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Inappropriate for Establishment Clause Scrutiny: Reflections on Mary Nobles Hancock's, God Save the United States and this Honorable County Board of Commissioners: *Lund, Bormuth*, and the Fight Over Legislative Prayer

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Inappropriate for Establishment Clause
Scrutiny: Reflections on Mary Nobles
Hancock’s, God Save the United States
and this Honorable County Board of
Commissioners: *Lund, Bormuth*, and
the Fight Over Legislative Prayer

Samuel W. Calhoun*

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* Class of 1960 Professor of Ethics and Law, Washington and Lee University. Thanks to Mary Nobles Hancock and the Editorial Board of the *Washington and Lee Law Review* for inviting me to participate in the 2018 Student Notes Colloquium. Thanks also to Professor Russ Miller for his help, especially for his timely encouragement.

I. Introduction

Mary Nobles Hancock's Note evaluates two conflicting federal circuit decisions on the constitutionality of legislative prayer.¹ She thus bravely chose to explore what one scholar has called an "Establishment Clause Train Wreck."² Although in the strict sense I'm a volunteer too, in reality that's not so. Once Ms. Hancock asked me to comment on her Note, how could I gracefully refuse? Oh, I had sufficient grounds had I wanted to assert them—the main one being that I'm no expert on the issue of legislative prayer.³ But I accepted the invitation regardless. My hope was that as a non-expert, I might be able to offer a useful, or at least interesting, perspective.⁴ If some readers believe I am mistaken, I appeal to them for charity. The late Yale Law Professor Arthur Leff said we commonly assign those who disagree with us into one of the "usual residuary categories—ignorance, insanity and evil."⁵ If that's where I end up in some peoples' estimation, I hope they'll recall I provided advance warning of the challenge my lack of expertise presents.⁶

1. Mary Nobles Hancock, Note, *God Save the United States and this Honorable County Board of Commissioners: Lund, Bormuth, and the Fight Over Legislative Prayer*, 76 WASH. & LEE L. REV. 399 (2019). Legislative prayer is "[t]he practice of opening governmental sessions with prayer." Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 221 (2008).

2. Klukowski, *supra* note 1.

3. Before reading Ms. Hancock's Note, I was unfamiliar with constitutional jurisprudence regarding the specific topic of legislative prayer. I did, however, have a general understanding of the original meaning of the Establishment Clause. See, e.g., Samuel W. Calhoun, *Separation of Church and State: Jefferson, Lincoln, and the Reverend Martin Luther King, Jr., Show It Was Never Intended To Separate Religion From Politics*, 74 WASH. & LEE L. REV. ONLINE 459, 465–70 (2018) (arguing that the Founders did not intend to separate religion from politics); Samuel W. Calhoun, *May the President Appropriately Invoke God? Evaluating the Embryonic Stem Cell Vetoes*, 10 RUTGERS J.L. & RELIGION ONLINE 1, 6–16 (2009) (opining that the idea of a separation between church and state is mischaracterized by scholars).

4. Another motivation for accepting was to support the Student Notes Colloquium, one of the law school's most innovative and significant events. It's not common for student work to be recognized in the format of an academic conference.

5. Arthur Allen Leff, *Law and Technology: On Shoring Up a Void*, 8 OTTAWA L. REV. 536, 543 (1976).

6. For why my lack of expertise doesn't necessarily connote ignorance, see

Part II, after noting the complexity of this issue, briefly comments on Ms. Hancock's analysis, which focuses on how current Supreme Court doctrine should be applied to legislative prayer. Part III ranges more broadly. My basic position is that the Supreme Court has long misconstrued the Establishment Clause. This misinterpretation in turn has led the Court mistakenly to interpose itself into the realm of legislative prayer, an incursion the Founders never intended.

II. Ms. Hancock's Note

A. Complexity of the Issue

Upon first reading *Lund* and *Bormuth*, I was struck by how each federal circuit's litigation history is the mirror image of its counterpart. In *Lund*, the Fourth Circuit litigation, the federal district court found the County Commission's prayers to be unconstitutional.⁷ A Fourth Circuit panel reversed in a 2–1 split decision, finding the prayers to be constitutional.⁸ The Fourth Circuit en banc, in a 10–5 split decision, reversed the panel's holding, reinstating the district court's determination that the prayers were unconstitutional.⁹ *Bormuth*, the Sixth Circuit litigation, followed a parallel course to the opposite conclusion. The federal district court found the County Commission's prayers to be constitutional.¹⁰ A Sixth Circuit panel reversed in a 2–1 split decision, finding the prayers to be unconstitutional.¹¹ The Sixth Circuit en banc, in a 9–6 split decision, reversed the panel's holding, reinstating the district court's determination that the prayers were constitutional.¹²

supra note 3.

7. *Lund v. Rowan County*, 103 F. Supp. 3d 712 (M.D.N.C. 2015).

8. *Lund v. Rowan County*, 837 F.3d 407 (4th Cir. 2016).

9. *Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (en banc). Judge J. Harvie Wilkinson III, the dissenter from the Fourth Circuit panel decision, authored the majority opinion for the Fourth Circuit en banc.

10. *Bormuth v. County of Jackson*, 116 F. Supp. 3d 850 (E.D. Mich. 2015).

11. *Bormuth v. County of Jackson*, 849 F.3d 266 (6th Cir. 2016).

12. *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc). Judge Richard Griffin, the dissenter from the Sixth Circuit panel decision, authored the majority opinion for the Sixth Circuit en banc.

I've mentioned six opinions: two district court opinions, two federal circuit panel opinions, and two en banc federal circuit opinions. These six opinions total 221 pages, representing the views of thirty-two federal judges. The overall figures on the Establishment Clause question? Regarding number of pages, I count 104 for unconstitutionality and 117 for constitutionality. Regarding number of judges, I count seventeen for unconstitutionality and fifteen for constitutionality.¹³ Given these close tallies, I think it's safe to say the constitutionality issue is unusually challenging. How is a newcomer like me supposed to make sense of it? Ms. Hancock's excellent Note is a great starting point.

B. Ms. Hancock's Analysis

Ms. Hancock's Note provides a very helpful entry point into this complicated subject. She first does a superb job of concisely and accurately conveying both the general history of Supreme Court Establishment Clause jurisprudence¹⁴ and the two governing Supreme Court decisions on the specific issue of legislative prayer.¹⁵ Next, she clearly presents the two conflicting federal circuit decisions,¹⁶ highlighting how the Sixth Circuit in *Bormuth* rejects the four factors identified as dispositive by the Fourth Circuit in *Lund*.¹⁷ To this point, Ms. Hancock's Note is largely descriptive. Even had she stopped there, the Note would have made a valuable contribution. Providing a clear roadmap through confusing terrain is a worthy accomplishment in itself.

13 I counted each judge only once. Thus, I didn't double-count those appellate judges who served on the circuit panels.

14 Hancock, *supra* note 1, at 11–17.

15 *Id.* at 21–32. The two Supreme Court decisions discussed are *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

16 Hancock, *supra* note 1, at 32–44.

17 *Id.* at 38–44. The en banc *Lund* decision, in its unconstitutionality ruling, emphasized “the commissioners . . . [as] exclusive prayer-givers; the consistent, singular faith of the prayers; the commissioners’ invitation for the meeting attendees to participate in the prayers; and the local government setting.” *Id.* at 38. The en banc *Bormuth* decision, in its ruling upholding Jackson County’s prayer practices, believed these factors had no significance “in assessing the constitutionality of . . . legislative prayer.” *Id.* at 42–44.

But the Note does more than describe. Ms. Hancock also carefully evaluates whether *Lund*'s four factors¹⁸ for evaluating legislative prayer reflect the values the Supreme Court stressed in *Marsh*—the “societal value in honoring tradition”¹⁹—and *Town of Greece*—“inclusivity.”²⁰ She discusses additional values as well, including lending gravity,²¹ inviting reflection on democratic ideals,²² and avoiding coercion.²³ Ms. Hancock concludes that *Lund*'s four factors are helpful in implementing all five of these important values.²⁴ Consequently, other courts should reject *Bormuth*'s approach²⁵ and instead utilize *Lund*'s four factors until the Supreme Court rules on the issues presented.²⁶

Ms. Hancock's Note reflects what she rightly conceived to be her principal task—to evaluate the extent to which the conflicting circuit court decisions accord with existing Supreme Court precedent, in this instance two prior decisions that were necessarily authoritative for the Fourth and Sixth Circuits. But the last time I looked, I was not a sitting federal circuit judge. Not being a federal judge I am sure has certain downsides, but there is an important upside as well—I can range more freely regarding the issue of legislative prayer. In particular, I am not compelled to conform my views to Supreme Court precedent.

III. Legislative Prayer Is Inappropriate for Establishment Clause Scrutiny

I will begin my broader inquiry by agreeing with two insights from the late-Justice Scalia. First, he lamented that a certain notion regarding the Constitution has “gained currency,” meaning

18. *Supra* note 17 and accompanying text.

19. Hancock, *supra* note 1, at 76, 79.

20. *Id.*

21. *Id.* at 50.

22. *Id.* at 50, 58, 79.

23. *See id.* at 65, 67, 75 (noting that people “uncomfortable with the prayer may feel pressured to follow along”; that there is a perceived threat of allocating “benefits or burdens . . . based on participation”; and audience members could be intimidated “into participation”).

24. *Id.* at 56–59, 62, 68–69, 77–79.

25. *Id.* at 54–55, 61–62, 66–67, 74–75.

26. *Id.* at 77–80.

“that if something is intensely bad, it must be prohibited by the Constitution; or if intensely desirable, it must be required by the Constitution.”²⁷ Second, Scalia decried the theory of an evolving Constitution, for example, the belief that the goal of constitutional interpretation is to determine what the Constitution ought to say, rather than discern what the document objectively says according to its original meaning²⁸—“the most plausible meaning of the words of the Constitution to the society that adopted it.”²⁹

But what is objectionable about an evolving Constitution? Here I will rely not on Scalia, but on the late Justice Byron White: “[D]ecisions that find in the Constitution principles or values that cannot fairly be read into the document usurp the people’s authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.”³⁰ In other words, “ill-grounded constitutional adjudication thwarts democratic self-government.”³¹ And, given an

27. Justice Antonin Scalia, *The Idea of the Constitution, Alexander Meiklejohn Lecture at Brown University* (April 1991), in ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 157, 164 (Christopher J. Scalia & Edward Whelan eds., 2017). To Scalia, the original Constitution’s oblique acquiescence in slavery demonstrates that it’s “plainly unhistorical . . . to regard the Constitution as simply a shorthand embodiment of all that is perfect.” *Id.*

28. *Id.* at 165; Justice Antonin Scalia, *Original Meaning, Speech at the Attorney General’s Conference on Economic Liberties (June 14, 1986)*, in SCALIA, *supra* note 27, at 180, 183.

29. Scalia, *Original Meaning, supra* note 28, at 183.

30. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 787 (1986) (White, J., dissenting), *overruled by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). “Conversely, [b]ecause the Constitution itself is ordained and established by the people of the United States, [properly grounded] constitutional adjudication . . . does not . . . frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own making.” Samuel W. Calhoun, *Justice Lewis F. Powell’s Baffling Vote in Roe v. Wade*, 71 WASH. & LEE L. REV. 925, 962 n.184 (2014) (quoting *Thornburgh*, 476 U.S. at 787).

31. Calhoun, *supra* note 30, at 962. This conclusion reflects the view that majority rule prevails except when the majority is denied political power via constitutional protection accorded to enumerated individual rights. Thus, majority rule is the norm. To me, this is the most logical constitutional accommodation between group power and individual rights. The late-Professor Arthur Leff, however, someone I admire immensely, disagreed.

Leff acknowledges constitutional duality. “[T]he Constitution clearly says that there are circumstances in which the collective may override the normative beliefs of a bare numerical minority, and other circumstances in which one biological

ill-grounded holding, who would be usurping the peoples' right to govern themselves? The Supreme Court, of course, which Scalia called "an anti-majoritarian institution if there ever was one."³²

What I have said so far presumably reveals my perspective—I believe that the Supreme Court, exemplifying the evolving Constitution in action, routinely has wrongly interpreted the Establishment Clause. Before turning to the specific issue of legislative prayer, I will first substantiate this assertion with Establishment Clause decisions focusing on other issues.

individual is entitled to withstand everyone else" Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1248 (1979). He also accords to the Constitution the authority to proclaim who wins: "The Constitution as God says, in effect, that one wins out over the other when it, the Constitution, says so, and not when the individual or group says so." *Id.* But Leff believes the Constitution doesn't "exhaustively specify which circumstances are which." *Id.* When the Constitution says nothing about a particular situation, he considered it arbitrary, given other possible resolutions, to designate the collective as the winner. *Id.* at 1248–49.

As much as I admire Leff, I disagree with him here. Given the Constitution's structure—with principal articles establishing majority rule and a Bill of [enumerated] Rights protecting individuals, the default rule should accord power to the majority unless precluded by an explicitly protected individual right. This result is not an arbitrary disposition of power to the majority, but instead the natural consequence of the document's organization. This view is further supported by the history of the Bill of Rights, a document that many viewed as essential to prevent the new federal government from encroaching upon fundamental individual liberties. RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 341–42, 409–10 (2009). Given this historical backdrop, there is nothing arbitrary in concluding that everything the Bill of Rights does not protect against legislative interference is still subject to normal democratic processes.

It may be of interest to note that Leff's constitutional views are what he called "the lawyer's dog to be wagged by the enormous preceding tail" of his article. Leff, *supra* note 31, at 1230, 1245. The "tail" was an extended, now famous, discourse on whether there exists "a complete, transcendent, and immanent set of propositions about right and wrong, *findable* rules that authoritatively and unambiguously direct us how to live righteously." *Id.* at 1229. For my evaluation of Leff's conclusions, see Samuel W. Calhoun, *Grounding Normative Assertions: Arthur Leff's Still Irrefutable, but Incomplete, "Sez Who?" Critique*, 20 J.L. & RELIGION 31 (2004–05).

32. Scalia, *supra* note 27, at 165.

A. *Establishment Clause General Misinterpretations*

In *Everson v. Board of Education of Ewing Township*,³³ the Supreme Court first “applied the Establishment Clause to the states through incorporation via the Fourteenth Amendment.”³⁴ Putting aside the issue of whether incorporation was appropriate at all,³⁵ *Everson*, which “marked the beginning of the . . . Court’s modern era of Establishment Clause jurisprudence,”³⁶ made an exceptionally poor start in terms of fidelity to history. This is highly regrettable, for such faithfulness is indispensable for interpreting the Constitution according to its original meaning.³⁷

Everson’s bottom-line holding is that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’”³⁸ The Court’s source for the phrase, “wall of separation,” is *Reynolds v. United States*,³⁹ which in turn quoted Thomas Jefferson’s 1802 letter to the Danbury Baptist Association.⁴⁰ *Reynolds* was the first Supreme Court decision to rely upon Jefferson’s description of the First

33. 330 U.S. 1 (1947).

34. Hancock, *supra* note 1, at 407.

35. Justice Clarence Thomas criticized *Everson*’s incorporation stance for “glibly effect[ing] a sea change in constitutional law.” *Town of Greece v. Galloway*, 572 U.S. 565, 607 n.1 (2014) (Thomas, J., concurring). Thomas’s specific objection was that the Court gave insufficient consideration to federalism-based objections to the whole concept of incorporating the Establishment Clause. *Id.* at 604–08. Given that a major purpose of the Clause was to protect a State’s right to establish a religion from federal interference, *id.* at 606–07, Thomas believed that “[a]pplying the Clause against the States” prohibited precisely what the Clause was intended to protect. *Id.* at 1836. I find Thomas’s view persuasive, but even Justice Scalia, who so opposed an evolving Constitution, *supra* note 28 and accompanying text, did not join this portion of Thomas’s concurrence. 572 U.S. at 603.

36. Hancock, *supra* note 1, at 407.

37. *Supra* notes 28–29 and accompanying text.

38. *Everson*, 330 U.S. at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

39. 98 U.S. 145 (1878).

40. *Id.* at 164. The Court did not state its source for Jefferson’s letter. For the letter itself, see Thomas Jefferson, *Reply to Danbury Baptist Association* (Jan. 1, 1802), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 332 (Adrienne Koch & William Peden eds., 1944). Jefferson’s letter was a reply to an Address submitted to him by the Danbury Baptists. *From the Danbury Baptist Association* (after Oct. 7, 1801), in 35 *THE PAPERS OF THOMAS JEFFERSON* 407–09 (2008).

Amendment's purpose—"building a wall of separation between church and State."⁴¹ The *Reynolds* Court recognized that Jefferson didn't even attend the Constitutional Convention,⁴² yet nonetheless concluded that his Danbury letter should "be accepted almost as an authoritative declaration of the scope and effect" of the Amendment.⁴³ This deference to Jefferson's "wall of separation" metaphor was not harmful in *Reynolds* itself, which applied the Free Exercise rather than the Establishment Clause.⁴⁴ The Danbury letter explicitly corroborates *Reynolds*'s interpretation of the Free Exercise Clause—"Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."⁴⁵ *Everson*, however, misinterpreted Jefferson's separation metaphor in applying the Establishment Clause.⁴⁶

41. *Reynolds*, 98 U.S. at 164.

42. *Id.* at 163.

43. *Id.* at 164.

44. *Id.* at 162, 166; *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

45. 98 U.S. at 164. The Court here rephrases the language in Jefferson's letter that stated "the legislative powers of the government reach actions only, and not opinions." Jefferson, *supra* note 40. Jefferson's wording in turn rephrases the Baptists' earlier statement to him that "no man ought to suffer in Name, person or effects on account of his religious Opinions—That the legitimate Power of civil Government extends no further than to punish the man *who works ill to his neighbor*." *From the Danbury Baptist Association*, *supra* note 40.

46. *Infra* notes 47–52 and accompanying text. The late Mark DeWolfe Howe asserted that the Court has in numerous law and religion cases "too often pretended that the dictates of the nation's history, rather than the mandates of its own will, compelled a particular decision." MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 4 (1965). Any "superficial and purposive interpretations of the past," as well as any manipulations and distortions, are "a matter of consequence" when "the Court endeavors to write an authoritative chapter in the intellectual history of the American people, as it does when it lays historical foundations beneath its reading of the First Amendment." *Id.* Any "misreading" weaves "synthetic strands into the tapestry of American history." *Id.* Howe reminds us that although the justices can "bind us by their law," they aren't "empowered to bind us by their history." *Id.* at 5. "Happily . . . each of us is entirely free to find [our] history in other places than the pages of the *United States Reports*." *Id.* [By the way, Howe believes that the Supreme Court oversimplified the history of the First Amendment. *Id.* at 10–11. "[T]he Court, in its role as historian, has erred in disregarding the theological roots of the American principle of separation. The Court's tendency [is] to see that principle more as the reflection of a skeptic's

Immediately before listing numerous Establishment Clause prohibitions, the *Everson* Court stated its understanding of the Clause's meaning: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference."⁴⁷ This characterization no doubt made the Court quite comfortable, in the very next paragraph, in applying Jefferson's "wall of separation" metaphor to the Establishment Clause⁴⁸—a wall is needed to protect the state from religion.⁴⁹ But there is a fatal, mile-wide hole in this reasoning. In Jefferson's mind, a wall was needed for exactly the opposite reason⁵⁰—to protect religion from the state.⁵¹ Harvard Law Professor Noah Feldman strongly supports this conclusion:

doubt than as the expression of a believer's conviction" *Id.* at 15.

47. 330 U.S. at 15 (internal quotation omitted) (quoting *Watson v. Jones*, 80 U.S. 679, 730 (1871)).

48. *Id.* at 16.

49. Contrary to this single-faceted description of the Establishment Clause's purpose, the Court also grounded the Clause in the need "to protect religious minorities from persecution." NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 173 (2005). Professor Feldman, however, finds this explanation unpersuasive. *Id.* at 173–75. To so explain "the non-establishment movement . . . said much more about Black's own motives and those of his colleagues on the postwar Supreme Court than it did about eighteenth-century America." *Id.* at 174. My former colleague, Emeritus Professor Lash LaRue, in a fascinating study of the rhetoric of judicial decisions, argues that Justice Black's "story" in *Everson*, which overemphasized persecution in the history of the First Amendment, "is bad because it denies respect to the religious In this story, religion threatens to produce disorder and persecution, and an established church seems to be one of the worst calamities ever loosed upon a suffering humanity . . ." L.H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* 26 (1995); *id.* at 18–27.

50. Professor Feldman observes that the same fate has befallen Jefferson's famous Virginia Statute for Religious Freedom:

Despite the fact that Jefferson's statute said not a word about protecting the state from the effects of religion, and a great deal about protecting religious belief from the state, secularists have long emphasized what they characterize as Jefferson's secular orientation as the key to his position on religious liberty.

FELDMAN, *supra* note 49, at 38; Calhoun, *Separation of Church and State*, *supra* note 3, at 467–68.

51. In often ignored language in the Danbury letter, Jefferson "told the Baptists that he viewed the First Amendment with reverence because 'religion is a matter which lies solely between man and his God, [and] that he owes account to none other for his faith or his worship.'" Calhoun, *Separation of Church and State*, *supra* note 3, at 467 (quoting Jefferson, *supra* note 40). This wording

The crucial point for the background of the religion clauses of the Constitution . . . is that . . . [Jefferson's] focus was on the liberty of conscience and the necessity of individual judgment in finding the truth, which he feared the state might infringe. This was no antireligious secularism . . . The focus was . . . on protecting religion from government, not the other way round.⁵²

It's therefore clear that *Everson*, by misconstruing Jefferson's separation metaphor in the Establishment Clause context, laid a false foundation for all future Establishment Clause jurisprudence.⁵³

"demonstrates that [Jefferson's] wall was meant to insulate religious beliefs and practices from legislative interference," *id.*, a conclusion bolstered by Jefferson's characterizing the First Amendment's religion clause as an "expression of the supreme will of the nation in behalf of the rights of conscience." Jefferson, *supra* note 40. For another likely reason Jefferson chose his wall metaphor, which also had nothing whatever to do with protecting the state from religion. *Infra* note 52 and accompanying text.

52. FELDMAN, *supra* note 49, at 40; *Id.* at 175. Given the context of Jefferson's letter, he likely also had in mind protecting "the rights of conscience," *supra* note 51 and accompanying text, from an established national church. The Baptists had flagged the risks religious establishments posed to religious freedom in their previous Address to Jefferson—by indirectly criticizing Connecticut's established Congregationalist Church. They complained that "what religious privileges we enjoy . . . we enjoy as favors granted, and not as inalienable rights: and these favors we receive at the expence of such degrading acknowledgements as are inconsistant with the rights of freemen." *Danbury Baptist Association*, *supra* note 40. Philip Hamburger explains this language: "Baptists had to sign certificates as to their minority status in order to avoid paying taxes for support of the Congregationalist religious majority in each town, and therefore Baptists resented the establishments and looked to Jefferson for support." PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 156 (2002). Professor Feldman reminds us, however, that "it is absolutely correct to say that the First Amendment to the federal Constitution was drafted so that it would not apply to the states when it was enacted." FELDMAN, *supra* note 49, at 48. This means the First Amendment did nothing to interfere with existing state religious establishments, a fact of which Jefferson was well aware. DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 50 (2002); see Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in *WRITINGS OF JEFFERSON*, *supra* note 40, at 339, 341 (noting that religion's free exercise "is placed by the constitution independent of the powers of the general government"; Jefferson therefore left the issue of suitable religious exercises "as the constitution found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies").

53. The late Chief Justice Rehnquist shared this criticism of *Everson*: "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately [via *Everson*] the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years." *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). Rehnquist's answer was to "frankly and explicitly" abandon the "wall

Two examples demonstrate that the Court's Establishment Clause decisions since *Everson* have bungled history in additional ways. First, Professor Feldman convincingly criticizes the former requirement that a practice must have had a secular purpose to pass muster under the Establishment Clause:⁵⁴

“Secularism” in the contemporary sense was a term unknown to the framers and unmentioned by the Reconstruction Congress that drafted the 14th Amendment . . . Yet in 1963, in an opinion stating respectfully that “the place of religion in our society is an exalted one,” the Supreme Court was prepared to hold, with precious little historical precedent, that the Constitution required government to act with a “secular” purpose and that civic practices deeply ingrained in American life would have to be eliminated.⁵⁵

Second, Justice Scalia pointed out that the Establishment Clause had never been thought to prohibit “a government policy of favoritism toward religious practice in general.”⁵⁶ He backed this up with a host of examples, including presidential Thanksgiving proclamations expressing gratitude to God and publicly paid chaplains for the Senate, the House of Representatives, and the military.⁵⁷ Yet, “in 1973, in contradiction of our entire national history,” the Court imposed a “principle of neutrality,” for example, “the government could not show favoritism to religion.”⁵⁸

I imagine that right now those who've read Ms. Hancock's Note are puzzled by my argument. My critique thus far has been that the Supreme Court has distorted American history in its Establishment Clause decisions.⁵⁹ But isn't this a strange

of separation” metaphor. *Id.* at 107. My answer is to apply the metaphor as Jefferson actually meant it. *See supra* notes 47–53 and accompanying text; *infra* notes 70–71 and accompanying text.

54. FELDMAN, *supra* note 49 at 181–82. The “secular purpose” requirement's most well-known embodiment is as part of the “*Lemon* test,” referring to *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

55. FELDMAN, *supra* note 49, at 181–82. The decision in question was *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

56. Antonin Scalia, *Interpreting the Constitution, Parliament House Address, Sydney, Australia (Aug. 1994)*, in SCALIA, *supra* note 27, at 188, 190–91.

57. *Id.* at 191.

58. *Id.* (internal citations omitted). Justice Scalia didn't name the 1973 decision, but presumably it was *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973).

59. *See supra* notes 33–58 and accompanying text.

argument to make in the specific context of legislative prayer? Ms. Hancock demonstrates that both *Marsh* and *Town of Greece*, precisely because of legislative prayer's pervasive presence over two centuries of American public life, exempted the practice from normal Establishment Clause constraints on government action.⁶⁰ How then can I justify criticizing *Marsh* and *Town of Greece* as wrongly decided?

I'll explain momentarily, but not before mentioning something that makes me very uneasy about the stance I've taken. As already stated, in *Lund* the Fourth Circuit found the particular legislative prayer in question to be unconstitutional.⁶¹ The author of the majority opinion is J. Harvie Wilkinson III,⁶² who's the antithesis of an "evolving Constitution" judge. Consider these three statements from his book, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right To Self-Governance*, a title that clearly signals Wilkinson's position: (1) "[L]iving constitutionalism is a complete inversion of democratic primacy and turns the Constitution's foremost premise of popular government on its head;"⁶³ (2) "[W]hen judges take it upon themselves to update the Constitution in the name of the popular will, they deprive all 'participants, even the losers, the satisfaction of a fair hearing and an honest fight,'"⁶⁴ and (3) "[L]iving constitutionalism is paternalism, premised on the belief that [the] very few know what is best for [the] very many, which is to say us all."⁶⁵

Because Judge Wilkinson rejects an evolving Constitution, one must read his *Lund* opinion as not only submitting to *Marsh* and *Town of Greece*'s authority to interpret the Establishment Clause,⁶⁶ but also accepting them as historically correct.⁶⁷ It makes

60. Hancock, *supra* note 1, at 414, 420.

61. See *supra* note 9 and accompanying text.

62. *Id.*

63. J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF—GOVERNANCE 20 (2012). I think it's appropriate to treat "living" as synonymous with "evolving."

64. *Id.* at 26.

65. *Id.* at 32.

66. *Lund v. Rowan County*, 863 F.3d 268, 276, 278, 287 (4th Cir. 2017) (en banc).

67. A concurring judge explicitly asserts that the majority decision "comports

me uneasy to disagree with such an eminent jurist, especially because he lives nearby in Charlottesville and is a dear friend of my recently retired colleague, Emerita Professor Ann Massie. I'm emboldened to do so only because of my own firm belief that the Supreme Court has thoroughly botched the history of the Establishment Clause, especially regarding its interpretation of Jefferson's "wall of separation" metaphor.⁶⁸ That conviction, plus the likelihood I'll never be personally involved in a case before the Fourth Circuit.

B. Establishment Clause Legislative Prayer Misinterpretations

So why do I believe the Supreme Court's legislative prayer jurisprudence is mistaken? First, as previously stated, *Everson* started the Court's Establishment Clause analysis on the wrong foot by misconstruing Jefferson's "wall of separation" metaphor.⁶⁹ Rather than invoking separation to protect religion from the state, as Jefferson intended, the Court invoked separation to protect the state from religion.⁷⁰ Had Jefferson's conception of separation been correctly applied from the outset, legislative prayer would've later never been subjected to Establishment Clause scrutiny. How does legislative prayer potentially implicate the state in damaging religion?⁷¹

with . . . the history of the Establishment Clause." *Id.* at 292 (Motz, J., concurring).

68. See *supra* notes 38–52 and accompanying text.

69. See *supra* note 53 and accompanying text.

70. See *supra* notes 47–52 and accompanying text.

71. Jefferson's other likely concern was to protect individual consciences from infringement by an established national church. See *supra* note 52. Although in *Everson* the Court, via Fourteenth Amendment incorporation, declared itself empowered to read the First Amendment as also prohibiting state religious establishments, 330 U.S. at 15, one can't rightly impose that expanded meaning upon Jefferson himself, who knew that the First Amendment as enacted didn't restrict state religious establishments. See *supra* note 52. Consequently, if one seeks in good faith to ground an interpretive approach to the First Amendment upon Jefferson's own views, one should invoke only his concerns about an established national church. This would necessarily mean that to Jefferson the Establishment Clause would be inapplicable to legislative prayer in state settings. Prayers opening state legislative sessions or county commission meetings obviously have nothing to do with establishing a national church.

If the Court, rather than focusing on Jefferson's individual perspective, had evaluated legislative prayer under the Establishment Clause as the Founders meant it, the clear result would've still been "no violation." The Clause's chief purpose was to prohibit Congress from establishing a national church. This was the Senate's view in the early 1850's, when it rejected a challenge to Congressional chaplains.⁷² Professor Feldman agrees with the Senate's position.⁷³ Given *Everson's* incorporation of the Establishment Clause against the States, one would naturally expect that *Marsh*, in assessing the constitutionality of legislative prayer, would've focused on whether the practice establishes a state religion.⁷⁴ Had the Court done so, the quick answer should've been "no." Legislative prayers "bear no resemblance to the coercive state establishments that existed at the founding."⁷⁵ Regardless of their form, such establishments used the law to coerce: "They exercised government power . . . to exact financial support of the church, compel religious observance, or control religious doctrine."⁷⁶ Because "actual legal coercion [is what] counts,"⁷⁷ the "subtle coercive pressures" associated with legislative prayer don't create "an Establishment Clause violation."⁷⁸

Marsh, however, rather than evaluating chaplaincies based on the coercive characteristics of state establishments, instead upheld them based on a broad historical argument—chaplaincies had been around from the time of the First Amendment,⁷⁹ and they

72. The Senate believed the practice didn't violate the Establishment Clause because "a rule permitting Congress to elect chaplains is not a law establishing a national church." *Marsh v. Chambers*, 463 U.S. 783, 789 n.10 (1983).

73. The Establishment Clause was intended to prohibit "a national establishment." FELDMAN, *supra* note 49, at 42. Feldman later states that the "Clause guaranteed that the [federal] government would not compel anybody to support any religious teaching or worship with which he conscientiously disagreed." *Id.* at 48–50. To me, these two assertions are inconsistent in that the second seems a broader prohibition than the first.

74. See *Town of Greece v. Galloway*, 572 U.S. 565, 607–08 (2014) (Thomas, J., concurring).

75. *Id.* at 608

76. *Id.*

77. *Id.* at 609–10.

78. *Id.*; see *infra* note 105.

79. 463 U.S. at 786, 788, 792, 795.

therefore must be constitutionally permissible.⁸⁰ The Court, however, should've grounded its argument in the main purpose of

80. *Id.* at 792, 795. The framers “were supremely untroubled by norms like the opening of legislative sessions with symbolic prayers.” FELDMAN, *supra* note 49, at 50. Although legislative prayers were certainly the norm, I take issue with Professor Feldman’s adjective, “symbolic,” if by that term he means “pro forma” or “insincere.” The prayers of that era were much more than symbolic. Although not a legislative prayer, George Washington’s 1789 Thanksgiving Proclamation is germane to this issue because of its relevance to the original meaning of the Establishment Clause. On September 25, 1789, the very day that Congress reached “final agreement . . . on the language of the Bill of Rights,” the House also “resolved to request the President to set aside a Thanksgiving Day to acknowledge ‘the many signal favors of Almighty God.’” *Marsh*, 463 U.S. at 788, n.9. President Washington issued the proclamation on October 3, 1789. George Washington, *Thanksgiving Proclamation (Oct. 3, 1789)*, in BASIC WRITINGS OF GEORGE WASHINGTON 565 (Saxe Commins ed., 1948). The seriousness of Washington’s prayer is evident throughout. Among other things, he asserted (a) “the duty of all Nations to acknowledge the providence of Almighty God;” (b) called the American people to thank “the beneficent Author of all the good that was, that is, or that will be” for a variety of things, including “the favorable interpositions of his providence, which we experienced in the course and conclusion of the late war”; and (c) urged prayers to beseech

the great Lord and Ruler of Nations . . . to pardon our national and other transgressions, to enable us all, whether in public or private stations, to perform our several and relative duties properly . . . [and] to render our national government a blessing to all the People, by constantly being a government of wise, just and constitutional laws.

Id. (*infra* Appendix, sentences 1–4, respectively). Washington’s prayer wasn’t merely a symbolic performance. A single fact makes this irrefutably clear—the overwhelming evidence that Washington personally credited God for His “favorable interpositions” during the Revolutionary War. *See, e.g.*, RICHARD BROOKHISER, *FOUNDING FATHER: REDISCOVERING GEORGE WASHINGTON* 146 (1996) (crediting God for his victory at Monmouth); RON CHERNOW, *WASHINGTON: A LIFE* 335 (2010) (crediting God for the French alliance); *id.* at 384 (crediting God for his successful thwarting Benedict Arnold’s treachery); NATHANIEL PHILBRICK: *IN THE HURRICANE’S EYE: THE GENIUS OF GEORGE WASHINGTON AND THE VICTORY AT YORKTOWN* xiv–xv (2018) (crediting God for allowing that all “the pieces” necessary for victory “finally fell into place”). In his first inaugural address, Washington summed up his perspective:

No People can be bound to acknowledge and adore the invisible hand, which conducts the Affairs of men more that the People of the United States. Every step, by which they have advanced to the character of an independent nation, seems to have been distinguished by some token of providential agency.

George Washington, *First Inaugural (April 30, 1789)*, in BASIC WRITINGS, *supra* at 558, 559.

the Establishment Clause—chaplaincies are permissible because they don't establish a state church.⁸¹

Because *Marsh* ultimately found no constitutional violation,⁸² isn't it immaterial that the Court applied the wrong rationale? Not at all. After holding that the bare fact of legislative prayer didn't violate the Establishment Clause,⁸³ the *Marsh* Court considered other possible objections, one of which was that the prayers were in the Judeo-Christian tradition.⁸⁴ The Court held that a prayer's content wasn't of concern to judges so long as "the prayer

81. See *supra* notes 75–78 and accompanying text. The historical argument has some logical flaws in the Fourteenth Amendment incorporation context. The fact that many states had chaplaincies discloses nothing about lawmakers' views concerning a potential Establishment Clause violation. Prior to *Everson* in 1947, that clause didn't even apply to the states. Consequently, until that year, legislatures could've created state chaplaincies without regard to the First Amendment. It's therefore unpersuasive to argue that pre-1947 state chaplaincies demonstrate that state lawmakers found them permissible under the Establishment Clause.

82. The late Chief Justice William Rehnquist believed that by the Establishment Clause the Framers meant to forbid not only "establishment of a national religion," but also "preference among religious sects or denominations." *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); see *id.* at 113. "Given the 'incorporation' of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects." *Id.* at 113. Even if Rehnquist were correct about this supplemental purpose, it would be wrong to interpret the Establishment Clause as barring preferential treatment to Christianity versus other religions or no religion. As previously noted, the House petitioned Washington to issue a Thanksgiving Proclamation on the same day it approved the wording of the Bill of Rights. See *supra* note 80. President Washington's proclamation doesn't explicitly mention Christianity, but it's clear he meant the Christian God in referring to "Almighty God," "beneficent Author," and "the Great Lord and Ruler of Nations." *Supra* Appendix, para. 1. In his Circular to the States, "a formal message to the thirteen governors that [he issued as] the Commander in Chief," BROOKHISER, *supra* note 80, at 148, Washington concluded by expressing his "earnest prayer" that God "would most graciously be pleased to dispose" the governors and all citizens "to do Justice, to love mercy, and to demean ourselves with that Charity, humility and pacific temper of mind, which were the Characteristicks of the Divine Author of our blessed Religion . . . without [which] . . . we can never hope to be a happy Nation." George Washington, *Circular to the States (June 8, 1783)*, in BASIC WRITINGS, *supra* note 80, at 488, 498. The title, "Divine Author," unmistakably refers to Jesus Christ. BROOKHISER, *supra* note 80; Samuel W. Calhoun, *Getting the Framers Wrong: A Response to Professor Geoffrey Stone*, 57 U.C.L.A. L. REV. DISCOURSE 1, 6 n.34 (2009).

83. 463 U.S. at 792.

84. *Id.* at 793.

opportunity . . . [isn't] exploited to proselytize or advance any one, or to disparage any other, faith or belief.”⁸⁵ What’s the basis of these additional requirements as a constitutional mandate? I believe they’re a prime example of the evolving Constitution at work. *Marsh* demonstrates the insidiousness of a malady I’ll call “American Evolving Constitutionalism.”⁸⁶ Even though the Court strove for fidelity to history, it failed in the end—the Court couldn’t resist supplementing the historical record with its own policy views. If *Marsh* had instead focused on the principal purpose of the Establishment Clause in an incorporation context—prohibiting an established state church—prayers violating the Court’s proscriptions would’ve been constitutionally unobjectionable because they’re a far cry from the coercive characteristics of state establishments.⁸⁷

Marsh’s added proscriptions reveal a Court posed to censor legislative prayers, but *Town of Greece* demonstrates a censorship risk far beyond the factors *Marsh* singled out for disapproval. Consider how *Town of Greece* describes the approved purposes for legislative prayer: “lend[ing] gravity to public business, remind[ing] lawmakers to transcend petty differences in pursuit of a higher purpose, and express[ing] a common aspiration to a just and peaceful society.”⁸⁸ Nothing in this list even necessarily connotes a prayer. Reflecting upon the Preamble to the Constitution would admirably serve the same three goals. This fact

85. *Id.* at 794–95. *Town of Greece* agrees with these prohibitions. See *Town of Greece v. Galloway*, 572 U.S. 565, 579–584 (2014).

86. See *supra* notes 28–29 and accompanying text. I wasn’t thinking of Professor Arthur Leff when I coined this phrase. Nonetheless, I assume my doing so was inspired by the impression left years ago from reading Leff’s brilliant critique of economic analysis of the law, an “academic theory” he labeled “American Legal Nominalism” because “its basic intellectual technique” was to substitute “definitions for both normative and empirical propositions.” Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 459 (1974). Leff was tempted by an alternative label, “Econominalism,” but rejected it as “barbaric.” *Id.* at 459 n.26. For the same reason, I rejected “American Constitutional Evolutionism” as the name of the interpretive approach I join the late - Justice Scalia in criticizing.

87. See *supra* notes 74–78 and accompanying text. This isn’t to say that any such legislative prayers would be a good thing. See *infra* notes 90–93 and accompanying text.

88. *Town of Greece*, 572 U.S. at 575. The Court later expressed another legitimate purpose for legislative prayer—“acknowledging the central place that religion, and religious institutions, hold in the lives of those present.” *Id.* at 591.

alone shows that the Court had in mind a watered-down notion of prayer.⁸⁹

What about prayers that don't conform to the Court's narrow conception, i.e., those aimed at more than "elevat[ing] the purpose of the occasion and . . . unit[ing] lawmakers in their common effort"?⁹⁰ The Court expressly disapproved of three possible prayer objectives: "denigra[ting] nonbelievers or religious minorities, threaten[ing] damnation, or preach[ing] conversion."⁹¹ What could possibly be wrong with proscribing such prayers? Wouldn't prayers with these characteristics be very unwise in a public meeting? Yes, but "foolishness" shouldn't be equated with "constitutionally forbidden." Doing so isn't appropriate doctrinally.⁹² In addition, foolishness has cures other than judicial censorship.⁹³

The *Town of Greece* standard has the potential to censor a much broader range of prayer content. The majority opinion reflects tension in the Court's reasoning. On the one hand, being nonsectarian isn't a requirement of constitutionality.⁹⁴ "Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian."⁹⁵ On the other hand, the restriction just described still applies. Therein lies the problem. The evaluative standard is subjective and malleable. Who knows what might cause a court to brand a particular prayer as exceeding its "legitimate function"?⁹⁶ Judges could certainly differ on what counts as a "[p]rayer that is solemn and respectful in tone, [one] that invites lawmakers to reflect upon shared ideals and common

89. The Court's sanctioned purposes are commendable in themselves, but they still evince a constricted idea of prayer.

90. *Id.* at 583. These are worthy goals. *But see supra* note 89 and accompanying text.

91. *Id.*

92. Because the Establishment Clause, properly interpreted, doesn't prohibit legislative prayer. *See supra* notes 69–81 and accompanying text.

93. *See infra* notes 102–112 and accompanying text.

94. *Town of Greece*, 572 U.S. at 577–84.

95. *Id.* at 582. Ministers shouldn't be required "to set aside their nuanced and deeply personal beliefs for vague and artificial ones." *Id.*

96. *Id.* at 583.

ends before they embark on the fractious business of governing.”⁹⁷ How, for example, would a court likely rule on prayers calling on God to forgive our corporate and individual sins, as George Washington did in 1789?⁹⁸ And what if someone emulated Washington by thanking God for favorably intervening in past problems faced by the locality in question?⁹⁹ It’s easy to envision a court’s deciding that such prayers exceed the “brief acknowledgment of . . . belief in a higher power” that *Town of Greece* sanctioned.¹⁰⁰

Town of Greece, although repudiating some bases for censorship, still grants the judiciary discretion to censor broadly. In a nation that historically has greatly valued religious liberty, judges shouldn’t be policing individuals’ prayers.¹⁰¹ This is particularly the case because there’s another way to handle the challenges presented by legislative prayer.

97. *Id.*

98. *See infra* Appendix; *supra* note 80. I’m not focusing here on whether it’d be wise to include this plea in a legislative prayer. The issue is whether the Constitution, properly interpreted, would forbid one’s doing so. The same point applies to any subject of prayer. *See infra* note 99 and accompanying text.

99. We’ve seen that Washington undeniably believed in such “favorable interpositions of [God’s] providence.” *See infra* Appendix, sentence 3; *supra* note 80. Keep in mind that Washington’s Thanksgiving Proclamation was issued in response to a House request made the very day Congress approved the final language of the First Amendment. *Marsh v. Chambers*, 463 U.S. 783, 788 n.9 (1983); *supra* note 80.

100. 572 U.S. 565, 590–92 (2014). The two examples of prayer the Court recounts suggest that these particular judges would have no constitutional objection to such a prayer. *See id.* at 570–74. That outcome, however, is uncertain even for these jurists, and who knows how another court might rule.

101. Professor Feldman observes that prohibiting legislative prayers by paid public officials “can be defended by saying that the government is just limiting what its employees can say or do in the exercise of their official capacities.” FELDMAN, *supra* note 49, at 284 n.4. *See Hancock, supra* note 1, at 9–10 (prayer by such an official would be “government speech” not subject to protection under the Free Exercise Clause). In my view, the government shouldn’t be able to curtail how any person prays, public official or not. Consider President George W. Bush’s Remarks on September 14, 2001 at the National Day of Prayer and Remembrance Service (which I’m treating as in effect a prayer), which Professor Feldman describes as “[s]uffused with as much theology as any presidential address since Lincoln’s second inaugural.” FELDMAN, *supra* note 49 at 241. It would’ve been outrageous had Congress or a court tried to limit what President Bush could say on such an occasion.

IV. Conclusion

My main objective has been to show that the Founders didn't intend legislative prayer to be subjected to judicial oversight via the Establishment Clause.¹⁰² The Supreme Court, relying on history, accorded legislative prayer special Establishment Clause treatment, but, having succumbed to "American Evolving Constitutionalism,"¹⁰³ it unfortunately still imposed significant restraints. A better solution would be to allow those giving legislative prayers to grapple with the challenges presented. They could then decide whether a change in prayer practices was warranted. This approach admittedly might sometimes call for forbearance and toleration from those who object to particular legislative prayers. But there's evidence suggesting that Americans have these qualities.

A very early example shows Americans' ability to accommodate exposure to prayers thought to be objectionable. *Marsh* notes that two delegates to the First Continental Congress opposed beginning with prayer because "the delegates . . . 'were so divided in religious sentiments . . . that [they] could not join in the same act of worship.'"¹⁰⁴ Nonetheless, an opening prayer was given after Samuel Adams "stated that 'he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.'"¹⁰⁵

Regarding the practical potential for change in prayer practices, *Town of Greece* relates how Nebraska's chaplain dropped "all references to Christ" after a Jewish lawmaker complained.¹⁰⁶ This step reflected "the practical demands placed on a minister

102. See *supra* notes 69–81 and accompanying text.

103. See *supra* note 86 and accompanying text.

104. *Marsh v. Chambers*, 463 U.S. 783, 791 (1983).

105. *Id.* at 792 (quoting CHARLES FRANCIS ADAMS, *FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE ABIGAIL, DURING THE REVOLUTION* 37–38 (1876)). On the general subject of unease based on differing beliefs, Professor Feldman points out that it's "largely an interpretive choice to feel excluded by the fact of other people's faith." FELDMAN, *supra* note 49, at 242. Feldman wouldn't countenance coercion, *id.*, a charge that's also levied against legislative prayer. I oppose coercion too, but I agree with *Town of Greece's* refutation of this characterization of legislative prayer. 572 U.S. at 588–592; see *supra* text accompanying notes 75–78. Ms. Hancock disagrees. Hancock, *supra* note 1, at 67–68; *supra* note 23.

106. 527 U.S. at 580 (quoting *Marsh*, 463 U.S. at 793 n.14).

who holds a permanent, appointed position in a legislature and chooses to write his or her prayers to appeal to more members, or at least to give less offense to those who object.”¹⁰⁷ Judge Jeffery Sutton, concurring in the Sixth Circuit’s en banc *Bormuth* decision, supported a similar approach regarding legislative prayer. How should a prayer be worded?

Good manners might have something to say about all of this and how it is done. So too might the Golden Rule. But the United States Constitution does not tell federal judges to hover over each town hall meeting in the country like a helicopter parent, scolding/revising/okaying the content of this legislative prayer or that one.¹⁰⁸

With the United States’s growing religious diversity,¹⁰⁹ those giving legislative prayers likely will increasingly be led, either by “practical demands” or “[g]ood manners” or “the Golden Rule,” to modify their prayer practices to be more inclusive.¹¹⁰ This process will undoubtedly be slow and halting, with many objectionable

107. *Id.* Whether a Christian pastor should’ve dropped all references to Christ is a complicated question. See Calhoun, *supra* note 3, at 463 n.11. Rather than taking this step, the Nebraska chaplain could’ve instead invited the Jewish lawmaker to give an opening prayer, with complete freedom to pray in the Jewish tradition.

108. *Bormuth v. County of Jackson*, 870 F.3d 494, 521 (Sutton, J., concurring).

109. Professor Feldman notes “the increasing presence of other non-Christian minorities, and an attendant atmosphere of religious multiculturalism.” FELDMAN, *supra* note 49, at 45. It’s interesting that Feldman also emphasizes the significance of religious diversity to the protection accorded freedom of conscience in the American Founding. *Id.* at 43–44. In fact, “Madison believed that religious diversity itself, not the Bill of Rights, was most important: ‘[W]ithout religious diversity to ensure nonestablishment from the practical standpoint, a constitutional amendment would do no good, since it would be ignored by the majority.’” Samuel W. Calhoun, *If Separation of Church and State Doesn’t Demand Separating Religion from Politics, Does Christian Doctrine Require It?*, 74 WASH. & LEE L. REV. ONLINE 565, 580 n.73 (2019) (quoting FELDMAN, *supra* note at 45).

110. As I’ve already suggested, *supra* note 107, being more inclusive doesn’t necessarily require self-censorship regarding the particulars of one’s own faith. Consider also Professor Feldman’s description of what happened at the National Day for Prayer and Remembrance following the 9/11 attacks. After President George W. Bush gave a Christian-Protestant themed address, “he was followed in the pulpit not only by the dean of the [Episcopalian Washington National] [C]athedral but also by the Roman Catholic archbishop of Washington, D.C., an African-American Methodist minister, Billy Graham, a rabbi, and an imam who recited verses from the Qur’an.” FELDMAN, *supra* note 49, at 241.

legislative prayers along the way. But recall Justice Scalia's point emphasized previously. The fact that something is undesirable doesn't mean it's prohibited by the United States Constitution.¹¹¹ In the Fourteenth Amendment incorporation context, the Establishment Clause was meant only to prohibit an established state church. Legislative prayer most assuredly doesn't threaten this result. Consequently, any problems such prayer presents should be resolved like people of good will should always handle their differences—by struggling to find the right balance between fidelity to their own beliefs while simultaneously showing respect to those with whom they disagree.¹¹²

Appendix

George Washington Thanksgiving Proclamation¹¹³
City of New York, October 3, 1789

[1] Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor, and Whereas both Houses of Congress have by their joint Committee requested me “to recommend to the People of the United States a day of public thanks-giving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.”

[2] Now therefore I do recommend and assign Thursday the 26th day of November next to be devoted by the People of these

111. See *supra* notes 27, 98–99 and accompanying text. Similarly, a practice's desirability doesn't mean it's constitutionally required. *Id.* For example, I like Judge Wilkinson's suggested “Message of Religious Welcome” in the *Lund* panel decision, which makes clear that members of all religious faiths are welcome at County Commission meetings. *Bormuth*, 837 F.3d at 431. But for the reasons this Comment explains, I don't think the Constitution requires such a statement.

112. As a Christian who has sometimes been called upon to pray publicly in a secular setting, I've had to grapple with such issues myself.

113. *Washington, Thanksgiving Proclamation (Oct. 3, 1789)*, in BASIC WRITINGS, *supra* note 80, at 565. This proclamation resulted from a House request made the very day Congress approved the First Amendment's final language. *Marsh*, 463 U.S. at 788 n.9; *supra* notes 80, 99 and accompanying text.

States to the service of that great and good Being, who is the beneficent Author of all the good that was, that is, or that will be.

[3] That we may then all unite in rendering unto him our sincere and humble thanks, for his kind care and protection of the People of this country previous to their becoming a Nation, for the signal and manifold mercies, and the favorable interpositions of his providence, which we experienced in the course and conclusion of the late war, for the great degree of tranquility, union, and plenty, which we have since enjoyed, for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly for the national One now lately instituted, for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge and in general for all the great and various favors which he hath been pleased to confer upon us.

[4] And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech him to pardon our national and other transgressions, to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually, to render our national government a blessing to all the People, by constantly being a government of wise, just and constitutional laws, discreetly and faithfully executed and obeyed, to protect and guide all Sovereigns and Nations (especially such as have shown kindness unto us) and to bless them with good government, peace, and concord. [5] To promote the knowledge and practice of true religion and virtue, and the [i]ncrease of science among them and Us, and generally to grant unto all Mankind such a degree of temporal prosperity as he alone knows to be best.