811). The House had initially approved the bill without recorded debate on the religious set-aside. See *id.* at 534–35 (Feb. 6, 1811).

²²³ *Id.* at 608–09 (Mar. 2, 1811). More than sixty percent of the voting House members voted against the bill on reconsideration. *Id.* at 609.

In sum, the evidence of Madison's vetoes in 1811 strongly supports the contention that Madison was a consistent opponent of all vestiges of religious establishment. The man who fought so hard to keep Virginia's government from funneling a small portion of state funds to an array of denominations and clergymen might quite naturally cast these vetoes opposing governmental incorporations of churches and governmental land grants to churches. The vetoes are also strong evidence that he viewed the Establishment Clause as a ban on even noncoercive national government action that actively supported religion, whether through financial means, such as land grants, or more symbolic means, such as the incorporation of a church at its own request.

B. Military Chaplaincies

While serving as President, Madison had few dealings with the congressional chaplaincy practice,²²⁴ but he dealt more frequently with the military chaplaincy, particularly during the years surrounding the War of 1812. Because of the differences between the two practices,²²⁵ Madison's dealings with military chaplains might not conclusively demonstrate how he felt about legislative chaplains; nevertheless, the practices are similar enough that the evidence regarding military chaplaincies should be considered.

Madison's presidential dealings with military chaplaincies fall into two categories: nominations of chaplains, and approval of legislation. First, he nominated for the Senate's confirmation a few individuals for military chaplaincies. Most of these chaplaincies were related to the military buildup in the War of 1812; in fact, many of the appointees had already received their commissions from the military before Madison even nominated them. His subsequent nominations came to the Senate in batches, often merely forwarding recommendations from the Secretary of War and including nominations for not only chaplains but many other ranks and offices as well.²²⁶ Thus, Madison's presidential nominations of military chaplains, and the Senate confirmations as well, were likely viewed by most as a mere formality.

Second, Madison signed two bills providing for military chaplaincies. In January 1813, Madison signed into law a bill issuing various regulations for the armed forces. It specified that "there shall be appointed to each brigade one chaplain, who shall be entitled to the same pay and emoluments as

²²⁴ See *infra* Part III.D.

²²⁵ See *supra* note 15 (discussing differences between legislative and military chaplaincies); *infra* notes 243–44 and accompanying text (discussing Madison's writings in which he opposed military chaplaincies but viewed them as presenting a closer question than legislative chaplaincies).

²²⁶ See 2 EXECUTIVE JOURNAL OF THE SENATE, 1789–1875, at 124 (June 20, 1809) [hereinafter EXEC. J. OF THE SEN.]; *id.* at 196 (Dec. 17, 1811); *id.* at 265 (May 11, 1812); *id.* at 352 (June 10, 1813); *id.* at 355, 371–72 (June 18, 1813); *id.* at 397 (July 26, 1813); *id.* at 475, 477 (Feb. 17, 1814); 3 *id.* at 4–5 (Dec. 15, 1815); *id.* at 49–50 (Apr. 27, 1816); *id.* at 50–51 (Apr. 29, 1816).

a major in the infantry.”²²⁷ In April 1816, he signed into law a similar bill, providing that “there be . . . one chaplain to each brigade of the army, who shall receive the pay and emoluments of major, as heretofore allowed.”²²⁸

Although Madison did not try to end the military chaplaincy practice while he was President, the evidence does not show him to have been a warm supporter of it. Likely his attention was directed largely to the war and foreign relations, increasingly so as he continued in office; this may help to explain why he did not do more to end a practice he later said was unconstitutional.²²⁹ In any event, he believed there were differences between the two practices that made military chaplaincies less problematic than legislative chaplaincies.²³⁰

C. Tax Exemption for Bible Printing Plates

In February 1813, Madison signed a bill excluding from national taxes certain plates that were being imported for use in printing Bibles.²³¹ The impetus for this private law came from a memorial that the managers of the Bible Society of Philadelphia presented to Congress. The Bible Society aimed to use the plates to print copies of the Bible that would be distributed free of charge. They had ordered the plates from Britain in 1809, but with the onset of the War of 1812, Congress imposed duties on all British manufactures imported into the United States.²³² Thus, the Bible Society asked for equitable relief from Congress, not primarily because it was printing a religious publication, but on the grounds that (1) it was not a profit-making enterprise, and (2) it had ordered the goods before war broke out and before the duties were enacted by Congress. Even so, in the House of Representatives, there was “some time spent” in an off-the-record discussion by a Committee of the Whole before the House, and ultimately President Madison, approved the bill.²³³

At first blush, evidence that Madison approved a federal tax exemption for a religious group importing Bibles seems to illuminate his thoughts on how the state should relate to religious groups; but upon closer inspection,

²²⁷ Act of Jan. 29, 1813, ch. 16, § 16, 2 Stat. 796.

²²⁸ Act of Apr. 24, 1816, ch. 69, § 2, 3 Stat. 297.

²²⁹ For Madison’s opinion that military chaplaincies violated the Establishment Clause, see *infra* notes 243–44 and accompanying text.

²³⁰ See *infra* note 244 and accompanying text; see also *supra* note 15 (describing differences between military chaplaincies and legislative chaplaincies).

²³¹ Act of Feb. 2, 1813, ch. 17, 6 Stat. 116.

²³² See 5 J. OF THE SEN., *supra* note 138, at 231 (Jan. 14, 1813); 8 J. OF THE H.R., *supra* note 108, at 615 (Jan. 14, 1813).

²³³ 8 J. OF THE H.R., *supra* note 108, at 651–52 (Jan. 29, 1813). Although there is no way to know, the discussion may have centered on differences between the House and Senate versions of the bill, which were both before the Committee of the Whole. In the end, the committee reported out the Senate version, with no amendment. *Id.* at 651.

the evidence turns out to be largely unenlightening.²³⁴ The tax exemption in this case could have been granted to a nonreligious group on the same grounds. Evidence like this shows that Madison was willing to use law to protect religious groups and causes from various kinds of inequity having nothing to do with their religious nature. It does not show, however, that Madison was willing to use law to grant religious groups special privileges, support, or endorsement not available to secular groups and causes. In any case, evidence of this tax exemption surely tells us nothing about how Madison viewed the legislative chaplaincy.

D. Compensation Bill for Congressional Chaplains

While Madison served as President, from 1809 to 1817, only one bill regarding legislative chaplains was presented to him: a bill in 1816 providing that the salaries of Congress's chaplains would be maintained at \$500 per year, the same amount that the chaplains had been paid ever since the First Congress decided to pay them in 1789. By contrast, the bill increased the salaries of other congressional staff.²³⁵ Some members of Congress had been in favor of raising the salaries of chaplains as well. As proposals to increase various staff salaries were being considered, Senator Joseph Varnum of Massachusetts proposed that the salaries of House and Senate chaplains be increased from \$500 per year to \$1000 per year; the Senate rejected his proposal. Although Senator Varnum then "gave notice that he should ask leave to bring in a bill to increase the salary of the chaplains to Congress," his efforts ultimately proved fruitless.²³⁶ Thus Congress presented Madison with a bill providing a stagnant compensation for chaplains. He signed this bill into law in 1816.²³⁷

IV. YEARS IN RETIREMENT (1817–1836)

A. Detached Memoranda

When Madison left the presidency in 1817, he left public office for good.²³⁸ For his remaining nineteen years, he largely retreated from public life, although he continued to offer personal advice and public recommendations regarding various policy issues facing the country. Otherwise, he

²³⁴ This is all the more true in light of the fact that Madison later expressed pointed disapproval of state government attempts to exempt "Houses of Worship" from state taxes. See Madison, Detached Memoranda, *supra* note 32, at 555.

²³⁵ See Act of Apr. 30, 1816, ch. 168, § 3, 3 Stat. 334 (increasing salaries of House and Senate clerks by twenty percent).

²³⁶ 6 J. OF THE SEN., *supra* note 138, at 584–88 (Apr. 25, 1816).

²³⁷ Act of Apr. 30, 1816, ch. 170, 3 Stat. 334.

²³⁸ He was, however, a delegate to Virginia's state constitutional convention of 1829, where he made only one speech and had little influence on the proceedings. RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 263 (2006).

used the time to collect and organize his personal papers, to manage his estate, and to help establish the University of Virginia.²³⁹ Sometime during this period, probably within a few years after leaving the presidency, he wrote a series of essays he entitled *Detached Memoranda*.²⁴⁰

In one of these essays, bearing the heading *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments*, he dwelt at some length on church-state relations, the Establishment Clause, and chaplaincies:

Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?

In strictness the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation.

The establishment of the chaplainship to Congs is a palpable violation of equal rights, as well as of Constitutional principles: The tenets of the chaplains elected [by the majority] shut the door of worship ag[ain]st the members whose creeds & consciences forbid a participation in that of the majority. . . .

If Religion consist in voluntary acts of individuals, singly, or voluntarily associated, and it be proper that public functionaries, as well as their Constituents sh[oul]d discharge their religious duties, let them like their Constituents, do so at their own expence. How small a contribution from each member of Congs w[oul]d suffice for the purpose? How just w[oul]d it be in its principle? How noble in its exemplary sacrifice to the genius of the Constitution; and the divine right of conscience? Why should the expence of a religious worship be allowed for the Legislature, be paid by the public, more than that for the Ex[ecutive] or Judiciary branch of the Govt[?]

Were the establishment to be tried by its fruits, are not the daily devotions conducted by these legal Ecclesiastics, already degenerating into a scanty attendance, and a tiresome formality?

Rather than let this step beyond the landmarks of power have the effect of a legitimate precedent, it will be better to apply to it the legal aphorism *de minimis non curat lex*²⁴¹: or to class it cum “*maculis quas aut incuria fudit, aut humana parum cavit natura*.”²⁴²

²³⁹ See generally BRANT, *supra* note 26, at 607–42.

²⁴⁰ Regarding the date for the *Detached Memoranda*, see HAMBURGER, *supra* note 12, at 181; LEVY, *supra* note 10, at 121; Fleet, *supra* note 32, at 534–35; Wallace, *supra* note 114, at 1251 n.327.

²⁴¹ *De minimis non curat lex* means “the law does not bother with trifles.” See *infra* note 309.

²⁴² *Maculis quas aut incuria fudit, aut humana parum cavit natura* means “a few blots which a careless hand has let drop, or human frailty has failed to avert.” See *infra* note 309.

Better also to disarm in the same way, the precedent of Chaplainships for the army and navy, than erect them into a political authority in matters of religion.²⁴³

While Madison believed military chaplaincies to be unconstitutional, the remainder of the essay shows that he viewed them as presenting a closer question than legislative chaplaincies; further, within the group of military chaplaincies, he viewed chaplaincies for “navies with insulated crews” as the most difficult case of all, although in the end he would still view such appointments as unconstitutional.²⁴⁴

One is struck both by the specificity of Madison’s reflections and by their sheer bulk. No one else from the Founding period even came close to writing this much, or this directly, about the permissibility or wisdom of the congressional chaplaincy. And James Madison, primary sponsor of the First Amendment, clearly called the congressional chaplaincy an “establishment.” He left no doubt as to his opinions: the practice “involve[s] the principle of a national establishment” and violates the Establishment Clause, equality rights, and the “divine right of conscience” for which he had labored all his life.

B. Letter to Edward Livingston

As specific and lengthy as it is, the *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments* essay of the *Detached Memoranda* is not the only Madisonian writing in which he directly addressed the practice of appointing congressional chaplains. During this period Madison also wrote a letter to Edward Livingston in which he made many of the same points he made in the *Detached Memoranda*. Yet there is one important addition: in this letter, he pointedly disclaimed his own involvement in providing for legislative chaplaincies in Congress:

I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace. This has always been a favorite principle with me; and it was not with my approbation, that the deviation from it took place in Congs., when they appointed Chaplains, to be paid from the Natl. Treasury. It would have been a much better proof to their Constituents of their pious feeling if the members had contributed for the purpose, a pittance from their own pockets. As the precedent is not likely to be rescinded, the best that can now be done, may be to apply to the Constn. the maxim of the law, *de minimis non curat*. . . .²⁴⁵

Every new & successful example . . . of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that relig-

²⁴³ Madison, *Detached Memoranda*, *supra* note 32, at 558–59.

²⁴⁴ *Id.* at 558–60.

²⁴⁵ *De minimis non curat* means “do not bother with trifles.” See *infra* note 309.

ion & Govt. will both exist in greater purity, the less they are mixed together.²⁴⁶

Thus by 1822, and perhaps earlier, Madison had declared in no uncertain terms that he viewed the congressional chaplaincy to be both unconstitutional and unwise. He grounded those conclusions in separationist theory, using phrases like “perfect separation between ecclesiastical and civil matters” to describe his ideal social order. He also grounded his conclusions in human experience, alluding to “past [examples of separation],” which he believed demonstrated that “religion & Govt. will both exist in greater purity, the less they are mixed together.” Moreover, he claimed that he had never supported the legislative chaplaincy practice while he served in Congress. Again, for sheer volume as well as depth of analysis, Madison’s ruminations on legislative chaplaincies far exceed anything found in the writings of others from his generation on that subject.

V. EXPLANATIONS

The most plausible reading of this record is that James Madison consistently opposed legislative chaplaincies throughout his life. At most, some of the facts indicate that, in order to achieve more pressing goals, he occasionally kept his views on the chaplaincy to himself when he did not have the numbers on his side; but none of the historical facts are irreconcilable with Madison’s own claim that he had always viewed the legislative chaplaincy as a violation of the Establishment Clause as well as the natural rights of conscience. On the other hand, if he is viewed as having supported the congressional chaplaincy in 1789, Madison must have been a remarkably inconsistent proponent of disestablishment in the specific context of payments to the clergy—first opposing, then supporting, and then opposing again the payment of public funds to clergymen for their religious services. Even more problematic, he must have been either lying or forgetting his earlier views when he told Edward Livingston in 1822 that he had never approved the practice while he sat in Congress.

The numerous difficulties with this second interpretation of Madison make it too implausible to be believed. Section A of this Part describes these difficulties in some detail. Section B analyzes the historical incidents that are most suggestive of Madison’s support for legislative chaplains, demonstrating that all of them can be explained in other ways that are more plausible in light of Madison’s own claims and the record as a whole. Section C of this Part shows that if Madison did oppose legislative chaplaincies throughout his life, he was not likely alone in this sentiment; even during Madison’s early career there was a substantial body of disestablishmentarian thought, some of it directly critical of legislative chaplaincies, within which Madison’s opposition to chaplaincies would have fit nicely. Section

²⁴⁶ Letter from Madison to Livingston, *supra* note 33, at 105–06.

D examines some of the supporters of the legislative chaplaincy, showing that in Madison's day there were substantial numbers of high government officials who supported and encouraged legislative chaplaincies. Section D also demonstrates, however, that while these figures may have been responsible for creating or perpetuating legislative chaplaincies, Madison was not likely one of their number. Not a single one of these figures was known as a champion of disestablishment, as was Madison, and none of them made common cause with Madison in his most divisive fights against religious establishments.

A. *Difficulties Posed by the Inconsistency Hypothesis*

Viewed in its entirety, the historical record presents a complex portrait of James Madison, and it is fair to say that some of the evidence is in tension. On the two occasions when Madison explicitly discussed legislative chaplaincies, he said they were unconstitutional and unwise.²⁴⁷ There are, however, four episodes from earlier in his life that could reasonably be held to indicate Madison's contrary opinion on the specific question of legislative chaplaincies: (1) Madison's membership in the House committee charged with establishing the first rules for the chaplaincy in the First Congress;²⁴⁸ (2) Madison's vote in the House in favor of the statute providing compensation for the first chaplains appointed under these rules;²⁴⁹ (3) Madison's 1788 vote in the Confederation Congress in favor of Paine Wingate's proposal that two chaplains be appointed to Congress at the annual salary of \$300 each;²⁵⁰ and (4) Madison's approval of the 1816 bill maintaining compensation to chaplains at \$500 each.²⁵¹ Three of these episodes occurred within the two-year period from 1788 to 1789; the last occurred in 1816, just before Madison left the presidency. Section B of this Part discusses each of these incidents in some detail. Before entering that discussion, however, it is instructive to see how other commentators have interpreted these episodes from Madison's life.

Based primarily on the facts that Madison (1) sat on the committee that established the first rules for the chaplaincy in the new Congress and (2) voted for a bill providing compensation for congressional chaplains—and perhaps drawing some indirect support from his presidential proclamations of days of prayer²⁵²—many scholars argue that Madison supported

²⁴⁷ See *supra* Part IV.

²⁴⁸ See *supra* Part II.A.

²⁴⁹ See *supra* Part II.B.

²⁵⁰ See *supra* Part I.J.

²⁵¹ See *supra* Part III.D.

²⁵² As President, Madison did issue four such proclamations at the request of Congress, in 1812, 1813, 1814, and 1815. NOONAN & GAFFNEY, *supra* note 42, at 207; Fleet, *supra* note 32, at 562 n.54. It is probably proper to note that these were the exact years during which Americans were fighting British forces on U.S. soil, during the War of 1812. This was a particularly bitter and dangerous war for the new country, and it still stands as the only war in our history during which the enemy sacked and burned

paid chaplains during his years in Congress. Judge Michael McConnell cites Madison to show that the Framers generally did not view legislative chaplaincies as unconstitutional.²⁵³ Professor Robert Cord also asserts that Congressman Madison saw nothing constitutionally amiss in the practice of paying legislative chaplains.²⁵⁴ Other commentators have agreed.²⁵⁵ But because Madison clearly repudiated the paid legislative chaplaincy more than once after he left the presidency, such commentators—considering the evidence from later in Madison’s life—usually conclude that he changed his mind dramatically after 1789.²⁵⁶ Professor Cord, for example, asserts

Washington, D.C. Madison’s presidency, of course, included four other years as well, years before and after the war, and in none of these other years did he issue any religious proclamations, as far as we know. But during the war years, as Madison drew increasing criticism from Congress and the public for failing to proclaim a day of public prayer, Congress issued resolutions calling for presidential proclamations, and Madison complied, though he still drew fire for wording the proclamations so as to avoid directly recommending prayer or religion to nonbelievers. See BRANT, *supra* note 26, at 502, 546–47.

In his 1822 letter to Livingston, Madison sought to excuse to some extent his presidential proclamations. Letter from Madison to Livingston, *supra* note 33, at 105–06 (noting that during his presidency he had “found it necessary on more than one occasion to follow the example of predecessors” in proclaiming “fasts and festivals,” but suggesting that this might be excusable because his recommendations contained no sanctions enforcing worship and expressed no preference for one religious sect over another). He never suggested that legislative chaplaincies might be excusable on similar grounds, or indeed any grounds. Professor Levy asserts that Madison justified his presidential proclamations by reference to the fact that he was President during the time a war was fought on American soil. LEVY, *supra* note 10, at 121.

In any event, Madison seems to have opposed such proclamations as generally unconstitutional by the time he wrote the *Detached Memoranda*. His opposition is discussed in *id.* at 123. See Madison, *Detached Memoranda*, *supra* note 32, at 559–62; see also Letter from Madison to Livingston, *supra* note 33, at 105 (referring to certain “Executive Proclamations of fasts and festivals” as a “deviation from the strict principle” of “the immunity of Religion from civil jurisdiction”). There is strong evidence, however, that Madison viewed presidential prayer proclamations (and military chaplaincies) as somewhat less constitutionally problematic than paid legislative chaplains or nonpreferential taxes to support ministers, both of which involved the more coercive taxing and spending powers of the government. See Madison, *Detached Memoranda*, *supra* note 32, at 559–62; *supra* note 15.

²⁵³ Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988) (“We know, far more certainly than we usually know these things, that the framers did not consider legislative chaplains to violate the [E]stablishment [C]lause That [Madison] and other framers at that time believed legislative chaplains were consistent with the [F]irst [A]mendment is powerful evidence.”). McConnell argues, however, that we should not let *that* sort of “Framers’ intent” decide the question of how their constitutional principles ought to be interpreted and applied to legislative chaplains today. *Id.* at 362–63.

²⁵⁴ See CORD, *supra* note 17, at 23, 32–33, 36.

²⁵⁵ See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 788–89 & nn.8–10 (1983) (Burger, C.J., majority opinion).

²⁵⁶ See, e.g., CORD, *supra* note 17, at 32–33, 35–36; HAMBURGER, *supra* note 12, at 103–07, 181–84; Wallace, *supra* note 114, at 1251; *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 53–54 (2004) (Thomas, J., concurring) (citing ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 22 (1982), and HAMBURGER, *supra* note 12, at 105); *Marsh*, 463 U.S. at 788 & nn.8–10, 791 n.12 (Burger, C.J., majority opinion); see also *supra* note 30 and accompanying text (commentators alluding to Madison’s inconsistency on church-state issues more generally). Professor Cord even regards Madison’s *Detached Memoranda*, written after he left the

bluntly: “Obviously the Madison of the ‘Detached Memoranda’ is not the Madison responsible for the First Amendment nor the President who issued proclamations of days of thanksgiving and prayer. One cannot in good conscience and dispassionate scholarship make consistent—the inconsistent.”²⁵⁷ There are a number of problems, however, with this understanding of Madison as being inconsistent on the legislative chaplaincy issue. The biggest problems are: (1) it presumes to understand Madison’s personal opinions based solely on his unexplained voting record, while discounting his later express opinions as the product of regret; (2) it gives insufficient attention to Madison’s other disestablishmentarian activities both before and after 1789, requiring an understanding of Madison as unprincipled and vacillating on church-state issues; and (3) it requires one to believe that by 1822, Madison was either forgetting his past opinion on legislative chaplaincies, or lying about it.

The first difficulty with the inconsistency hypothesis is that for purposes of understanding Madison’s private opinions, it relies on Madison’s unelaborated actions in office, to the virtual exclusion of his later explanations of those actions. To the extent Cord²⁵⁸ and others²⁵⁹ claim that Madison’s thoughts on legislative chaplaincies at *any* time of his life should be

presidency, as contradicting Madison’s letter to Edward Livingston, written “five years after Madison left the presidency.” CORD, *supra* note 17, at 31. One page later Cord writes: “My concept of James Madison does not include the incongruous action of . . . failing to object as a Committee member recommending to Congress a Chaplain system *if he believed it to be unconstitutional* or a basic violation of proper legal Church-State relations. . . . The historical record . . . shows a principled Madison . . .” *Id.* at 32–33. But in light of all his allegations of Madison’s self-contradictions, Cord never satisfactorily explains why his view of Madison presents a more “principled Madison,” or a less “incongruous” Madison, than any particular alternative view of Madison’s beliefs.

²⁵⁷ CORD, *supra* note 17, at 36. Cord’s explanation for Madison’s dramatic change of opinion seems to be that “Madison out of office and as an old man regretted some of his past public actions,” *id.* at 35, and due to this regret he made some questionable constitutional arguments in private reflections—in much the same way, Cord says, that Richard Nixon, after he left the presidency, might (hypothetically) have regretted taping conversations in the Oval Office and been moved to write that such taping is “unconstitutional.” *Id.* at 36. Whatever the reason, Cord says, Madison held inconsistent viewpoints on these issues over time; but the relevant Madison viewpoint, according to Cord, is plainly the viewpoint Madison adopted while he occupied elective office, as opposed to whatever viewpoint he held afterwards: “[T]he repudiation of one’s actions taken while in public power, by an elderly statesman out of power, is hardly a solid base upon which to build a convincing historical argument, much less constitutional law.” *Id.*

²⁵⁸ See *id.* at 228 (“[T]he ‘Detached Memoranda’ is certainly not a valid basis on which to judge what Madison believed, either when he was President or in his earlier active public life.”); *id.* at 36 (“[Rather than relying on] one document written in Madison’s declining years, I think that Madison should be judged on his behavior, statements, and actions *while he was a public servant in the House and in the Presidency making policy and accountable for it.*”).

²⁵⁹ See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 895–96 (2005) (Scalia, J., dissenting) (arguing that Madison’s later writings disapproving executive proclamations recommending prayer “should not be read to contradict Madison’s [religious] statements in his first inaugural address,” and in any event those later writings “[do] not disapprove public acknowledgment of God, unless one posits (what Madison’s own actions as President would contradict) that reference to God [is discriminatory amongst religious sects]”).

divined without reference to his only writings on the subject, the claim falters. The most direct evidence of what a person believes is what she says she believes. Of course, she may be lying, and one would want to study her actions to see if they can be squared with her words. But a vote is the sort of action that is open to many differing interpretations. To treat a vote, by itself, as proof of a legislator's ideals—and then use that “proof” to override the legislator's own clearly stated assertions of ideals—is to assume that a legislator always favors every item in every measure she votes for and disapproves of every item in every measure she votes against. These assumptions are patently untrue. If one wants to know what personal opinions a certain person is willing to subordinate in order to achieve some other goal, studying a voting record makes some sense. But if it is the personal opinion itself that one wants to discover, a voting record will be much less illuminating. A vote (or signature), with no further elaboration, is comparatively poor evidence of what the voter (or signer) truly desires. And in the case of Madison, the relevant question for originalists is exactly that: what did he truly desire with regard to legislative chaplaincies? Madison's votes and signatures, standing alone, cannot give us a reliable answer to that question, and certainly should not be taken as proof that he did not think what he said he thought. A person's unexplained actions or votes as an elected official—with the attending pressures to compromise or temporarily subordinate his own ideals in order to achieve some goal—will surely be considerably less probative of *those ideals* than are the person's explicit written opinions, composed during leisurely moments away from the pressures of public life, where there is nothing to lose by being honest and nothing to gain by concealing beliefs.

A separate problem is that in concluding that Madison was inconsistent, scholars like Cord may be giving insufficient attention to Madison's other actions and writings on the subject of governmental support of religion, before and after 1789. As early as 1776 Madison was trying (unsuccessfully) to erase all governmental “emoluments or privileges” for the clergy of Virginia, many of which involved no distributions of public funds at all.²⁶⁰ In 1790, just one year after his vote for the bill that provided compensation to congressional chaplains and other staff, Madison opposed a motion to require the national government to count the number of clergymen in the country, arguing that “the General Government is proscribed from interfering, in any manner whatever, in matters respecting religion,” and that the proposed enumeration would present too great an intrusion by the state into religious matters.²⁶¹ Such an “intrusion,” however, surely would have been less coercive than the congressional chaplaincy, which forced even dissenting taxpayers to pay ministers to read prayers. Such evidence makes it difficult to believe that Madison would have had no ob-

²⁶⁰ See *supra* notes 67–68, 71–74 and accompanying text.

²⁶¹ See *supra* Part II.D.

jection to a paid congressional chaplaincy in 1789. His life was filled with battles and arguments against state intrusions into religious matters, some of which were less intrusive than the legislative chaplaincy.

Perhaps the most relevant example of such a Madisonian argument is the *Memorial and Remonstrance* of 1785, in which Madison argued against a tiny public expenditure that supported religion by funneling public money to the clergy of each taxpayer's choice.²⁶² There are, of course, differences between Patrick Henry's proposed assessment and the paid congressional chaplaincy, but these differences suggest the chaplaincy was more constitutionally problematic than the assessment that Madison opposed. Compared to the chaplaincy, the assessment would have distributed religious benefits more equitably, to more than one or two sects each year. And under the chaplaincy system, taxpayers do not choose their own minister-beneficiaries, as they would have under Henry's assessment. Moreover, Henry's proposal, to a greater extent than the chaplaincy, was explicitly grounded in a secular concern for the order and stability of civil society. If Madison opposed the assessment on disestablishmentarian grounds, these differences make it difficult to believe he would have supported the congressional chaplaincy.

Madison's support for the chaplaincy becomes even more unlikely when one considers the similarities between assessments and the paid congressional chaplaincy. In important ways, both practices smack of the religious establishments Madison constantly opposed. The paid legislative chaplaincy, like the proposed general assessment, is a tiny, nonpreferential²⁶³ public expenditure to promote religion within some community by paying the clergy. It is difficult to reconcile Madison's opposition to the Virginia assessment in 1785 with his support of paid legislative chaplains four years later in 1789, if indeed he did support them. This is especially true in light of the particular arguments he used in the *Memorial and Remonstrance* against nonpreferential expenditures in support of religion.²⁶⁴

Most if not all of the arguments from the *Memorial and Remonstrance* apply with as much force to the paid chaplaincy as they do to the particular

²⁶² See *supra* Part I.G.

²⁶³ The chaplaincy expenditure could be called "nonpreferential" under the assumption that the chaplaincy is regularly rotated among different denominations or religions. If this is not the case, the legislative chaplaincy may well represent a preferential discrimination in favor of one religious group and against others, a separate problem. But even with a rotating chaplaincy, some religious groups are bound to be excluded; thus, the chaplaincy by its nature embodies some degree of preference no matter how it is administered, and this fact in itself may counsel rejection of the practice. This point has been made before. See, e.g., Madison, Detached Memoranda, *supra* note 32, at 558; see also *Marsh v. Chambers*, 463 U.S. 783, 823 (1983) (Stevens, J., dissenting) ("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. . . . [It] seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of [sixteen] years constitutes the preference of one faith over another in violation of the Establishment Clause.").

²⁶⁴ See *supra* notes 89–96 and accompanying text.

tax scheme to which they were directed—and Madison’s own writings suggest that he thought so too, at least by the time he wrote the *Detached Memoranda*.²⁶⁵ For example, Madison argues in the *Memorial and Remonstrance* that the state should not distribute funds to sustain the clergy because:

the Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . [T]he duty . . . to the Creator . . . is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.²⁶⁶

If the religion of each man must be left to his own conscience, and this means that the state cannot force taxpayers to pay clergymen to do religious work, it must equally mean that the state cannot force taxpayers to fund clergymen to read prayers in legislatures. Again, Madison argues in the *Memorial* that a religious assessment “degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree.”²⁶⁷ If a religious assessment forces dissenting citizens to bend to the legislature’s opinions regarding religion, so does the paid legislative chaplaincy, which compels support from taxpayers, and to some degree from individual legislators, who do not agree with the prayers being offered. Many other examples could be drawn from the *Memorial and Remonstrance* to illustrate the applicability of its arguments to the legislative chaplaincy.²⁶⁸

On this evidence, one is led to suspect that Madison opposed the paid legislative chaplaincy in 1785 when he wrote the *Memorial and Remonstrance*. But if he then supported it in Congress four years later in 1789, and opposed it again by 1822, James Madison comes off as a capricious, unprincipled fellow who gets blown back and forth by whatever view of church-state relations happens to be fashionable at a given time.

This may be an accurate understanding of Madison, but the record of his life as a whole suggests otherwise.²⁶⁹ Before showcasing Madison as an

²⁶⁵ See Madison, *Detached Memoranda*, *supra* note 32, at 555, 558 (arguing that the Virginia assessment bill, which he had opposed in the *Memorial and Remonstrance*, was a violation of “the sacred principle of religious liberty”; and that likewise, “the appointment of Chaplains to the two Houses of Congress” was not “consistent . . . with the pure principle of religious freedom”); see also Letter from Madison to Livingston, *supra* note 33, at 105 (arguing that the congressional chaplaincy was a “deviation from” what was “a favorite principle with me”: specifically, “the immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace”).

²⁶⁶ Madison, *Memorial and Remonstrance*, *supra* note 90, at 173.

²⁶⁷ *Id.* at 176.

²⁶⁸ See generally *id.* at 173–78.

²⁶⁹ See, e.g., RAKOVE, *supra* note 74, at ix–x; *infra* note 275 and accompanying text; see also Brant, *supra* note 41, at 24 (author of definitive biography of Madison opining that “[w]hatever inconsistencies there may be in Madison’s position on other public questions, none can be found in his record upon freedom of religion”).

inconsistent and perhaps hypocritical proponent of religious liberties, one should make sure the historical record clearly demonstrates inconsistency. The historical record, however, does not clearly demonstrate Madison's inconsistency.²⁷⁰ The evidence that may be adduced to demonstrate his approval of legislative chaplaincies—which consists solely of votes he cast as a congressman and bills he signed as President—is less clear and more susceptible to alternative explanations than is the evidence of his disapproval, which includes his own explicit claims that he had always disapproved the practice.²⁷¹

This brings up perhaps the most significant problem with the inconsistency hypothesis, which is that Madison himself told Edward Livingston that he had been consistent in his opinion of legislative chaplaincies and that he had not changed his mind.²⁷² By 1822, in the letter to Livingston, Madison said he had never agreed with the congressional chaplaincy practice while he was in Congress.²⁷³ Logically, this statement of historical fact must be either true or false. If it is false and in fact Madison had favored the practice as he sat in Congress, then in his 1822 letter to Edward Livingston, Madison either lied or forgot his earlier opinions on the subject. There are only three possibilities that account for all of the evidence: (1) Madison changed his mind on the issue sometime after 1789 and lied in his letter to Livingston, knowing that he had favored the legislative chaplaincy while he was an elected official; (2) Madison changed his mind and opposed legislative chaplaincies later in life, but he forgot that he actually had favored the practice while he was an elected official; or (3) Madison's recounting was truthful and accurate, and in fact he had never favored the practice while he was an elected official, despite his committee membership and voting record.

The possibilities that Madison (1) lied to Livingston or (2) forgot his earlier stance are, on the whole, unpersuasive, and perhaps a bit demeaning of Madison as well. More so than many others of his generation, Madison was known for being scrupulously honest and having a keen memory for detail.²⁷⁴ He probably stood on philosophical principle more often, and more consistently, than most of his contemporaries.²⁷⁵ Further, issues of

²⁷⁰ For detailed consideration of the evidence allegedly showing Madison's support for legislative chaplains, see *infra* Part V.B.

²⁷¹ For alternative explanations and analysis of his votes and signatures as an elected official, see *infra* Part V.B.

²⁷² See *supra* Part IV.B.

²⁷³ See *supra* Part IV.B.

²⁷⁴ See, e.g., BRANT, *supra* note 26, at 642–46; JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 53–54, 113, 172 (2000); KOCH, *supra* note 75, at 291–92.

²⁷⁵ For example, one contemporary of Madison who has surely fared less well with historians on this score is “the notoriously self-contradicting Jefferson.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 896 (2005) (Scalia, J., dissenting). As another example, Patrick Henry is sometimes regarded as

church and state had occupied his deep interest since the days before he had entered politics,²⁷⁶ so he would not likely have regarded incidents in his political life that carried church-state implications as insignificant or unworthy of recollection. Moreover, his essays in the *Detached Memoranda* and his post-presidential letters are cogent, organized, and rich in detail—hardly the product of a forgetful dotard in his embarrassing years of decline. It seems particularly unlikely, then, that by 1822 he would mistake opinions he had held earlier in life on a church-state issue—not merely forgetting he had favored a particular practice, but mistakenly remembering himself as having opposed a practice he had actually favored. And it is hardly more likely that he was uncharacteristically lying about his past opinions, particularly because he had nothing to gain politically by doing so in private writings composed after leaving public office.

Possibility (3), that Madison was being accurate and honest in his letter to Livingston, thus appears the most plausible—or at any rate the least implausible—explanation. Further, it is the only possible explanation of the evidence that presents Madison as principled and consistent throughout his life. If the evidence does not refute that interpretation, it should be preferred over interpretations that have him shifting his opinions back and forth, and later either lying or forgetting about his prior stance.

Indeed the best way to make sense of the evidence from Madison's life is to view him as consistent on the legislative chaplaincy question throughout his life. Taking into account all the evidence, one can conclude that Madison never wavered from the belief that the First Amendment, after its ratification, forbade the practice of paid legislative chaplains. And it is certainly conceivable, as one commentator has asserted, that "Madison's mature position on religious freedom was probably complete in its essentials when he drafted [the] amendments" to George Mason's declaration of religious rights in the Virginia Constitutional Convention of 1776.²⁷⁷ Reconsideration of each element of the historical evidence purportedly demonstrating Madison's approval of the legislative chaplaincy reveals that Madison's actions as an elected official are not necessarily inconsistent with the view he later claimed to have held consistently throughout his life—the view that legislative chaplaincies violate principles of religious liberty.

having been driven by vanity and personal ambition, often regarding the popularity of a measure as his sole criterion for deciding whether to support it. See BRANT, *supra* note 26, at 31–32, 107, 126–27.

²⁷⁶ See *supra* Part I.A.

²⁷⁷ LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 86 (1995); see also Brant, *supra* note 41, at 24.

*B. Reconsideration of the Evidence Adduced to Show Madison's
Inconsistency*

1. The Chaplain Rules Committee.—One piece of evidence of Madison's supposed approval of the legislative chaplaincy is his service on the chaplain rules committee. Some commentators say that Madison had been appointed to the House committee that "recommended the Congressional Chaplain system."²⁷⁸ Actually, this committee did not "recommend" the system as a whole; the committee neither proposed the chaplaincy for Congress in the first instance nor suggested that chaplains be paid. The original "recommendation" for chaplains in the new Congress came from the Senate, and it did not include any provision for compensation.²⁷⁹ After the Senate decided that the new Congress needed a chaplaincy, it asked the House to create a five-member rules committee to propose rules to "regulate the appointment of Chaplains" and to "govern the two Houses in cases of conference," modeled on a similar dual-function committee the Senate had already created.²⁸⁰ This House committee created at Senate insistence was the committee to which Madison was appointed. It is possible that Madison wanted to be on this committee—if indeed he desired the post—primarily to help shape the rules on conference committees. But even if he was interested in influencing the chaplaincy rules, as is likely, Madison probably sought appointment to this committee, not to promote the chaplaincy, but to help protect religious liberty.

Neither Madison nor his committee recommended that Congress have a chaplain, and to take him at his word, he did not favor the practice even at this early date. But if chaplains were a foregone conclusion, even someone who did not support the idea of a chaplaincy might want to be appointed to such a committee in order to craft rules that would keep the practice within certain limits. And it stands to reason that if such a person were, like Madison, well known beforehand for his published sentiments on the danger of mixing church and state, he might be appointed to such a committee as a means of assuaging dissenters. Appointing a prominent defender of religious dissenters to the chaplaincy rules committee might at least provide some assurance that the chaplaincy system would be governed by rules that took into account the dissenters' concerns. In this light, Madison's appointment to the rules committee is far from conclusive evidence that Madison favored the chaplaincy practice.²⁸¹

²⁷⁸ *CORDELL*, *supra* note 17, at 23; *see also* PFEFFER, *supra* note 30, at 247.

²⁷⁹ *See supra* note 138 and accompanying text.

²⁸⁰ *See supra* notes 138–41 and accompanying text.

²⁸¹ *Contra, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 788 & n.8 (1983) (Burger, C.J., majority opinion) (inferring from Madison's membership on the chaplain rules committee that Madison, like his fellow congressmen, supported the congressional chaplaincy).

It is not unthinkable that a member of the House of Representatives in 1789 could have opposed the congressional chaplaincy. There were almost certainly other House members besides Madison who were personally opposed to maintaining paid congressional chaplains. The congressmen who had only two years earlier attended the Constitutional Convention of 1787, producing the very plan that created the House of Representatives, could not have forgotten how that Convention had permanently tabled Benjamin Franklin's motion to invite a clergyman to read prayers.²⁸² The legislative chaplaincy might also have bothered many of the Pennsylvania congressmen; Pennsylvania, where the 1787 Constitutional Convention was held, had apparently never used chaplains in its own legislature or state conventions, and state delegates rejected an attempt later that year to inject them into the Pennsylvania convention considering ratification of the national Constitution.²⁸³ Opposition to legislative chaplains was registered on the very floor of Congress as early as 1774, when John Jay and John Rutledge both spoke against the motion to have prayers read in the First Continental Congress.²⁸⁴ And later events suggest the continuing presence of opponents in Congress. For example, when the House selected its chaplain in 1796, eighty-eight members arrived for the session and took their seats, but only seventy votes were cast for a chaplain—sixty-three of which favored the sole nominee for the post, Dr. Ashbel Green.²⁸⁵ In other words, it appears that seven members voted against Green, and another eighteen members, although not speaking against the traditional chaplaincy practice, consciously refused to cast a vote. Dr. Green later wrote that during his tenure as chaplain, as few as one-third of the members of Congress actually attended when he led prayers.²⁸⁶ In 1813 Timothy Dwight, Congregationalist minister and president of Yale, reported that at times in congressional chaplain selections, votes had actually been cast for such "infidels" as Thomas Paine and Republican Congressman Matthew "Spitting" Lyon, best known for spitting in the face of Federalist Representative Roger Griswold and then drubbing him with fireplace tongs on the floor of the U.S. House of Representatives.²⁸⁷ And of course Madison himself, after he left the presidency, expressed his frustration that "the daily devotions conducted by these legal Ecclesiastics" were "already degenerating into a scanty attendance, and a tiresome formality."²⁸⁸ Hence it was an "open secret" that many in Congress were less than enthusiastic about the congressional chaplaincy, and

²⁸² See *supra* note 114 and accompanying text.

²⁸³ See *infra* notes 324–29 and accompanying text.

²⁸⁴ See *supra* notes 46–48 and accompanying text.

²⁸⁵ 5 ANNALS OF CONG., *supra* note 27, at 125–33 (Dec. 7–11, 1796).

²⁸⁶ 1 STOKES, *supra* note 15, at 457.

²⁸⁷ *Id.*

²⁸⁸ Madison, Detached Memoranda, *supra* note 32, at 559.

some were outright opponents of it. It would not be surprising if Madison were of that number.

In short, Madison's service on the rules committee is not good evidence that he supported the legislative chaplaincy. Given his prior demonstrated interest in church-state issues, his committee membership may easily be explained by his desire to propose rules assuring that the potential harm of chaplains was minimized—for example, by requiring rotation of the chaplaincy amongst various Christian denominations. This, in fact, is what the committee decided to do. The committee's recommended rules were read on April 15, 1789, and approved by the full House, in agreement with the Senate, on April 17. The rules stated that the Senate and House were individually to select one chaplain each, of different denominations, and that the chaplains were required to interchange with one another weekly.²⁸⁹ These rules contrasted with the less considerate operating mode of the Confederation and pre-Confederation Congresses, which had never adopted all these rules and in fact from time to time had appointed only one chaplain.²⁹⁰ The rules proposed by Madison's committee seem designed, not to assure that Congress would have chaplains, but to minimize the potential harm of chaplains and offer some comfort to religious dissenters.²⁹¹ Thus, Madison's membership on this committee does not indicate that he supported the congressional chaplaincy; in fact, his membership could be perfectly consistent with personal opposition to legislative chaplains.

2. *Compensation for Chaplains: The Wingate Motion.*—On one occasion in 1788, as he sat in the Confederation Congress, Madison voted “ay” to Paine Wingate's proposal to continue paying two chaplains for the Confederation Congress, at the rate of \$300 each per year.²⁹² If Madison voted for paid chaplains, the argument goes, he must have supported the practice.²⁹³ But this is not necessarily true. Indeed, other Founding Fathers apparently voted for legislative chaplains from time to time despite their opposition to the practice. John Jay, for example, opposed the practice on principle from its very inception,²⁹⁴ and yet ten years later, after the practice had been well established and was perhaps “not likely to be rescinded,”²⁹⁵

²⁸⁹ 1 J. OF THE H.R., *supra* note 108, at 15–16 (Apr. 15 & 17, 1789).

²⁹⁰ *See supra* Part I.B–C.

²⁹¹ On January 8, 1790, the same rules were adopted again by Congress to apply for another year. 1 J. OF THE H.R., *supra* note 108, at 134 (Jan. 7–8, 1790). Similar rules were adopted by Congress in each year thereafter, throughout Madison's tenure in the House of Representatives. *See* 1 J. OF THE SEN., *supra* note 138, at 219 (Dec. 9, 1790); *id.* at 324 (Oct. 24, 1791); *id.* at 452 (Nov. 5, 1792); 2 *id.* at 6 (Dec. 3, 1793); *id.* at 121 (Nov. 18, 1794); *id.* at 197 (Dec. 9, 1795); *id.* at 300 (Dec. 9, 1796).

²⁹² *See supra* note 118 and accompanying text.

²⁹³ *See, e.g.,* Marsh v. Chambers, 463 U.S. 783, 788 n.8; *id.* at 788 & n.10.

²⁹⁴ *See supra* note 47 and accompanying text.

²⁹⁵ This was Madison's assessment in his 1822 letter to Livingston. *See supra* note 246 and accompanying text.

Jay made a motion on the floor of the Confederation Congress that “the appointment of chaplains [to Congress] be made annually.”²⁹⁶

Several factors might explain why a legislator like Madison (or Jay), who maintained principled objections to the chaplaincy practice, might sometimes support measures making some provision for chaplains. First, Madison may have been unwilling to signal opposition until he could argue that the chaplaincy was actually unlawful, which was an argument he could not make in 1788 or 1789. In other words, it is possible that Madison’s resistance to the legislative chaplaincy hardened after the practice became (in his view) unlawful—that is, after ratification of the First Amendment in 1791. It was not until September 25 of 1789 that the final wording of the Establishment Clause was approved by the House and the Senate and sent to the states.²⁹⁷ That was more than a month after Madison’s vote on the omnibus compensation bill, five months after his service on the chaplain rules committee, and one and one-half years after his vote on Paine Wingate’s chaplaincy proposal. And even then, Madison did not know whether this language would be approved by the states and thus become legally binding; it would take two more years for that to happen.²⁹⁸

Therefore, Madison could not reliably have predicted in 1788, or even by the time of his vote on the omnibus compensation bill of 1789, what the Bill of Rights would say about the involvement of the new national government in religious matters. This raises the possibility that even if Madison regarded the chaplaincy as legally permissible in 1788 or 1789, by 1791 he viewed it as inconsistent with the newly ratified First Amendment.

But it is more likely that Madison’s opposition to the paid legislative chaplaincy was just as strong before the First Amendment was drafted as it was afterwards, and had little to do with the legal changes effected by the ratification of the First Amendment. When he voiced his opposition in the *Detached Memoranda*, he claimed that the chaplaincy was inconsistent with not only “the Constitution” but also “the pure principle of religious freedom,” a natural right that Madison viewed as preexisting the Constitution.²⁹⁹ He also claimed that the congressional chaplaincy violated “equal

²⁹⁶ 27 J. OF THE CONT’L CONG., *supra* note 46, at 683 (Dec. 13, 1784).

²⁹⁷ 1 J. OF THE H.R., *supra* note 108, at 121 (Sept. 24, 1789); 1 J. OF THE SEN., *supra* note 138, at 88 (Sept. 25, 1789).

²⁹⁸ The Bill of Rights, including the First Amendment, did not become officially ratified and binding until December 15, 1791, the date Virginia approved it. Virginia was the eleventh state to do so. Since Vermont had become the fourteenth state in the Union on March 4, 1791, eleven states were now necessary to constitute the requisite “3/4 of the several states” mandated by Article V for ratification of any constitutional amendments. See U.S. CONST. art. V. Regarding Virginia’s ratification and the necessity of approval by eleven states, see Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-seventh Amendment*, 61 *FORDHAM L. REV.* 497, 532 (1992). But see David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 485 n.187 (1983) (noting that “[e]xactly when the Bill of Rights took effect is a matter of some dispute” among scholars, in light of the timing of various states’ ratification decisions and Vermont’s entry into the Union).

²⁹⁹ Madison, *Detached Memoranda*, *supra* note 32, at 558.

rights, as well as of Constitutional principles.”³⁰⁰ Thus Madison grounded his objections in preexisting natural law as well as the positive law of the First Amendment.

If Madison opposed legislative chaplaincies on natural law principles even before the Bill of Rights was ratified, why did he vote in favor of Paine Wingate’s 1788 proposal to pay chaplains? To answer this question, one must examine the context of the vote. As discussed above and as any legislator can attest, a voting record can easily be misunderstood, particularly when one cannot, or does not, consider all the relevant facts surrounding the vote. Votes in favor of a measure do not necessarily prove that the voter preferred every item in the measure to any alternatives he could imagine. Madison’s support for Wingate’s proposal in 1788 provides a perfect example. Wingate’s proposal stipulated that Congress pay two chaplains an annual salary of \$300 each. That proposal appears to endorse the paid chaplaincy, that is, until one notices that Congress had previously paid two chaplains an annual salary of \$400 each.³⁰¹ Thus Wingate was effectively proposing, not an affirmation of the value of congressional chaplains, but a salary reduction for them. The proposal turned out to be successful, likely attracting most of its supporters because of the Confederation’s increasingly untenable financial position rather than any support or opposition to the chaplaincy itself. Madison’s vote for Wingate’s proposal may easily be seen, then, not so much as a vote to pay chaplains, but as a vote to pay them less.

3. *The 1789 Compensation Statute.*—Similar to his vote on the Wingate Motion, Madison’s vote on the omnibus compensation statute in 1789 must be viewed in historical context. There is no dispute that while serving in the new House of Representatives on August 10, 1789, Madison voted “yea” on an omnibus compensation bill, which included compensation for all the members of Congress and several congressional staff officers, including chaplains for each house.³⁰² There are, however, plausible explanations for this consistent with Madison’s opposition to the congressional chaplaincy.

It may be that Madison thought opposing the chaplaincy would be quixotic and ineffective, or even politically dangerous. Madison may well have thought it risky, even among many of his constituents in Virginia, to speak against the chaplaincy practice at this time. Although in 1789 he might still have been basking in the recent passage of Jefferson’s Act for Establishing Religious Freedom, which was enacted in Virginia under Madison’s own shepherding,³⁰³ he could not have forgotten the political

³⁰⁰ *Id.*

³⁰¹ See *supra* note 117 and accompanying text.

³⁰² See *supra* note 159 and accompanying text.

³⁰³ See *supra* notes 97–99 and accompanying text.

strength of those who had opposed Jefferson's bill.³⁰⁴ When Madison attended the newly constituted House of Representatives only three years after his narrow victory over assessments in Virginia—facing delegates from states much less progressive than Virginia on matters of church and state—any opposition he might have voiced to the longstanding tradition of chaplains must have seemed almost certain to alienate many of his new colleagues, and at the same time, quite unlikely to succeed.

Instead of fighting this battle at that time, Madison may have resolved instead to try to minimize the harm of the practice by making rules that required chaplains to rotate between houses weekly and be of differing denominations. This explanation of the evidence would be consistent with his political savvy and his willingness to compromise to achieve a political goal—traits that he demonstrated on other occasions as well.³⁰⁵ If he had voiced opposition to the chaplain compensation provision, insisted on a full floor debate, and then been outvoted, the result would have been worse than simply a waste of valuable time; forever after, perhaps, the branches of the national government would have pointed to that vote whenever they wanted to justify the constitutionality or general acceptability of any governmental

³⁰⁴ Jefferson first introduced the bill in the Virginia House of Delegates in June 1779. The House refused to bring the bill to a vote before the session ended, so Jefferson and his allies had it printed for general circulation during the recess. However, the publication was anonymous; even Jefferson was not so bold as to attach his name to it at this time. One may guess why. As it happened, Jefferson's strategy actually backfired. The reaction to the bill showed the strength of the opposition; when the House reconvened later that year, it was deluged with petitions opposing Jefferson's bill and supporting a nondiscriminatory tax for the support of clergy. This push was continued in 1784 by the eminent and formidable Patrick Henry, who introduced a bill for such a tax. Jefferson was in Paris acting as American minister to France and so could not be present to defend his religious freedom bill, but Madison countered Henry's proposal in 1785 by writing and circulating the *Memorial and Remonstrance*. Tellingly, he too circulated his writing anonymously. NOONAN & GAFFNEY, *supra* note 42, at 178. Although Madison's tract and others like it ultimately achieved their intended effect of stirring up the public and defeating Henry's bill, the public's reaction in Virginia may well have been grounded in a popular mistrust of Anglicans (who had been the established church in Virginia and were associated with the British crown) and the ordained clergy as much as anything else. For a discussion of the negative reactions to the Act for Establishing Religious Freedom, see WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 290–95 (1993). For a general discussion of the circumstances surrounding Henry's proposal and Madison's reaction to it, see BRANT, *supra* note 26, at 126–29; KOCH, *supra* note 75, at 26–31; RAKOVE, *supra* note 74, at 33–35.

³⁰⁵ See, e.g., Brant, *supra* note 41, at 9 (same); ELLIS, *supra* note 274, at 52 (referring to Madison's reputation in 1790 as "the shrewdest and most politically savvy veteran of the tumultuous constitutional battles of the 1780s"); RAKOVE, *supra* note 74, at 28 ("Madison's talent lay . . . in a rigorous political intelligence that enabled him both to maintain the integrity of his own positions but also to recognize when logic had to yield to reality. . . . In 1783, as later, Madison had to settle for less than he sought and less than he believed the public good required[, b]ut the ability to shape an agenda and to sense possible lines of compromise set leaders apart from backbenchers[, and b]y the spring of 1783, these were talents Madison possessed."); 1 STOKES, *supra* note 15, at 386 (describing Madison's support for a state bill incorporating the Episcopal church in Virginia, on the grounds that it was a "temporary measure and to prevent assessment, which he rightly considered a much more serious danger").

measure providing financial support to a religious group.³⁰⁶ He may have thought an unsuccessful opposition would be a worse precedent, and more affirming of the legitimacy of the practice, than remaining silent for the time being.³⁰⁷

Perhaps the most important reason for Madison's vote in favor of the omnibus bill of 1789, however, was the fact that it was omnibus. Madison was trying to get the new government up and running; he could not afford to delay or possibly derail an already much-delayed compensation plan for the new national legislature in order to contest one line item. A functioning Congress would require payment of member and staff salaries as soon as possible. Madison voted for the 1789 compensation bill, despite his objections to the paid chaplains (which may have been well known or widely suspected after his publication of the *Memorial and Remonstrance* in 1785), because a vote on the bill did not represent a vote on chaplains as much as a vote on the new national government. He was in favor of almost anything that would move the process forward at that point, after so much delay.³⁰⁸

Moreover, there is some evidence that while he thought practices like the paid chaplaincy were violations of important principles, he considered them relatively lesser violations.³⁰⁹ As relatively inconsequential establish-

³⁰⁶ Madison seems to have had something like this in mind when he wrote in his letter to Livingston that, in light of the fact that "the precedent [of the congressional chaplaincy] is not likely to be rescinded, the best that can now be done, may be to apply to the Constn. the maxim of the law, *de minimis non curat* [do not bother with trifles]." Letter from Madison to Livingston, *supra* note 33, at 105. In other words, we should minimize the precedential effect of the legislative chaplaincy, treating it as an odd sort of outlier rather than allowing it to be used as evidence justifying other types of governmental support of religion.

³⁰⁷ Madison apparently took a somewhat similar position with respect to the slavery question. Madison opposed slavery but did not fight in halls of power for its abolition. According to contemporaneous chroniclers, this was because he knew he would be destined to lose the political battle and was therefore fearful of setting a dangerous precedent that would serve to further legitimize slavery. See BRANT, *supra* note 26, at 131, 636–38.

³⁰⁸ See 1 ANNALS OF CONG., *supra* note 27, at 660 (July 13, 1789); *id.* at 925–26 (Sept. 11, 1789).

³⁰⁹ See Madison, Detached Memoranda, *supra* note 32, at 558–59 ("[In strictness] the appointment of Chaplains to the two Houses of Congress" is not "consistent with the Constitution, and with the pure principle of religious freedom," but that to avoid giving this practice "the effect of a legitimate precedent, it will be better to apply to it the legal aphorism *de minimis non curat lex*: or to class it cum '*maculis quas aut incuria fudit, aut humana parum cavit natura*.'" (emphasis added)); Letter from Madison to Livingston, *supra* note 33, at 105 (noting that "as the precedent [of congressional chaplains] is not likely to be rescinded, the best that can now be done, may be to apply to the Constn. the maxim of the law, *de minimis non curat*" (emphasis added)).

The Latin phrase *de minimis non curat lex* refers to a familiar common law doctrine, translated as "the law does not bother with trifles." The other Latin phrase Madison uses has more interesting origins. "[M]aculis, quas aut incuria fudit aut humana parum cavit natura" is a quote from Horace's famous epistle "The Art of Poetry." HORACE, *The Art of Poetry*, lines 352–53, in HORACE: SATIRES, EPISTLES, AND ARS POETICA 478 (H. Rushton Fairclough trans., Loeb Classical Library 1926, reprinted 1966). The phrase means "a few blots which a careless hand has let drop, or human frailty has failed to avert." *Id.* at 479. Madison may have read the original epistle, but these lines from Horace are also quoted, along with an English verse translation of them, by Henry Fielding in his classic novel *Tom*

ments, then, he likely viewed them as not worth the cost of derailing the whole compensation bill.

For these reasons, a vote in favor of the omnibus compensation bill was not a vote in favor of legislative chaplains, as Madison tried to make clear in his 1822 letter to Livingston. In this letter, Madison was perhaps doing what legislators frequently have to do: explaining a vote in favor of a measure that he deemed good on the whole but which included a few unpopular or unwise provisions that he personally did not favor.³¹⁰

4. *The 1816 Compensation Statute.*—Attention to historical context also helps explain Madison’s approval of the 1816 bill providing compensation to congressional chaplains. Two factors are critical. First, by 1816 the legislative chaplaincy had persisted in Congress under the new Constitution for over twenty-five years. It was no longer even arguably a question of first impression, as it might have been in 1789. Madison viewed the chaplaincy practice as so firmly entrenched that he wrote to Livingston within six years of the 1816 bill that “the precedent [of congressional chaplaincies] is not likely to be rescinded.”³¹¹ Whether this was truly Congress’s attitude in 1816 or not, Madison probably believed it was. This belief could well have discouraged him from vetoing the congressional chaplaincy on Establishment Clause grounds. After all, if Madison vetoed the bill, he would risk being overridden (and embarrassed) by Congress—a risk Madison would be loathe to take in the wake of a war in which his popularity had suffered. And for the eventual realization of his vision of the Establishment Clause, a veto override on the chaplaincy question would set a worse precedent than the continuing existence of the practice itself. A traditional practice that is continued but not contested can later be explained as an oversight; a traditional practice that is vetoed by the President and then supported by two-thirds of both houses of Congress in a veto override would surely be cited for decades to come as a precedent showing the overwhelming sense of an early Congress that legislative chaplaincies, and perhaps by implication more pernicious religious entanglements as well, did not violate the Establishment Clause. By contrast to Madison’s approval of the 1816 bill, he cast two vetoes on Establishment Clause grounds in 1811, showing that as President he was willing to take stands on Establishment Clause issues. However, this was prior to the outbreak of war, and as he likely anticipated, Congress did not come close to overriding either of them.³¹² In sum, the very fact that the congressional chaplaincy had already

Jones (published in 1749), with which Madison may also have been familiar. HENRY FIELDING, *THE HISTORY OF TOM JONES, A FOUNDLING* 481 (Frank Kermode ed., Signet Classics 1963) (1749).

³¹⁰ See *Marsh v. Chambers*, 463 U.S. 783, 814–15 (Brennan, J., dissenting) (noting that Madison’s later opposition to the congressional chaplaincy may not have reflected a change in Madison’s mind but rather in his role).

³¹¹ See *supra* note 246 and accompanying text.

³¹² See *supra* Part III.A.

lasted so long, with so little public debate about it, may have provided one good reason for Madison to decide to play along quietly rather than risk a veto override in 1816.

Second, the bill itself could easily be seen as a triumph not for those who supported the congressional chaplaincy, but for those who opposed it. Congressional chaplains had been paid an annual salary of \$500 each since 1789, and despite statutory increases in compensation for other congressional officers, this bill assured that the chaplains would not get a raise even twenty-five years later.³¹³

In light of these alternative explanations it is difficult to say that Madison's approval of the 1816 act constitutes evidence that Madison viewed legislative chaplains as constitutionally permissible in 1816. On the contrary, like his approval of the Wingate proposal of 1788, it may well be evidence that he (and many other members of Congress) viewed chaplains as unworthy of a reasonable salary. In any case, Madison's signature on the 1816 bill can be explained in ways consistent with his personal disapproval of the legislative chaplaincy.

C. Early Disestablishmentarian Sentiment and the Legislative Chaplaincy

On the whole, then, the evidence is not strong that Madison supported legislative chaplaincies at any particular time. He may well have been speaking truthfully when he claimed he had opposed them throughout his life. His claim becomes all the more plausible when one notes the body of early disestablishmentarian thought upon which he could have drawn for such attitudes—a body of thought that was growing as the new national government was being founded. As this Section shows, public arguments for disestablishment were drawing on both Christian theology and liberal political theory in the last quarter of the eighteenth century. This Section also shows that Madison's own arguments included elements of both of these strands of disestablishmentarian thought.

If Madison indeed objected to the chaplaincy practice right from its inception in the First Congress, he would not have been alone. It is clear that some influential religious dissenters opposed the practice on principle from an early date. One example is Madison's neighbor and political supporter, the widely known Baptist minister John Leland, who lived and worked from 1778 to 1791 in Madison's home county of Orange,³¹⁴ and who claimed to have baptized over 1500 people during his lifetime.³¹⁵ In one of his tracts, written even as the First Amendment was being considered by the states in 1790, Leland took aim at legislative chaplains, military chaplains, and Sunday closing laws:

³¹³ See *supra* Part III.D.

³¹⁴ See *supra* note 127 and accompanying text.

³¹⁵ John Leland, *Events in the Life of John Leland, Written by Himself*, in WRITINGS OF JOHN LELAND, *supra* note 210, at 39.

A general assessment, (forcing all to pay some preacher,) amounts to an establishment

As it is not the province of civil government to establish forms of religion, and force a maintenance for the preachers, so it does not belong to that power to establish fixed holy days for divine worship [and thus] . . . the breach of the Sabbath (so called) is no part of civil jurisdiction. . . .

Under this head, I shall also take notice of one thing, which appears to me unconstitutional, inconsistent with religious liberty, and unnecessary in itself; I mean the paying of the chaplains of the civil and military departments out of the public treasury. . . . If legislatures choose to have a chaplain, for Heaven's sake, let them pay him by contributions, and not out of the public chest.³¹⁶

During the same year, in a letter published in Virginia and Kentucky newspapers, the Virginian "A.B." likewise drew on principles of constitutional and natural law to argue against legislative chaplains in the state legislatures:

[The legislative chaplaincy] is not constitutional: No part of the Virginia constitution authorizes such acts, nor does the federal constitution honor them. . . . The moment that a Minister is so fixed by law, as to obtain a legal claim on the treasury, for religious services, that moment he becomes a Minister of state, and ceases to be a Gospel-Ambassador. This is the very principle of religious establishment, and should be exploded forever. If government has a right to make a law to support one religious teacher, it has the same claim to support all.³¹⁷

Clearly, some writers in 1790 were making theological arguments that the legislative chaplaincy was contrary to the will of God as well as "unnecessary in itself." According to these arguments, a clergyman "ceases to be a Gospel-Ambassador" once he is appointed as a paid legislative chaplain. Yet beyond this, they also claimed the institution was "unconstitutional" and "inconsistent with religious liberty." These authors called the legislative chaplaincy a religious "establishment."

It should not surprise us if Madison and other disestablishmentarians opposed all legislative chaplaincies on principle from the beginning. For one thing, the paid chaplaincy was much like the religious assessments they had been protesting.³¹⁸ Many dissenters during the Founding Era objected to various vestiges of religious establishment, including religious assessments to pay stipends to clergymen, on theological grounds that might logically apply to paid legislative chaplains as well.

³¹⁶ Leland, *supra* note 210, at 118–19.

³¹⁷ A.B., Letter (from *Virginia Independent Chronicle*), in *Kentucky Gazette*, vol. 3 (no. 28) (Mar. 6, 1790), quoted in HAMBURGER, *supra* note 12, at 183–84 n.69.

³¹⁸ For comparisons of religious assessments and the paid legislative chaplaincy, suggesting that for disestablishmentarians the chaplaincy would be even more problematic than assessments, see *supra* notes 262–68 and accompanying text.

One of the foremost of these protestors was Isaac Backus, a Baptist leader in Massachusetts who opposed what he deemed to be a Congregationalist establishment in his state. As early as 1773 Backus had published a tract in Boston opposing a tax for the support of clergymen, making an argument that with few modifications could be applied equally to the legislative chaplaincy:

And can any man in the light of truth maintain his character as a minister of Christ if he is not contented with all that Christ's name and influence will procure for him but will have recourse to the kings of the earth to force money from the people to support him under the name of an ambassador of the *God of Heaven*. . . . Though the Lord hath *ordained that they which preach the Gospel shall live of the Gospel* or by the free *communications to them* which his Gospel will produce . . . yet the ministers of our land . . . [argue that] "Ministers of the Gospel would have a poor time of it, if they must rely on a *free contribution of the people* for their maintenance." . . . Now who can hear Christ declare that his kingdom is NOT OF THIS WORLD, and yet believe that this blending of church and state together can be pleasing to him?³¹⁹

Once again, we see a religious dissenter making theological arguments to oppose the state payment of clergymen for their religious services. Here Backus was not directly addressing the subject of the legislative chaplaincy; however, the chaplaincy practice, like the assessment practice, involves a "minister of Christ . . . hav[ing] recourse to the kings of the earth to force money from the people to support him," despite the Lord's ordinance that gospel preachers should be financially supported by "the Gospel or by the free communications to them which his Gospel will produce." And chaplains even lead prayer services in the government's building and on its timetable. Backus clearly opposed assessments, but for many religious dissenters of Backus's day, Christ's declaration that "his kingdom is not of this world" equally condemned the particular "blending of church and state together" that was represented by the legislative chaplaincy.

Others who had concerns about the mingling of government and religion did not ground their appeals in religious arguments, but were nonetheless suspicious of some traditionally accepted governmental endorsements of religious belief. Thomas Tucker of South Carolina, serving in the first House of Representatives, argued in 1789 against a proposed Thanksgiving Day proclamation on the secular ground that "it is a business with which Congress have nothing to do; it is a religious matter, and, as such, is proscribed to us."³²⁰ His colleague from South Carolina, Aedanus Burke, also spoke against the proposal, incorporating one of the arguments of the religious dissenters in noting that he "did not like this mimicking of European customs, where they made a mere mockery of thanksgivings. Two parties

³¹⁹ Isaac Backus, *An Appeal to the Public for Religious Liberty* (1773), reprinted in ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 314, 318 (William G. McLoughlin ed., 1968).

³²⁰ 1 ANNALS OF CONG., *supra* note 27, at 950 (Sept. 25, 1789).

at war frequently sung *Te Deum* for the same event, though to one it was a victory, and to the other a defeat.³²¹ Tucker and Burke might well have opposed the congressional chaplaincy on similar grounds.³²² Additionally, Alexander Hamilton of New York and Hugh Williamson of North Carolina both spoke against Benjamin Franklin's motion for prayers in the Philadelphia Convention of 1787, and although the historical record is unclear as to their views of the legislative chaplaincy, their opposition to Franklin's motion is evidence that they may have disfavored the chaplaincy practice in Congress as well.³²³

Other political figures of the time may have opposed legislative chaplaincies for similarly secular reasons, particularly if their own state had no chaplaincy tradition. Not all states had embraced the legislative chaplaincy tradition, and states without a longstanding history of appointing legislative chaplains may have contained significant numbers of chaplaincy opponents. In the large state of Pennsylvania, for example, legislative assemblies and conventions apparently had never appointed chaplains. When Benjamin Rush proposed in the Pennsylvania ratifying convention of 1787 that the convention appoint "a committee . . . to request the attendance of some minister of the gospel to-morrow morning, in order to open the business of the convention with prayer,"³²⁴ most of the delegates seemed to be taken by surprise. The convention record states:

This was considered by several gentlemen as a new and unnecessary measure, which might be inconsistent with the religious sentiments of some of the members, as it was impossible to fix upon a clergyman to suit every man's tenets, and it was neither warranted by the example of the [state's] General Assembly or of the convention that framed the government of Pennsylvania.³²⁵

³²¹ *Id.* at 949. The *Te Deum* is a Latin hymn in use for centuries by Roman Catholics and Anglicans, among others. It is a distinctly Christian hymn of praise and thanksgiving to God, traditionally sung after the election of a pope, the coronation of a king, a victory in battle, and other noteworthy events of state. Burke is noting here that opposing sides in battle, both believing they have God on their side, will offer the same ceremonial praises, and yet one side is always defeated, which leads Burke to doubt the sincerity of the "worshippers" as well as the efficacy of their "prayers." He seems to believe, like the religious dissenters, that thanksgivings to God should be sincere and perhaps private, rather than (following the "European customs") showy, state-ordered ceremonials serving political ends.

³²² Legislative chaplains may not sing the *Te Deum*, but they offer public prayers of much the same ceremonial nature in the halls of state, invoking God's blessings on a legislative body and its work of state, at the behest and funding of that state. And of course Tucker's objection, that any "religious matter" is "proscribed to us" in Congress, might well apply to the appointment and payment of ministers to read prayers before Congress. *Id.* at 950. When the Confederation Congress considered Paine Wingate's chaplaincy motion in 1788, Tucker, unlike Madison, voted against it. 34 J. OF THE CONT'L CONG., *supra* note 46, at 71 (Feb. 29, 1788).

³²³ See *supra* note 114.

³²⁴ *State Convention, Wednesday, November 21*, PA. HERALD & GEN. ADVERTISER, Nov. 24, 1787, vol. 5 (no. 92), p. 2, col. 2, *microformed on America's Historical Newspapers, 1690-1922* (Readex Archive of Americana Collection) (quoting Benjamin Rush).

³²⁵ *Id.*

Rush replied that he hoped the delegates had “liberality” enough to disregard the denominational affiliation of the minister who led the prayers, and that he thought they might well accept as precedent the “conduct of the first, and every succeeding Congress, who certainly deserved our imitation.”³²⁶ Warming up, Rush went on to opine: “[The fact t]hat the convention who framed the government of Pennsylvania, did not preface their business with prayer, is probably the reason . . . that the state has ever since been distracted by their proceedings.”³²⁷ The record then tersely states: “Mr. [John] Smilie objected to the absurd superstition of that opinion, and moved a postponement which was accordingly agreed to.”³²⁸ Apparently the matter was never brought up in the convention again.³²⁹

This evidence strongly suggests that most House members from Pennsylvania, at any rate, sitting in Congress less than two years later, would not have been supporters of the congressional chaplaincy, having opposed it in their own state assemblies.³³⁰ And the particular objections raised by the majority in the Pennsylvania ratifying convention also illustrate the point that several political leaders of the day were making arguments in opposition to chaplains that were more grounded in Enlightenment philosophy than in Christian theology. Rather than arguing from the Bible, the declarations of Christ, or the examples of the apostles, the Pennsylvania delegates argued the need for sensitivity to a diversity of viewpoints, the lack of precedent or tradition, and most tellingly, the need to abandon the “absurd superstition” that God would punish polities that did not appoint chaplains to read prayers in their legislative assemblies. Yet in the end they agreed with religious dissenters like Leland and A.B. in opposing legislative chaplains.

Still other public figures may have opposed the congressional chaplaincy in particular based on their liberal political theories, even if they did not oppose the chaplaincy practices of state or colonial legislatures. Some of these figures may have opposed it out of simple frugality or a fear of centralized taxing power; they may have seen it as a step in the development of a large and expensive national bureaucracy, full of small office-holders dependent on the national government for their salaries. A number of prominent statesmen of the Founding era opposed the federal Constitution itself

³²⁶ *Id.* (quoting Benjamin Rush).

³²⁷ *Id.* (quoting Benjamin Rush).

³²⁸ *Id.*

³²⁹ One is reminded of the disposition of Benjamin Franklin’s motion for prayers in the Philadelphia Constitutional Convention earlier that year, in which there were “several unsuccessful attempts for silently postponing the matter by adjourning,” before “the adjournment was at length carried, without any vote on the motion,” and the matter was never brought up again. *See supra* note 113 and accompanying text.

³³⁰ John Smilie himself sat in the House of Representatives beginning in 1793. *See* 4 ANNALS OF CONG., *supra* note 27, at 133 (Dec. 2, 1793).

on such grounds.³³¹ And some notable public figures opposed the congressional chaplaincy because of the greater religious diversity of the national assembly as compared to the state or colonial legislatures; liberal political theory led them to object to congressional chaplains because they believed the chaplaincy would violate the religious freedom of those delegates who, rightly or wrongly, would not be able conscientiously to join in the prayers. John Jay and John Rutledge were both of this number, voicing such a concern in opposition to the first motion for prayer in the Continental Congress in 1774.³³²

In sum, in the last quarter of the eighteenth century a number of religious dissenters made theological arguments showing that they had serious scruples about government involvement in religious matters; and at the same time, others were reaching the same conclusions drawing on liberal political theory.³³³ The principles of both these groups were sufficiently well enunciated by 1789 to have informed Madison's views on the legislative chaplaincy.

In fact, Madison's own arguments included elements of both of these strands of disestablishmentarian thought, drawing from time to time on both theology and liberal political theory as he decried various state involvements in religious matters. He sometimes made constitutional arguments, but he always asserted principles rooted in natural law, which he viewed as preexisting the Constitution. Some of these natural law principles sound like the theological arguments of the religious dissenters, while others seem rooted in the liberal political theory of the Enlightenment. On the subject of legislative chaplaincies, Madison asserted natural law principles. Both the *Detached Memoranda* and the letter to Livingston assert that the chaplaincy practice violates a "principle": in the *Detached Memoranda*, the principle is termed "the pure principle of religious freedom"³³⁴—a phrase that could find acceptance within both religious and more secular communities—while in the letter to Livingston, the principle is defined in a manner more clearly in line with Enlightenment thought, as "the immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace."³³⁵ As early as 1785, Madison was

³³¹ See, e.g., 3 ELLIOT'S DEBATES, *supra* note 129, at 29–34 (remarks of George Mason); *id.* at 215–17, 220–21 (remarks of James Monroe), 2 *id.* at 225–26, 312–15 (remarks of Melancton Smith). It is interesting to note that three years earlier in 1785, Melancton Smith had also led the Continental Congress to reject the religious set-aside, so disfavored by Madison, that had been proposed for the Land Ordinance of 1785. See 8 THE PAPERS OF JAMES MADISON, *supra* note 103, at 287 n.5; *supra* notes 102–04 and accompanying text.

³³² 1 STOKES, *supra* note 15, at 449; see also *supra* note 47 and accompanying text.

³³³ See generally WITTE, *supra* note 12, at 21–23, 26–33 (describing "Evangelical views" and "Enlightenment views" which formed "typical clusters of argument and adherence, distinct and distinguishable contributions to eighteenth-century American debates about religious rights and liberties").

³³⁴ Madison, *Detached Memoranda*, *supra* note 32, at 558.

³³⁵ Letter from Madison to Livingston, *supra* note 33, at 105.

grounding his opposition to the public funding of clergy on these same principles. In his *Memorial and Remonstrance* of 1785, he had argued against a tiny, nonpreferential governmental expenditure in Virginia that would pay a small stipend to the clergy of each taxpayer's choice; among his many reasons were the liberal arguments that "Religion is wholly exempt from [the] cognizance" of "the Legislative Body," and "it is proper to take alarm at the first experiment on our liberties."³³⁶ Madison used similarly broad language in 1790 when he criticized the attempt by Congress to have "ministers" enumerated in the census: "the general government is proscribed from interfering, in any manner whatever, in matters respecting religion"³³⁷ Yet in contesting establishments, Madison frequently grafted the principles of religious dissenters onto this branch of Enlightenment argument. A characteristic passage from his *Memorial and Remonstrance* nicely illustrates the fusion: "[A religious assessment] bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first," said Madison, making an Enlightenment-style argument, "is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world."³³⁸ But then he echoes the theological strains of the religious dissenters: "the second [is] an unhallowed perversion of the means of salvation."³³⁹

Madison thus stood in the line of disestablishmentarian dissent that was informed by certain elements of Christian theology as well as liberal political theory of a more secular nature.³⁴⁰ This line of dissent was contested in the late eighteenth century, on both theological and political grounds, but nevertheless served as the foundation for the Establishment Clause of the First Amendment.

So the question is, why did the congressional chaplaincy practice begin in 1774–1775 despite this disestablishmentarian tradition? One answer is that most of the primary dissenters had yet to make their arguments in 1774, although within thirty or forty years the movement for disestablishment would achieve striking results all over the country.³⁴¹ Further, those who supported the prayer practice at its inception seem to have been motivated by concerns that were related uniquely to the Revolutionary War—concerns

³³⁶ Madison, *Memorial and Remonstrance*, *supra* note 90, at 173–74.

³³⁷ 1 ANNALS OF CONG., *supra* note 27, at 1146 (Feb. 2, 1790); *see also supra* note 206 and accompanying text.

³³⁸ Madison, *Memorial and Remonstrance*, *supra* note 90, at 175; *see also supra* note 96 and accompanying text.

³³⁹ Madison, *Memorial and Remonstrance*, *supra* note 90, at 175; *see also supra* note 96 and accompanying text.

³⁴⁰ *See* WITTE, *supra* note 12, at 57–61 (tracing the theological and secular foundations of the ideal of disestablishment of religion).

³⁴¹ *See* Esbeck, *supra* note 127. Professor Esbeck argues that "the American disestablishment [of religion] occurred over a fifty- to sixty-year period, from 1774 to the early 1830s." *Id.* at 1590.

that would not be present in peacetime. The person most responsible for establishing the practice of clergy-directed prayer in the national assemblies was probably Samuel Adams, in 1774, and his motivations seem to have been political—he wanted to encourage support for the rebellion by having a rector of the “Church of England” deliver pro-rebellion sermons to congressional delegates in the form of prayers.³⁴² Others probably supported the practice during this time period because the hostilities with Britain made them fear for their safety and the success of their cause, and they sought to enlist God’s aid.³⁴³

Neither of these reasons would apply with much force once the war was over. But at that point, legislators might continue the practice unthinkingly and (unlike in 1774) without debate, not because they seriously considered it and found it consistent with their views on church and state, but because it was now tradition.³⁴⁴ A practice born in some controversy and justified on the ground of imminent national war and political gamesmanship became a tradition that was not often contested in public³⁴⁵ and that was perhaps continued automatically once the war was over and a new national government was established. And of course, most legislators were surely preoccupied with other concerns in the early years of the Republic. For many, as long as they were not forced to attend the prayers, they were not forced to confront the issue.

Whatever its origins, the idea of appointing and paying legislative chaplains did not originate with James Madison. Moreover, the idea did not originate with the twelve senators who were sitting in the Senate in April 1789 when that body made the first mention of chaplains in the new Congress. Probably without much thought, those twelve senators were carrying on a tradition that had begun with the appointment of a chaplain to the na-

³⁴² See *supra* notes 51–55 and accompanying text.

³⁴³ See, e.g., 2 J. OF THE CONT’L CONG., *supra* note 46, at 87–88 (June 12, 1775) (proclamation by Continental Congress, “considering the present critical, alarming, and calamitous state of these colonies,” of a day of “public humiliation, fasting, and prayer” to “implore [God’s] merciful interposition for our deliverance,” to the end “that all America may soon behold a gracious interposition of Heaven, for the redress of her many grievances, the restoration of her invaded rights, [and] a reconciliation with the parent state”).

³⁴⁴ Elias Boudinot, for example, who proposed the 1789 congressional resolution for a national Day of Thanksgiving, replied to the objections of Aedanus Burke and Thomas Tucker merely by “quot[ing] further precedents from the practice of the late [Confederation] Congress; and hoped the motion would meet a ready acquiescence.” 1 ANNALS OF CONG., *supra* note 27, at 950 (Sept. 25, 1789).

³⁴⁵ Tellingly, even when proposals for legislative prayers were publicly debated and rejected, usually the proposal was not voted down, but rather was permanently “postponed” or tabled, never to be brought up again. See *supra* note 113 and accompanying text (proposal for prayers in Philadelphia Constitutional Convention); *supra* notes 324–29 and accompanying text (proposal for prayers in Pennsylvania ratifying convention). This evidence suggests that although opponents of the practice may have had serious scruples about it, they were reluctant to go on record as voting against it, probably because they feared adverse political consequences.

tional Congress that met at the outbreak of the Revolutionary War—a tradition that has continued in Congress (though not in all the states) ever since.

D. Supporters of the Legislative Chaplaincy

There were undoubtedly several Founding Fathers who supported the legislative chaplaincy. But by and large, they drew on different traditions and sentiments than did Madison. Evidence about their sentiments can help explain the origins of the congressional chaplaincy. Although their attitudes may have been shared by many, it does not follow that their attitudes were shared by Madison and the dissenters with whom he made common cause in the fight against religious establishments.

1. *The Senators of 1789.*—The body most responsible for inaugurating the chaplaincy practice in the First Congress was the Senate of 1789, in which Madison did not sit. This Senate included at least a few men who were known supporters of practices that Madison opposed as religious “establishments,” and included no disestablishmentarians of Madison’s caliber and reputation, who would likely have objected to state sponsored religious exercises.

It was the U.S. Senate that proposed the congressional chaplaincy for the first time in the First Congress, in 1789.³⁴⁶ It is instructive to consider the backgrounds of the senators present on the day of the proposal. Several, if not all, of those senators may have supported the practice, although it is also possible that they did not give it much consideration at the time. Most of these men had experienced the chaplaincy practice in earlier Congresses, either before or during the Confederation (or both), and most had fought in the Revolutionary Army, where military chaplains were regularly employed. Of the twelve senators who sat in the Senate when it first proposed chaplains for the new Congress,³⁴⁷ eight had sat in Congress at some previous time. These eight men included six who had sat in the Continental Congress during the war-torn crisis years before Cornwallis surrendered at Yorktown,³⁴⁸ and two others, Paine Wingate of New Hampshire and Wil-

³⁴⁶ See *supra* note 138 and accompanying text.

³⁴⁷ These twelve men were: from New Hampshire, John Langdon and Paine Wingate; from Massachusetts, Caleb Strong; from Connecticut, William Samuel Johnson and Oliver Ellsworth; from New Jersey, William Paterson and Jonathan Elmer; from Pennsylvania, William Maclay and Robert Morris; from Delaware, Richard Bassett; from Virginia, Richard Henry Lee; and from Georgia, William Few. 1 J. OF THE SEN., *supra* note 138, at 7 (Apr. 6, 1789); *id.* at 10 (Apr. 7, 1789).

³⁴⁸ The six who had sat in the Continental Congress before Cornwallis’s surrender were John Langdon, Oliver Ellsworth, Jonathan Elmer, Robert Morris, Richard Henry Lee, and William Few. Each of these men was politically prominent in his own state and could be classed as a leader of the Revolution. John Langdon of New Hampshire was the newly elected President pro tempore of the Senate who presided when the committee was formed to consider the manner of electing chaplains; during the war he had been a prominent revolutionary and had superintended the construction of several continental warships. William Few of Georgia had been a lieutenant colonel in the militia. Jonathan Elmer of New Jersey had been a captain in a light infantry division. Robert Morris of Pennsylvania was a prominent

liam Samuel Johnson of Connecticut, whose backgrounds suggest that they might have supported the chaplaincy practice without scruple. Paine Wingate was an ordained minister of the Congregational church, the Puritan-origin church established by law in much of New England; William Samuel Johnson was the sixty-one-year-old son of a prominent Anglican clergyman who maintained strong ties to the Anglican Church—the established church in many southern colonies—and had refused to serve in the Continental Congress during the Revolution.³⁴⁹

One of the eight senators with previous congressional experience was Senator Richard Henry Lee of Virginia. More than the other senators, Lee had made a national reputation for himself as a leader of the Revolution. Besides serving as a militia colonel, he had become prominent in the Continental Congress as the primary speaker for the eminent Virginia delegation (which included George Washington and Thomas Jefferson as well); and it was Lee who introduced the independence resolution in 1776 that formally severed connections between Britain and the states.³⁵⁰ Importantly, however, this revolutionary icon had long been a staunch advocate of various kinds of governmental supports for religion. He was the author of the first national Thanksgiving Day proclamation in 1777 and had supported Patrick Henry's religious assessment bill in Virginia, which Madison and Jefferson had so famously opposed.³⁵¹ On this evidence, it is not hard to believe that Senator Lee would have supported, perhaps even suggested, the initiation of a chaplaincy for the new Congress in 1789; indeed it is difficult to believe he would have opposed it.

2. *Outside the Senate.*—Outside the Senate, additional supporters of the chaplaincy practice may have included Patrick Henry, John Marshall, and Edmund Randolph of Virginia; Benjamin Rush of Pennsylvania; Roger Sherman of Connecticut; and Elias Boudinot of New Jersey. Marshall, fu-

revolutionary and is known as “the financier of the American Revolution.” Oliver Ellsworth of Connecticut had served as state's attorney and then member of the Governor's Council during the war. Richard Henry Lee of Virginia is discussed at *infra* note 351 and accompanying text. Biographical information for the senators is taken from the Biographical Directory of the U.S. Congress, <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited Oct. 15, 2007) (searchable by name).

³⁴⁹ Additional information on Johnson was gathered from the U.S. National Archives and Records Administration, The National Archives Experience, America's Founding Fathers: Delegates to the Constitutional Convention, http://www.archives.gov/national-archives-experience/charters/constitution_founding_fathers_connecticut.html#Johnson (last visited Oct. 15, 2007) (scroll down to “William Samuel Johnson”).

³⁵⁰ T.R. FEHRENBACH, GREATNESS TO SPARE: THE HEROIC SACRIFICES OF THE MEN WHO SIGNED THE DECLARATION OF INDEPENDENCE 196–209 (1968); PETER D.G. THOMAS, TEA PARTY TO INDEPENDENCE: THE THIRD PHASE OF THE AMERICAN REVOLUTION 1773–1776, at 328 (1991).

³⁵¹ Regarding the first Thanksgiving Day proclamation, see “Lee, Richard Henry,” in Biographical Directory of the U.S. Congress, *supra* note 348; 1 STOKES, *supra* note 15, at 452–53. Regarding Lee's support for the religious assessment bill, see LEVY, *supra* note 10, at 62; Brant, *supra* note 41, at 16 (citing Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), in 2 LETTERS OF RICHARD HENRY LEE 304–07 (James C. Ballagh ed., 1911–14)).

ture Chief Justice of the U.S. Supreme Court, had supported Patrick Henry's proposed assessment for the payment of clergy in 1784.³⁵² Randolph and Sherman had both supported Franklin's motion for daily prayers in the Philadelphia Convention of 1787.³⁵³ Later that year, Rush had unsuccessfully proposed that a local clergyman be invited to say a prayer to begin the session of the Pennsylvania ratifying convention.³⁵⁴ It is reasonable to assume that those (like Rush, Randolph, and Sherman) who had supported inviting a clergyman into an assembly to read prayers might also have supported the paid legislative chaplaincy, particularly if they were not known for their scruples about government support of religion. And although the conclusion is debatable, supporters of religious assessments (like Henry and Marshall) might well have supported the legislative chaplaincy as well; their arguments about the need for governmental support of religious worship could also be made in favor of the legislative chaplaincy.

Sherman in particular, accustomed to Connecticut's longstanding Congregationalist establishment, could be counted on for support of religious measures. A prominent revolutionary, he had served on the committee of the Continental Congress that drafted the Declaration of Independence and had signed the Constitution as well, but was of an older generation than many other Framers (he was thirty years older than Madison).³⁵⁵ As a member of the first House of Representatives in 1789, he supported Elias Boudinot's motion calling for a presidential proclamation of "a day of public thanksgiving and prayer." In support of this motion, Sherman drew his argument from the biblical example of King Solomon dedicating the temple.³⁵⁶ In light of his devotion to the Connecticut establishment, his support for Franklin's motion for daily prayers in the Constitutional Convention, and his support for federal government proclamations of thanksgiving and prayer, there can be little doubt that he supported the congressional chaplaincy as well.

In addition, Elias Boudinot almost certainly supported the congressional chaplaincy.³⁵⁷ A zealous Presbyterian, he was appointed to (and probably chaired) the committee first appointed by the House in 1789 to propose rules governing the congressional chaplaincy.³⁵⁸ Later that year, as just noted, he sponsored a joint resolution calling for a presidential procla-

³⁵² BRANT, *supra* note 26, at 126.

³⁵³ *See supra* note 114.

³⁵⁴ *See supra* notes 324–29 and accompanying text.

³⁵⁵ Biographical information on Roger Sherman is taken from the Biographical Directory of the U.S. Congress, *supra* note 348.

³⁵⁶ 1 ANNALS OF CONG., *supra* note 27, at 950 (Sept. 25, 1789).

³⁵⁷ Biographical information on Elias Boudinot is drawn from 1 APPLETON'S CYCLOPAEDIA OF AMERICAN BIOGRAPHY 327–28 (James Grant Wilson & John Fiske eds., 1886; republished 1968); 1 DICTIONARY OF AMERICAN BIOGRAPHY 477–78 (Allen Johnson ed., 1964). *See generally* GEORGE ADAMS BOYD, ELIAS BOUDINOT: PATRIOT AND STATESMAN, 1740–1821 (1952).

³⁵⁸ *See supra* notes 140–43 and accompanying text.

mation of “a day of public thanksgiving and prayer.”³⁵⁹ A few years later Boudinot wrote *The Age of Revelation*, an attack on the deistic arguments of Thomas Paine. He left Congress to serve as director of the U.S. Mint from 1795 to 1805, but thereafter retired from public life in order to study biblical literature and publish religious works, including one book arguing that the American Indians were the ten lost tribes of Israel. Toward the end of his life he helped found the American Bible Society and served as its first president.

Historical evidence confirms, then, that several Founding Fathers made public arguments either directly or indirectly supportive of legislative chaplaincies. Some of these men were senators in 1789 and were instrumental in establishing the chaplaincy for the First Congress. The evidence also clearly shows, however, that their point of view on church-state questions, and on legislative chaplaincies in particular, was challenged and opposed by other public figures of the day.

3. *Significance of the Evidence of Support.*—On the day the Senate originally suggested a chaplaincy for the First Congress, there was not a consensus among the Founding Fathers on the legislative chaplaincy question. Presumably most had not seriously thought about it in light of disestablishmentarian arguments: Most were consumed with other, more pressing concerns for the creation and stability of the new governments in the United States, and the movement for disestablishment was just beginning to pick up steam. Still, it is clear that the legislative chaplaincy, and the assumptions that lay behind it, were being contested. Although the chaplaincy practice had its ardent supporters, a growing body of dissenting thought, both religious and secular, had begun to challenge the assumptions of traditionalism and establishment. As early as the 1770s these factions occasionally sparred with one another over questions such as chaplaincies, religious proclamations by government officials, and taxation for support of the clergy.

As discussed above, several chaplaincy supporters probably sat in the Senate in 1789.³⁶⁰ But not one of the twelve senators in attendance on April 7 was known, as Madison was, for championing the cause of religious dissenters and disestablishment. On the contrary, at least one or two of them were known to favor various forms of governmentally sponsored religious practices.³⁶¹ Further, most of them had previously experienced the chaplaincy, without ever really being exposed to a debate about it, in the course of their prior service in the Continental Congress. This perhaps explains how such a group could assume, without debate and as a matter of

³⁵⁹ 1 ANNALS OF CONG., *supra* note 27, at 949–50 (Sept. 25, 1789); *see supra* note 356 and accompanying text.

³⁶⁰ *See supra* Part V.D.1.

³⁶¹ *See supra* Part V.D.1.

course, that the new Congress would have a chaplaincy. Their uncritical support of various governmentally sponsored religious practices, however, was not likely shared by Madison. Madison had long demonstrated a particular interest in the rights of religious dissenters (having in fact married one), as well as the principles of disestablishment. Only four years earlier in Virginia he had fought Richard Henry Lee tooth and nail over these very principles. The Senate of 1789, where the congressional chaplaincy originated under the new Constitution, was the Senate of Richard Henry Lee, not James Madison. That is what Madison wanted Edward Livingston to understand.

CONCLUSIONS FOR JURISPRUDENCE

The question of what Madison thought about the practice of the legislative chaplaincy is not as broad as the question of what Madison thought the Establishment Clause prohibited; thus, evidence of Madison's thoughts on the legislative chaplaincy should not be taken to be the only relevant evidence on that latter question. Yet in light of Madison's past and present importance to Establishment Clause jurisprudence, his view on legislative chaplaincies cries out for clarification.

The legislative chaplaincy is a good case study in Establishment Clause doctrine because the practice is quite similar to a much wider body of government activity that often is the focus of Establishment Clause debate today. With respect to these activities, in which the government coerces relatively little but still demonstrates some religious preference or belief, the constitutional analysis has been tremendously influenced by judges' understandings of the history of the United States, particularly their assumptions about the ubiquity of certain practices of our national government early in its history, and the opinions of key Founders about those practices. The attitudes of many judges are probably reflected in the words of Justice Kennedy:

In determining whether there exists an establishment, or a tendency toward one, we refer to the other types of church-state contacts that have existed unchallenged throughout our history Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing [religious] symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices [like the legislative chaplaincy] that are accepted in our national heritage.³⁶²

Yet it is necessary to evaluate how "unchallenged" and "accepted" these practices actually have been in our national heritage, and particularly among those key Founders who gave them any thought.

³⁶² *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 662–63 (1989) (Kennedy, J., concurring).

On the question of the legislative chaplaincy, the weight of the historical evidence suggests that the principal Framers of the First Amendment, James Madison, squarely and consistently opposed the practice throughout his lifetime. Moreover, he seems to have been the only Framers to have seriously considered the question after 1791—if other Framers or ratifiers gave sustained thought to the constitutionality of the legislative chaplaincy in light of the First Amendment, history has not preserved those reflections.³⁶³ Of course, even if other Framers had pointedly defended the practice, we might, as Judge McConnell suggests, ultimately decide to reject the Framers' defense of a practice like the chaplaincy if we find their arguments to be illogical and inconsistent with the principle they intended to write into the Establishment Clause.³⁶⁴ But if it turns out that those Framers who carefully considered the issue were not inconsistent—if key Framers like Madison in fact intended all along for the First Amendment to forbid congressional chaplains and perhaps other similar practices—that would surely counsel a reevaluation of Establishment Clause jurisprudence regarding governmental demonstrations of religious belief.

The historical record as a whole suggests that this view of Madison is the accurate one. It is clear that Madison took some actions in his life that might be construed as support for the congressional chaplaincy, particularly if one ignores the specific historical contexts of those actions. It is equally clear that he explicitly claimed the legislative chaplaincy was an unconstitutional and unwise violation of natural rights, and that he had never supported it. In essence, Madison begged his future biographers to take account of the entire historical record, including the particular contexts in which he acted. When one takes all of the evidence into account, Madison's actions as an elected official can in fact be reconciled with his opposition to the practice. But his words, unambiguous as they are, cannot be squared with support for the legislative chaplaincy unless he lied or experienced an uncharacteristic spell of forgetfulness.

Because there are plausible explanations for his actions as an elected official consistent with his opposition to the congressional chaplaincy, there is little reason to assume he forgot or thought inconsistently on the issue. His record is in fact quite consistent on issues of establishment, even during his time in public office. From his days as a state convention delegate leading the unsuccessful early campaign to dismantle Virginia's religious establishment; to his tenure in the Virginia legislature, where he led the opposition to a general nonsectarian assessment for the support of religion and privately expressed his opposition to a federal plan to grant government land parcels for religious uses; to his days in the First House of Representatives, where he helped draft the Establishment Clause and served as its chief

³⁶³ See 1 STOKES, *supra* note 15, at 350 (“Probably Madison gave [the subject of church-state relations] more intensive thought and scholarly consideration than any of his colleagues.”).

³⁶⁴ See *supra* note 253 and accompanying text.

sponsor, while opposing the enumeration of ministers by the national government because it would too far mingle church and state; to his presidential vetoes, on disestablishmentarian grounds, of a federal land grant to one church and the federal incorporation of another; to his days in retirement decrying the legislative chaplaincy and similar practices implying (as he thought) a national religious establishment; he was a constant exponent of dissenting, disestablishmentarian views. These views may not have been mainstream views, but they were Madison's views, and they seem to have been shared by some secularists of his day and by some radical religious dissenters, like John Leland, who since 1788 or earlier had been among Madison's staunchest supporters and whose strongholds of Baptist support were located within and near Madison's home county in Virginia.

The historical record demonstrates that in all likelihood James Madison consistently opposed the legislative chaplaincy throughout his political life and also considered it a violation of the Establishment Clause he had helped to frame. If true, that understanding casts into doubt the Supreme Court's reasoning in *Marsh v. Chambers*, which relied heavily on the supposed uniformity of sentiment among the Framers (including Madison) as the Court upheld the constitutionality of legislative chaplains. Even more importantly, it casts doubt on *Marsh's* numerous progeny, the subsequent Supreme Court and lower court cases which have relied on *Marsh* and its reading of the history of the congressional chaplaincy to justify minimized judicial scrutiny of other federal and state governmental acts endorsing some religious belief or practice.

Although tradition is important, the tradition that matters most for interpreting the Establishment Clause is the unique tradition of disestablishmentarian dissent that formed it. A more accurate understanding of Madison's views may present an opportunity to craft a more consistent Establishment Clause jurisprudence, one that can be more honestly squared with our dissenting traditions as well as the goals of one of the principal Framers.

