“VARIED CAROLS:”
LEGISLATIVE PRAYER IN A PLURALIST POLITY

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Although the Supreme Court held in a 1983 decision, Marsh v. Chambers, that the traditional practice of prayers by legislative chaplains did not constitute an Establishment Clause violation, the decision left open whether such prayers could be “sectarian.” That open question has been litigated in several recent cases, and a similar controversy has arisen over public prayers by military chaplains. The specific focus of most of these controversies has been whether legislative chaplains could include references to “Jesus” or “Allah” in their prayers. This article places the controversies in a broader context of thinking about the Establishment Clause by distinguishing four rival conceptions of that Clause. Two of these positions, here called “Enlightenment separationism” and “Evangelical separationism,” would prohibit legislative prayer altogether – a view ruled out by Marsh. The two other positions, called the “Religion of the Republic” and the “Pluralist Polity” approaches, follow Marsh in permitting the practice, but differ from each other over the nature of permissible prayers. The former position would permit legislative prayer only in the forms of “ceremonial deism” or of “American civil religion”; the latter permits legislative prayers of any kind, however “sectarian” or “denominational,” provided that over time the prayers reflect a sufficient variety of religious voices and perspectives to dispel any appearance that the legislature is favoring any particular form of religious belief. The article argues that the “Pluralist Polity” position accords better with the tradition of religious liberty in this country by allowing the extraordinary vitality and diversity of the American religious scene to find fuller and freer expression. In support of these conclusions, the article develops in detail three main arguments: that the purported distinction between “sectarian” and “non-sectarian” prayer is illusory; that the attempt to enforce such a distinction will operate in a discriminatory fashion; and that the approach that favors a “Religion of the Republic” will itself threaten to fall foul of the Establishment Clause.

The article then assesses, against the standards of the Pluralist Polity approach, three different models for selecting legislative chaplains – the first involving (as in Marsh) the appointment of a single official chaplain from a particular faith; the second involving the rotation of daily chaplains who are freely selected by individual legislators in their own discretion; and the third involving modest constraints intended to ensure that within reasonable limits all faiths in the political community are eventually invited to provide chaplains. It finds that the last model provides a solution that combines American

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Prayer by a legislative chaplain before the start of official business does not violate the Establishment Clause. So the Supreme Court held in a 1983 decision, *Marsh v. Chambers*. But while *Marsh* is settled law, the scope of the decision has...
become increasingly controversial. If a legislative chaplain may pray, then he or she will naturally be disposed to draw on the imagery, language, symbolism or sacred writings of his or her own faith. But if so, is there not a risk that the legislature will be seen to be endorsing such prayer, or to have created an illegitimate preference for a particular religion? On the

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4 Marsh itself opened the door to later questions by intimating that the practice of legislative prayer might be challenged in circumstances indicating that "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794-95.


other hand, if the legislature itself scripts or censors the chaplain’s prayer, does that not risk creating an impermissible governmental orthodoxy? As Justice Hugo Black once wrote, “government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.”

Faced with such concerns, some courts and other governmental bodies have concluded that legislative chaplains’ prayer, to be constitutional, must be “non-sectarian” -- and, in particular, must avoid invoking the name of Jesus.8

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8 For the spectrum of positions, see Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276 (4th Cir.), cert. denied, 126 S. Ct. 426 (2005) (county aspired to inclusiveness and non-sectarianism and accordingly requested that invocations refrain from using the name of Jesus); Wynne v. Town of Great Falls, South Carolina, 376 F.3d 292 (4th Cir. 2004), cert. denied, 125 S. Ct. 2990 (2005) (town council violated Establishment Clause in opening council sessions with prayers that frequently included references to Jesus Christ; permissibility of prayer in the Judaeo-Christian tradition did not include prayer that invoked name of Jesus); Coles v. Cleveland Board of Education, 171 F.3d 389 (6th Cir. 1999) (Board’s practice of opening meetings with moment of silence or with prayers, many of which made specific reference to the name of Jesus, was unconstitutional); North Carolina Civil Liberties Union Legal Fdn. v. Constangy, 947 F.2d 1145, 1147-49 (4th Cir. 1991) (prohibiting state judge’s practice of opening court sessions with prayer invoking “our Father in Heaven”); Hinrichs v. Bosma, 400 F. Supp.2d 1103 (S.D. Ind. 2005) (Indiana House of Representatives violated Establishment Clause by having sessions opened with prayers that frequently invoked the name of Jesus or emphasized Christian doctrine relating to him); Hinrichs v. Bosma, No. 105CV0813, 2005 WL 3544300 (S.D. Ind. Dec. 28, 2005) (permitting prayer in names of God, Allah and Elohim, but not of Jesus); Pelphrey v. Cobb County, Ga., 410 F. Supp.2d 1324 (N.D. Ga. 2006) (brief explicit references to Christian faith in invocations at openings of county commission or county commission planning sessions insufficient to show proselytization or favoritism); Rubin v. City of Burbank, 101 Cal. App.4th 1194, 124 Cal. Rptr.2d 867 (2d Dist. 2002), modified on denial of reh’g (Oct. 7,
Controversies over the contents of public prayers by military chaplains – though raising different issues from legislative chaplains’ prayers⁹-- have resulted (thus far) in similar outcomes.¹⁰

At first sight, this approach seems to avoid both horns of the dilemma sketched above. On the one hand, “non-sectarian” prayer is conceived to be prayer of a kind that can be said or heard by anyone – or at any rate, by virtually

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⁹ See Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) (institution of military chaplaincies, which was founded by Continental Congress and repeatedly authorized by Congress, is designed to accommodate religious needs of military personnel and their families and does not in general violate Establishment Clause). The question of military chaplains’ prayers will not be considered in this paper.

anyone from among the vast majority of the American people – without causing offense. Further, precisely because “non-sectarian” prayer purports to transcend the differences between particular sects or denominations, a legislature can allow such prayer without appearing to prefer or endorse any one of them. On the other hand, “non-sectarian” prayer is considered to remain prayer – only prayer that is more inclusive in its reach, and less closely associated with any particular faith, than sectarian prayer. Because it seeks to express only what is common to all -- or at least the most dominant -- faith traditions, chaplains from different backgrounds should be willing and able to recite “non-sectarian” prayers without damage to their own, more specifically denominational, beliefs. “Non-sectarian” prayer thus appears to offer a way of sustaining the tradition of legislative prayer – and thus of following Marsh – without compromising the value of governmental “neutrality” in matters of religion.¹¹

¹¹ See, e.g., Larson v. Valente, 456 U.S. 228, 244 (1982) (The “clearest command” of the Religion Clause is that “one religious denomination cannot be officially preferred over another”).
OVERVIEW

Three Problems With Mandating “Non-Sectarian” Prayer And a Proposed Solution

The central argument of this paper is that the “solution” just outlined is spurious. There are three main reasons for that conclusion: first, the idea of “non-sectarian” prayer is illusory; second, a mandate prescribing that legislative prayer be “non-sectarian” would discriminate against many conscientious clergy of different faiths; and third, such a mandate would itself threaten to cause an Establishment Clause violation. Parts II, III and IV below will develop these arguments in detail. Part V will outline a solution that appears to avoid these three problems, to be constitutionally valid, and to have independent merits of its own. The problems and their solution are, in brief, as follows.

1. The illusion of “non-sectarian” prayer

First, the purported distinction between “sectarian” and “non-sectarian” prayer is illusory. Every prayer, by its very

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12 More generally, the demand that legislative prayer, to be permissible at all, must be “non-sectarian” reflects the underlying thought, regrettably found in much of the Supreme Court’s jurisprudence, that while “a little religion in our public life” is tolerable, “the religion must be tamed, cheapened, and secularized.” McConnell, supra n. __, at 127. See also id. at 134 (“[T]he two sides on the Warren and Burger Courts shared a conception that everything touched by government must be secular.”).
nature, reflects and conveys a particular system of beliefs about the nature of ultimate reality, and is thus “sectarian.” However inclusionary or ecumenical a prayer is intended to be, it necessarily incorporates a particular theological viewpoint or belief, just as a statement in Esperanto remains a statement in a particular language (Esperanto), however artificial and contrived that language might be.

Further, given the “dizzying religious heterogeneity of our Nation,” there simply can be no such thing as prayer that

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13 Elk Grove Unified School Dist. v. Newdow, 542 U.S. at 34-5 (O’Connor, J., concurring in judgment). Although the United States is unquestionably the most religiously diverse nation on earth, many Americans remain unaware of the extent to which the religious nature of the population has changed in recent decades. “We are surprised to find that there are more Muslim Americans than Episcopalians, more Muslims than members of the Presbyterian Church, USA, and as many Muslims as there are Jews – that is, about six million. We are astonished to learn that Los Angeles is the most complex Buddhist city in the world, with a Buddhist population spanning the whole range of the Asian Buddhist world from Sri Lanka to Korea, along with a multitude of native-born American Buddhists. Nationwide, this whole spectrum of Buddhists may number about four million.” Diana L. Eck, A New Religious America: How a “Christian Country” Has Become the World’s Most Religiously Diverse Nation 2-3 (2002). Further, the more “traditional” American religions, including Christianity, have undergone dramatic transformations at the same time. “The face of American Christianity has also changed, with large Latino, Filipino, and Vietnamese Catholic communities; Chinese, Haitian, and Brazilian Pentecostalist communities; Korean Presbyterians, Indian Mar Thomas, and Egyptian Copts. In every city in the land church signboards display the meeting times of Korean or Latino congregations that nest within the walls of old urban Protestant and Catholic churches.” Id. at 4.

According to some studies, between 1990 and 2000 the Moslem population of this country grew 109%, the Buddhist population 170%, and the Hindu population 237%. In 2004, there were an estimated 1,558,068 American Moslems, 1,527,019 Buddhists, and 1,081,051 Hindus. Only two other religions included more than 1,000,000 American adherents in 2004: Christianity (224,437,959) and Judaism (3,995,371). Other rapidly growing religions in the United States include Baha’i, New Age, and Sikhism. See Largest Religious Groups in the United States of America, available at http://www.adherents.com/rel_USA.html (citing the work of City University of New York sociologists Barry A. Kosmin, Seymour P. Lachman and others,
expresses a “common denominator” for our society. As Dean Geoffrey Stone wrote almost a quarter century ago, “the very concept of a ‘nondenominational prayer’ is self-contradictory. There are well over fifty different theistic sects in the United States, each of which has its own tenets regarding the appropriate nature and manner of prayer. Any effort to compose a truly nondenominational prayer must thus produce, at best, a sterile litany virtually devoid of true religious meaning.\textsuperscript{14} Other scholars writing more recently agree fully with that judgment.\textsuperscript{15} Both across and within the many faith traditions in the United States, profound and


\textsuperscript{15} These scholars have stressed the impossibility of arriving at a “common denominator” of belief in the circumstances of contemporary American religious pluralism. See, e.g., John Witte, Jr., From Establishment to Public Religion, 32 Cap. U. L. Rev. 499, 515 (2004) (denying the possibility of “a public religion of the common denominator” and stating, “[i]n the religiously heterogeneous environment of our day—with more than 1,000 incorporated denominations on the books—no such effective common religion can be readily devised or defended.”); William P. Marshall, The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy, 78 Notre Dame L. Rev. 11, 19 (2002) (“Religious traditions in the United States are immensely diverse. The possibility of finding a common denominator underlying all belief systems is virtually impossible. Any public expression of religious affirmation will inevitably fail to be comprehensive. And those groups whose religious beliefs are outside the governmental practice will fairly be able to claim that the government has engaged in sectarian preference to their detriment.”); Michael W. McConnell, Neutrality Under the Religion Clauses, 81 Northwestern U. L. Rev. 146, 163 (1986) (arguing against government-prescribed public school prayers, “even of ‘lowest common denominator’ religion,” because they “must inevitably favor not just religion over nonreligion, but one religion or group of religions – probably the majority’s – over the others”).
intractable differences exist as to the nature and characteristics of the “Supreme Being or . . . Supreme Reality”\(^\text{16}\) addressed through prayer. Thus, prayers within each of the three leading monotheistic religions -- Judaism, Christianity and Islam -- embody certain conceptions about the nature of God and his dealings with the world that are inconsistent with conceptions of ultimate reality held in other religious traditions.\(^\text{17}\) Jewish, Christian, and Moslem prayers based on the conception of a unitary and transcendent God reject pantheistic or immanentist conceptions of divinity, such as those found in some forms of Buddhism or Hinduism. Prayers addressed to a personal God who hears human petitions and who intervenes in human affairs will “exclude” the followers of faith traditions that take ultimate reality to be impersonal, or that believe petitionary prayer to be useless.\(^\text{18}\)

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\(^{16}\) Welsh v. United States, 398 U.S. 333, 340 (1970) (plurality op.).


\(^{18}\) “Without the presupposition that prayer changes the will of God in some respect, whether he hears or rejects the prayer, no prayer of supplication seems to be meaningful.” Paul Tillich, Biblical Reality and The Search for Ultimate Reality 80 (1955).
Furthermore, even the attempt to find forms of prayer that could accommodate the three main monotheistic religions alone would be problematic, if not impossible. Prayer -- even within the limits of monotheism alone -- is dense with thought, imagery, and allusions that cannot be neatly parsed out into “sectarian” and “non-sectarian” elements, or decomposed into portions that do or do not “exclude” alternative monotheistic viewpoints. Not surprisingly, Jews pray as Jews, Christians as Christians, Moslems as Moslems. Conceptions of God, His nature and His dealings with the world that are widely shared within one monotheistic tradition but not within another are embedded in virtually every prayer that pious followers of those traditions would be apt to say. Thus, certain strict Jewish and Moslem conceptions of God’s oneness or unitariness will “exclude” traditional Christian trinitarianism. Conversely, Christian conceptions of God as

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19 Marsh rejected the argument that the legislative prayers at issue in that case violated the Establishment Clause because “the prayers are in the Judaeo-Christian tradition.” 463 U.S. at 793. See also Van Orden v. Perry. 125 S. Ct. at 2862 n.7 (plurality op.). Extrapolating from that aspect of the case, one might argue that prayers within a monotheistic “Judaeo-Christian-Islamic tradition” could also pass constitutional review. See generally Richard W. Bulliet, The Case for Islamo-Christian Civilization (2006).

20 In Islamic theology, “[a] ‘polytheist’ (mushrik) is anyone who makes anyone or anything a ‘partner’ (sharik) with God; the term extends to Jews and Christians, indeed to all unbelievers.” Michael Cook, The Koran: A Very Short Introduction 34 (2000).
a Father who brings redemption only through his Son Jesus will “exclude” Jews and Moslems. Yet these conceptions will guide and inform the prayers that Jewish, Christian and Moslem chaplains will say.

Further, any effort to identify commonly acceptable elements of prayer and authorize their use before legislative bodies would involve the secular courts in monitoring and regulating the contents of prayers in ways that lie beyond the institutional competence (and perhaps even the constitutional jurisdiction) of those courts. *Marsh* itself prudently warned the courts not to “embark on a sensitive evaluation or to parse the content of a particular prayer.”

“[T]he one unforgivable sin is shirk, associating other beings with God in worship.” William Montgomery Watt, *Companion to the Qur’an* 65 (1994). According to a leading Moslem scholar and expositor of Islam, the Koran repeatedly “show[s] up the dangerous silliness of humans who come either to equate or identify finite beings with the Infinite one, or to posit intermediary gods or powers between Him and His creation.” Fazlur Rahman, *Major Themes of the Qur’an* 7 (1989). The Moslem doctrines, which trace back to the Koran, are aimed against the Christian doctrine that Jesus was the Son of God. See Koran 4:48; 4:171; 23:91.

21 See Moshe Halbertal and Avishai Margalit, *Idolatry* 150 (Naomi Goldblum trans. 1992) (Christian worship of a God “one of whose attributes is being the father of a son” puts Christians, in some Jewish views, “outside the tradition of a people who direct their worship toward the God of Israel”). This does not mean, however, that Jews do not regard God as a father or pray to him in that manner. See Rabbi Adin Steinsaltz, *A Guide to Jewish Prayer* 10 (2000).

22 463 U.S. at 795. See Note, supra n.--, 119 Harv. L. Rev. at 1229 (“[T]he *Marsh* Court concluded that judicial review of the content of legislative prayer should be extremely minimal”); Maddigan, supra n.--, at 338 (The Court in *Marsh* “did not seize on the distinction between sectarian and non-sectarian prayer . . . because of its reluctance to scrutinize the content of the prayer”).
It is no answer to these arguments to say that while there may be no tenable distinction between “sectarian” and “non-sectarian” prayer from the perspective of the theologian, there is one from the perspective of the constitutional lawyer. The attempt to restrict prayers to a particular, State-approved kind unavoidably implicates both religious and legal considerations: they are knotted together both in logic and in practice. Because the distinction between “sectarian” and “non-sectarian” prayer is rooted in the contents of prayer and the beliefs that prayer expresses, it is a theological distinction; because it is also aimed at preventing offense to members of the political community who do not share the prayer-giver’s beliefs, it is a political or constitutional distinction. It must, accordingly, be both at once, because the hearer’s interpretation of the contents of the prayer is precisely what underlies any offense that the prayer causes to that hearer.

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23 See Brief Amicus Curiae of the American Jewish Congress in Support of Appellees, Hinrich v. Bosma, United States Court of Appeals for the Seventh Circuit, Case No. 05-4604; 05-5781 at 10 (June 12, 2006) ("As a matter of constitutional law, there is an obligatory principle of non-sectarianism or non-denominationalism. It runs like a thread through cases involving public or civic religion. Compliance is not measured by the doctrinally sensitive calipers of the theologian . . . but by the practical yardstick of the lawyer or judge seeking to determine the public implications of particular religious formulas.").
To see this more clearly, consider the situation of a judge who is reviewing an Establishment Clause claim brought by a Buddhist group that legislative prayer invoking “God” is sectarian and, therefore, unconstitutional. At a minimum, the judge would need some understanding both of how the term “God” functions in theistic doctrine and worship, and of how the relevant form of Buddhism interprets the ultimate nature of reality, so that references to “God” will import assumptions incompatible with, and offensive to, Buddhist teaching and practice. The judge cannot simply look at the external, behavioristic facts that a speech act occurred and that some part of the audience took offense at it: indeed, without some analysis of the religious content of the speech act, the judge could not even identify the speech as a potential Establishment Clause violation. The contrary view leads to the absurd conclusion that any speech marking the commencement of legislative business could be actionable under the Establishment Clause if enough members of the audience claimed to find it religiously offensive – even if the speech
invoked “the Great Pumpkin” or “Richard Nixon” rather than “God.”

Further, the persistent failure of efforts to produce “non-sectarian” prayers – prayers that seek to avoid giving offense by minimizing the contents that could be identified with any particular faith or creed – attests to the unbreakable link in practice between religious and constitutional aspects of public prayer. The “Regents’ Prayer” invalidated in *Engel v. Vitale* said merely: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”24 The graduation prayer that was challenged successfully in *Lee v. Weisman* was as anodyne.25 Even the bare phrase “under God” in the Pledge of Allegiance gave offense to some religious groups.26 If there is a coherent *constitutional* – but not *theological* – distinction between “sectarian” and “non-sectarian” prayers, then why do controversies like these recur so routinely, and why are they so deeply felt? If there is such a thing as “nonsectarian

24 370 U.S. at 422.
prayer,” then why has it been so difficult to produce one? The search for a universally acceptable, “non-sectarian” prayer has been, and remains, the futile quest for a non-existent Holy Grail.

2. The discriminatory effects of mandating “non-sectarian” legislative prayer

Second, the attempt to find a generally acceptable, “non-sectarian” prayer is intended, in part, to avoid the risk that legislative prayer will discriminate against particular religions. Yet perversely, the insistence that legislative prayer be “non-sectarian” is itself certain to have unfair and discriminatory effects. (Indeed, the very term “non-sectarian” has a history as a euphemistic reference to liberal Protestantism, as opposed to Roman Catholicism and Evangelical Christianity.27) Faced with the choice of praying in conformity with a government-imposed standard of orthodoxy or not praying at all, many clergy (to their credit) will choose not to pray at all. By preventing them from praying in accordance with the deepest

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and most vital traditions of their faiths, courts that mandate only “non-sectarian” legislative prayer are effectively barring such chaplains from praying at all.

Consider some of the practical limitations of a judicial ruling that legislative chaplains could only give “non-sectarian” prayers. Any such mandate would call into question (to say no more) whether a Mormon elder could read from the Book of Mormon; whether a Moslem imam could quote from the Koran or from the hadiths\(^{28}\) relating to Mohammed; whether a Christian minister or priest could invoke the name of Jesus or recite passages from the New Testament; whether a rabbi could pray from the Hebrew Bible or Jewish liturgy. Traditional and hallowed forms of prayer that conveyed what a secular court found to be unacceptably “sectarian” associations, such as the Christian Lord’s Prayer\(^{29}\) or the Jewish Shema,\(^{30}\) would be ruled out. Given the multitude of

\(^{28}\) “Next to the Qur’ān itself, the most important Islamic textual material is the Hadith: the body of transmitted actions and sayings of the Prophet [Mohammed] and his Companions.” John Alden Williams (ed.), Islam 57 (1962).


\(^{30}\) “The Shema is a declaration of faith, a pledge of allegiance to One God, an affirmation of Judaism. . . . [I]t is the expression of Jewish conviction, the historic proclamation of
theological differences within even a single confessional
tradition and the extreme sensitivities surrounding them,
references to God as “Father,” “Lord” or “King” might well have
to be considered constitutionally suspect, or indeed forbidden.
A judicial effort to purge legislative prayer of any specifically
sectarian or denominational associations must ineluctably
tend towards the secularization of such prayer. In those
circumstances, many conscientious clergy will surely find
themselves unable to pray as legislative chaplains.

3. Mandating “non-sectarian” prayer as a potential
Establishment Clause violation

Third, in practice, the requirement that legislative prayer
be “non-sectarian” will itself tend to bring about an
unconstitutional “establishment” of “religion.” In other words,
the attempted cure may itself aggravate the disease. The risk
may arise in either of two ways. First, what the courts

Judaism’s central creed.” Rabbi Hayim Halevy Donin, To Pray As A Jew: A Guide to
the Prayer Book and the Synagogue Service 144 (1980). The first line of the Shema is
“Hear O Israel! The Lord is our God, the Lord alone” (Deut. 6:4) (Jewish Publication
Society Tanakh Translation). That verse “is repeated throughout the prayer services. It
is said in morning blessings, in the musaf Amidah of Shabbat and holidays, when the
Torah is taken out of the Ark on Shabbat and holidays, as a bedtime prayer, as part of
the deathbed confessional, and at various other times. . . . Jewish law requires a greater
measure of concentration on the first verse of the Shema than on the rest of the prayer.
People commonly close their eyes or cover them with the palm of their hand while
reciting it to eliminate every distraction and to help them concentrate on the meaning of
the words.” Shira Schoenberg, “The Shema,” available at
perceive as “non-sectarian” will likely prove to be highly sectarian, or even coercive, from other perspectives. What passes for the “non-sectarian” is often only “the familiar.” Thomas J. Curry, a Roman Catholic bishop and a leading Religion Clause scholar, makes this point effectively in connection with the debate over public displays of the Ten Commandments:

[Some] supporters of government sponsored religion pin their hopes on “nonsectarian” beliefs and practices. They appear to assume that there exists an innermost core common to all religious faiths, adherence to which coerces none. Tending to equate religion with moral teaching, and centering their beliefs on the Ten Commandments, they cannot understand . . . how government sponsorship of either could possibly violate religious freedom.

For many believers, however, the very selection of the Ten Commandments rather than, for example, the Beatitudes or the New Commandment of Christ as the fundamental underpinning of religious behavior is to embrace a specific religious perspective. An approach that supporters of government-sponsored religion perceive as nonsectarian actually connects with religious controversies that go back to the beginning of Christianity.[31]

A mandate for “non-sectarian” prayer may also pose a significant Establishment Clause issue in a second way.

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31 Curry, supra n.--, at 78.
Legislatures and courts might conclude that “non-sectarian prayer” would not cause an Establishment Clause violation because such prayer expressed either mere “ceremonial deism”\textsuperscript{32} or its more robust cousin, “civil religion.”\textsuperscript{33} But rather than being escape routes, both of these attempted solutions prove to be dead ends.

The concept of “ceremonial deism” first surfaced in Supreme Court case law in 	extit{Lynch v. Donnelly}, when Justice Brennan, in dissent, suggested that “the designation of ‘In God We Trust’ as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood . . . as [] form[s of] ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”\textsuperscript{34} On this account, prayers that are merely forms of ceremonial deism are “uniquely suited to serve such wholly secular

\textsuperscript{32} See Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083 (1996).
\textsuperscript{33} See Mirsky, supra n.--; Maddigan, supra n.--.
\textsuperscript{34} 	extit{Lynch v. Donnelly}, 465 U.S. at 716 (Brennan, J., dissenting). Even earlier, however, in 	extit{Engel v. Vitale}, 370 U.S. at 435 n.21, Justice Black had distinguished between “patriotic or ceremonial occasions” in which a Supreme Being was invoked and “unquestioned religious exercise[s].”
purposes as solemnizing public occasions.” 35 In Elk Grove Unified School District v. Newdow, Justice O’Connor cautioned, however, that “only in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism,” and commented that “[a]ny statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history.” 36 Nonetheless, she identified Marsh as a sui generis case in which prayer in the form of ceremonial deism could be “upheld . . . against Establishment Clause challenge” because it “was supported by an extremely long and unambiguous history.” 37

“Civil religion” is, purportedly, “an essentially secular, political phenomenon” that must be contrasted with “traditional, sacral religion.” 38 Although the idea of “civil

35 465 U.S. at 717.
36 542 U.S. at 40 (O’Connor, J., concurring in judgment).
37 Id.
38 Mirsky, supra n.--, at 1237; see also Maddigan, supra n.--, at 323 (“The God acknowledged in civil religion’s rituals is not the God of any traditional religion. Civil religion’s prayers are not the prayers of any particular church. No doctrine of
religion” appears to have originated with Jean-Jacques Rousseau, the concept of American “civil religion” gained prominence in a 1967 article by the sociologist Robert N. Bellah. According to Bellah,

there are . . . certain common elements of religious orientation that the great majority of Americans share. These have played a crucial role in the development of American institutions and still provide a religious dimension for the whole fabric of American life, including the political sphere. This public religious dimension is expressed in a set of beliefs, symbols, and rituals that I am calling American civil religion.[41]

Bellah found evidence of American civil religion in the public statements and other writings of the American founders, including George Washington’s first Inaugural Address, his proclamation of a day of public thanksgiving on


40 Other writers before Bellah had anticipated his ideas in various ways. One such writer was Will Herberg, whose 1955 book Protestant, Catholic, Jew developed the idea of “a civic faith.” But for our purposes, the single most important figure intervening between Rousseau and Bellah was the great 19th century French sociologist Émile Durkheim. In his classic The Elementary Forms of the Religious Life (Joseph Ward Swain trans. 1963), Durkheim argued that the system of beliefs and practices with regard to the sacred that constituted a society’s “religion” gave the society its distinctive unity and personality. For Durkheim, every society has such a constitutive sacral identity. Durkheim was a direct and powerful influence on Bellah. For a brilliant summary of Durkheim’s views of religion and their relevance to Establishment Clause jurisprudence, see John T. Noonan, Jr., The Lustre of Our Country: The American Experience of Religious Freedom 213-16 (1998).

October 3, 1789, his Farewell Address, Thomas Jefferson’s second Inaugural Address and Benjamin Franklin’s Autobiography. Important later statements included Abraham Lincoln’s Gettysburg Address and his second Inaugural Address. According to Bellah, American civil religion has consistently furnished language and imagery for Presidential inauguration speeches, was celebrated on occasions such as Memorial Day and Thanksgiving Day, and was expressed in public places and memorials such as the Arlington National Cemetery. In characterizing American civil religion, Bellah wrote that

[tl]ough much is selectively derived from Christianity, this religion is clearly not itself Christianity. . . . The God of the civil religion is not only rather “unitarian,” he is also on the austere side, much more related to order, law, and right than to salvation and love. Even though he is somewhat deist in cast, he is by no means simply a watchmaker God. He is actively involved and interested in history, with a special concern for America. . . . What we have, then, from the earliest years of the republic is a collection of beliefs, symbols, and rituals with respect to sacred things and institutionalized in a collectivity. This religion – there seems no other word for it – while not antithetical to and indeed sharing much in common with Christianity, was neither sectarian nor in any specific sense Christian.[42]

[42 Id.]
Bellah acknowledged that critics of American civil religion might dismiss it as merely an “American Shinto;” but he defended it “at its best [a]s a genuine apprehension of universal and transcendent religious reality as seen in or, one could almost say, as revealed through the experience of the American people.”

One might argue that “non-sectarian” legislative prayer (assuming that the concept is coherent) is compatible with the Establishment Clause either because (as Justice O’Connor suggested) such prayer amounted to inoffensive ceremonial deism, or else because it “exemplif[ied] American civil religion.” Yet taking either course would lure the courts into significant Establishment Clause problems rather than providing an escape from them. Although the modern Supreme Court has never comprehensively defined “religion” for purposes of the First Amendment, it would be plausible to
consider American civil religion to be a “religion” in the constitutional sense.\textsuperscript{46} (We have seen that Bellah concedes that civil religion is truly a “religion.”). Given how close to the ground the courts have set the trip-wire for “establishing” a “religion,”\textsuperscript{47} the judicially-mandated observance of civil religion in legislative prayer could therefore plausibly be found to be an unconstitutional “establishment.” Moreover, as we shall see, civil religion is indeed “antithetical” to other, traditional religions, and a mandate subjecting legislative prayer to the

\textsuperscript{46}Certainly, the Supreme Court has not limited the application of the Religion Clause to “traditional” or “sacral” faiths. One appellate court has remarked that the Court “has recognized atheism as equivalent to a ‘religion’ for purposes of the First Amendment on numerous occasions, most recently in McCreary County, Ky. v. American Civil Liberties Union of Ky., ---U.S. ----, 125 S.Ct. 2722 (2005). . . . [T]he Court has adopted a broad definition of ‘religion’ that includes non-theistic and atheistic beliefs, as well as theistic ones. Thus, in Torcaso v. Watkins, 367 U.S. 488 [(1961)], it . . . specifically included ‘Secular Humanism’ as an example of a religion. Id. at 495 n.11.” Kaufman v. McCaughrty, 469 F.3d 678, 682 (7\textsuperscript{th} Cir. 2005); see also Linnemeir v. Board of Trustees of Perdue University, 260 F.3d 757, 759 (7\textsuperscript{th} Cir. 2001) (Posner, J.) (“a public university that had a policy of promoting atheism, or Satanism, or secular humanism . . . would be violating the religion clauses of the First Amendment”); Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (public school course in transcendental meditation violated Establishment Clause).

\textsuperscript{47}As Justice Thomas has noted, “th[e] Court’s precedent permits even the slightest public recognition of religion to constitute an establishment of religion.” Van Orden v. Perry, 125 S. Ct. at 2866 (Thomas, J., concurring). Thus, Justice Thomas noted, one lower federal court has held that a cross erected on a rock in the Mojave Desert to honor veterans of the First World War “established” Christianity. “If a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge.” Id. Earlier, Chief Justice Burger sensibly complained that it was “ridiculous” for the Court to have viewed a moment-of-silence statute as “a step toward creating an established church.” Wallace v. Jaffree, 472 U.S. 38, 89 (1985) (Burger, C.J., dissenting).
requirements of civil religion would therefore be an impermissible religious preference. 48 Finally, repeated judicial scrutiny of legislative prayers would become necessary in order to ensure that their contents remained within the limits of civil religion (or even those of ceremonial deism). 49 Such continuing monitoring and regulation of the contents of prayer would surely risk an impermissible “entanglement” between the government and religion. 50

4. Religious pluralism and liberty of conscience as the elements of a solution

These three basic considerations – that the idea of “non-sectarian” prayer is illusory; that a mandate prescribing that legislative prayer be “non-sectarian” would discriminate against many conscientious clergy of different faiths; and that such a mandate would itself threaten to cause an Establishment Clause violation -- provide good reason to reject any requirement that legislative prayer be “non-sectarian.”

49 See Maddigan, supra n.--, at 338 (“a court must always scrutinize the content of a public prayer, at least to the degree necessary to determine if it is sectarian or used for proselytization.”).
50 See Thomas Curry, Interpreting the First Amendment: Has Ideology Triumphed Over History?, 53 DePaul L. Rev. 1, 12-13 (2003) (“Clearly, the practice would involve government in the exercise of jurisdiction beyond its competence, in evaluating religious questions as to what is ‘nonsectarian, nonproselytizing’ [prayer]”).
But if legislative prayer may (or must) be “sectarian,” would it not be likely to place the government in the unconstitutional position of preferring the particular faith of the chaplain who prays?

The answer is No. The key ingredients of that answer are found, first, in the conscious recognition of the vitalizing pluralism that dominates the American religious scene and, second, in a deep appreciation for the American tradition of religious liberty. An approach that combines those two features will avoid religious discrimination between people of different creeds while not involving the government in a constitutionally illegitimate preference for a single faith. “If members of minority religions (or other cultural groups) feel excluded by government symbols or speech, the best solution is to request fair treatment of alternative traditions, rather than censorship of more mainstream symbols.”\(^5\)

Legislative prayer should be rendered in different voices and traditions that fairly reflect the underlying variety of religions within the relevant political community. And every representative of a

\(^5\) McConnell, supra n.--, at 193.
different faith who prays before the legislature should be left free to pray in accordance with his or her conscience. As John Witte, Jr., puts it:

[t]oday, our public religion must be a collection of particular religions, not the combination of religious particulars. It must be a process of open religious discourse, not the product of an ecumenical distillation. All religious voices, visions, and values must be heard and deliberated in the public square. All public religious services and activities, unless criminal or tortious, must be given a chance to come forth and compete, in all their denominational particularity.\[52\]

In what follows, then, I shall develop in detail each of the three arguments outlined above against mandating “non-sectarian” legislative prayer. I shall conclude by outlining an approach that embraces the use of “sectarian” prayer but that also generates a constitutionally valid result. First, however, I shall attempt to situate the debate over legislative prayer in the larger context of rival understandings of the First Amendment’s Religion Clause.

### I. Situating the Problem of Legislative Prayer:

Why have there been objections to legislative prayer? After all, as the Court emphasized in *Marsh*, the practice of

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52 Witte, supra n.--, at 517.
legislative prayer had gone back to the origins of the Republic and before, and had continued uninterruptedly since then.\textsuperscript{53} Whether viewing the question as a matter of public acceptability or of constitutional doctrine, however, history alone cannot validate a practice in which government and religion have been intertwined.\textsuperscript{54} Demands for the

\textsuperscript{53} The origins of legislative prayer in this country can be traced to at least the opening meetings of the First Continental Congress, which assembled in Philadelphia on September 5, 1774. A motion was made the next day to begin daily sessions with a prayer. The name of a local Philadelphia clergyman, the Rev. Jacob Duché, was proposed. Objections to the motion were raised by John Jay of New York, a Congregationalist, and John Rutledge of South Carolina, on the grounds that, "proper as the act would be," it was impractical in view of the "diversity of religious sentiments represented in Congress." However, Samuel Adams of Massachusetts, like Jay a Congregationalist, rose to defend the motion. Adams said: "I am no bigot. I can hear a prayer from a man of piety and virtue, who is at the same time a friend of his country. I am a stranger in Philadelphia, but I have heard that Mr. Duché deserves that character; and therefore, I move that Mr. Duché, an Episcopalian clergyman, be desired to render prayers to the Congress tomorrow morning." On Adams’ suggestion, the motion carried without further opposition. (The facts and quotations above are drawn from Derek H. Davis, Religion and the Continental Congress 1774-1789: Contributions to Original Intent 73-78 (2000)).

Rev. Duché accepted Congress’ invitation and returned the next day, September 7, 1774. John Adams described the event in a diary entry for September 7, 1774:

\begin{quote}
Went to congress again. Heard Mr. Duche read Prayers. The Collect for the day, the 7\textsuperscript{th} of the Month, was most admirably adapted, tho this was accidental, or rather Providential. A Prayer, which he gave us of his own Composition, was as pertinent, as affectionate, as sublime, as devout, as I ever heard offered up to Heaven. He filled every Bosom present.
\end{quote}


Duché’s extemporized prayer, which caused such an “excellent Effect” on Congress, concluded:

\begin{quote}
All this we ask in the Name and through the merits of Jesus Christ, Thy Son and our Savior. Amen.
\end{quote}

See “The First Prayer in Congress,” available at http://memory.loc.gov/cgi-in/query/r?ammem/rbpe:@field(DOCID+@lit(rbpe0140100a)).

\textsuperscript{54} See, e.g., Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 218 (1986) (attributing the “discrepancy between the widespread conviction of late eighteenth-century Americans that government possessed no power in matters of religion and the persistent interference of government in religious affairs” to “the cultural and socials context of the time”).

“separation” of Church and State themselves have a long history in this country, and run very deep.

Commentators have found several sources or forms of separationism.\(^{55}\) One major source reflects attitudes towards religion prevalent in the American Enlightenment, and can be linked to the figure of Thomas Jefferson.\(^{56}\) The Supreme Court gave classic if one-sided expression to Enlightenment separationism in *Everson v. Board of Education*,\(^{57}\) when it declared that “[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”\(^{58}\)

\(^{55}\) For a careful analysis of different understandings of “separation,” see Douglas Laycock, *The Many Meanings of Separation*, 70 U. Chi. L. Rev. 1667, 1686-90, 1700-01 (2003); see also Carl H. Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. Rev. 371, 379-94. The two kinds of separationism considered here – Enlightenment and Evangelical – are intended to be abstractions or ideal types, not exactly matching either particular historical views I associate with those positions, nor exactly the views of the contemporary Supreme Court Justices most likely to be considered “separationists,” but related to both sets of views. See Brady, supra n. --, at 509-13; 524-25.


\(^{57}\) 330 U.S. 1 (1947).

\(^{58}\) Id. at 10; see also id. at 31-2 (Rutledge, J., dissenting) (“The Amendment’s purpose was not to strike merely at an official establishment of a single sect, creed or religion . . . . [I]t was to create a complete and permanent separation of the spheres of religious
Since the publication in 1964 of Mark DeWolfe Howe’s classic *The Garden and The Wilderness: Religion and Government in American Constitutional History*, however, courts and scholars have become aware of another important variety of separationist thought – what can be called “Evangelical separationism.” If Thomas Jefferson is the patron saint of Enlightenment separationism, Roger Williams is that of Evangelical separationism. Like Jefferson, Williams activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”). For an historical account of the background to the Everson decision, including the anti-Catholic sentiments of its author, Justice Black, see Hamburger, supra n.--, at 454-63.

59 Mark DeWolfe Howe, *The Garden and The Wilderness: Religion and Government in American Constitutional History* (1964). Later scholars have followed Howe’s lead. See, e.g., McConnell, supra n.--, at 136 (“It is a mistake to read the Religion Clauses as a triumph for the forces of Enlightenment secularism. Proponents of religious freedom were the least secular and most ‘enthusiastic’ of the sects.”).

60 My use of this term may lead oversimplification if it fosters the mistaken belief that religiously-minded (or Christian) separationists were or are formed from a single mold. They were not and are not. There is an array of beliefs and strategies here ranging from radical disengagement from the world to merely maintaining a pronounced detachment from it. See Michael McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DePaul L. Rev. 191, 194-98 (1992). For an analysis of the variety of eighteenth century Evangelical (primarily Baptist) views that influenced the shaping of the Religion Clause, see Brady, supra n.--, at 461-70.

61 “Roger Williams, the founder of Rhode Island . . . has been described as ‘the truest Christian amongst many who sincerely desired to be Christian,’ . . . [and] was one of the earliest exponents of the doctrine of separation of church and state.” Engel v. Vitale, 370 U.S. at 434 n.20. I am using Williams here to represent a strand in Establishment Clause thought; he was not, in fact, a direct influence on the Framers (although the leaders and members of the Evangelical churches were). See Laycock, supra n.--, at 1674.

For an account of Williams that emphasizes his interest in the civic equality of believers (rather than their disengagement from civic affairs), see McConnell, supra n.--, at 210-11. Other scholars see Williams as a figure obsessed with protecting the purity of the Church – so much so, that his “division between the spiritual and the worldly” seemingly left the two spheres “almost irrelevant to each other.” Hamburger, supra n.--, at 42; see also id. at 50 (Williams “separated himself from all institutionalized religion, including even that of his fellow Separatists”).
wished to build a wall of separation between Church and State – but unlike Jefferson, when Williams did so, “it was not because he was fearful that without such a barrier the arm of the church would extend its reach. It was, rather, the dread of the worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained.”

The “wilderness,” as Williams explained in a letter, was the world:

The faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly proving that the church of the Jews under the Old Testament in the type, and the church of the Christians in the antitype, were both separate from the world; and that when they have opened a gap in the hedge or the wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day. And that therefore if He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world; and that all that shall be saved out of the world are to be transplanted out of the wilderness of the world, and added unto his church or garden.[63]

With a forthrightness that makes him a compelling figure for many contemporary Christians, Williams condemned the centuries-old linkage between the Christian Church and the

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[63] Id. at 5-6.
State that had been forged under the Roman Emperor Constantine: “The unknowing zeale of Constantine and other Emperours, did more hurt to Christ Jesus his Crowne and Kingdome, then the raging fury of the most bloody Neroes.”

Like those modern Christians, Williams regarded Constantinianism as a persistent temptation to the Church, offering it an unholy bargain in which it exchanges its authority to witness to and judge the world in return for legal privileges and political power.

An anti-Constantinian Christian would likely view legislative prayer with severe misgivings, if not abhorrence. Surely the presence of a Christian minister leading prayer at a ceremonial state occasion such as the opening of legislative business would open a “gap” in the “hedge” that fences off the “garden” of the Church from the “wilderness” of the world?

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64 Quoted in Engel v. Vitale, 370 U.S. at 435 n.20.
66 “The Church was, in truth, making with the Empire the wager that Faust had made with Mephistopheles.” Toynbee, supra n.--, at 108.
Moreover, if there are constraints, whether formal or informal, on the prayers that that minister may say – constraints designed to mitigate the “offensiveness” of the Gospel to the world, while preserving the air of solemnity that surrounds true prayer – the scandal of legislative prayer must become even deeper.

Enlightenment separationism and Evangelical separationism do not, however, exhaust the range of possible theological, political and constitutional positions on legislative (or other public) prayer. Rather, just as separationism appears in (at least) two forms, so there are two corresponding views that would permit legislative prayer, albeit subject in both instances to appropriate conditions. The first view (which, like Enlightenment separationism, reflects a predominantly secularist mindset) would permit the public expression of what one of its exponents has called “a religion of the republic.”67 The “Religion of the Republic” approach, as we have seen, would allow for legislative prayer if and insofar as it amounts to no more than “ceremonial deism” or (and, it

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67 Mirsky, supra n.--, at 1253.
is argued, better) to an American civil religion that “cement[s] the communal symbolic life of American society.” The alternative view – which is advocated in this paper – would allow legislative prayer that instead reflects “the religions of the republic.” Let us call it “the Pluralist Polity approach.” In terms of a common categorization of the Establishment Clause jurisprudence of recent Supreme Court Justices, the Religion of the Republic view has strong affinities with the “endorsement test,” while the Pluralist Polity view has many features of “accomodationism,” and both are distinct from “separationism.”

Sharing much of the anti-Constantinian perspective of Evangelical separationism, the Plurality Polity approach regards the “religion of the republic” as an ersatz fabrication – an attempt to find, or rather to impose, an artificial and

68 Id. at 1255.
69 I borrow the term “Pluralist Polity” from Martin Marty, When Faiths Collide 67-96 (2005). Marty’s insightful discussion of American religious pluralism makes clear that one can find value in religious pluralism without denying the existence of religious truth. Civil pluralism does not entail, and should not be collapsed into, theological pluralism. See id. at 165-67; 171-76. See also Eck, supra n.--, at 69-77 (distinguishing “pluralism” from “diversity,” “tolerance,” and “relativism,” chiefly by noting that pluralism so understood requires active engagement with other faiths).
70 See Brady, supra n.---, at 509-19 (distinguishing “separationism,” the “endorsement test,” and “accomodationism,” explaining the unifying themes within each viewpoint and the bases of their differences from one another, and associating each of them with the positions of individual Justices).
synthetic unity on the irremediable religious pluralism of American life. Rather than treating religious pluralism as something to be regulated or even suppressed in the governmental setting, the Plurality Polity approach advocates that it be given full, open and uninhibited expression.

Like Evangelical separationism, the Pluralist Polity approach emphasizes the gravity of the act of praying. It agrees with the great modern Jewish theologian Joseph Soloveitchik that “to pray has one connotation only: to stand before God.” It too insists that “the very essence of prayer is the covenantal experience of being together with and talking to God.” It views with abhorrence the idea that public prayer might be undertaken for purely instrumental or secular reasons, such as to lend an air of solemnity to a governmental event or to create “an aesthetic experience rather than a covenantal one.” Where it differs from Evangelical separationism is in thinking that it is religiously possible to

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72 Id.
73 Id. at 98.
pray and to witness, purely and even passionately, at the behest of a governmental body.

The Pluralist Polity approach also has significant elements in common with Enlightenment separationism and even with the advocacy of “a religion of the republic.” 74 Like those positions, it sees the Constantinian bargain as doubly disastrous: the capture of the State by the Church must be avoided for sound political reasons, just as the capture of the Church by the State must be avoided for sound theological reasons. 75 It fully accepts that under our constitutional régime, the State must avoid illegitimate preferences for any sect or faith tradition: non-discrimination is imperative. It


75 In one of its early “Enlightenment separationism” cases, the Supreme Court took exactly this view, stating that “[t]he first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion . . . showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support for government to spread its faith.” Engel v. Vitale, 370 U.S. at 431.

The consensus of informed observers seems to be that the American model of Church-State relations has indeed, over time, proven to be both vitalizing to religion and beneficial to politics. See, e.g., Seymour Martin Lipset, American Exceptionalism: A Double-Edged Sword 60-63 (pb. ed. 1997). But in some critical circumstances, this has arguably proven not to be so. As Mark Noll has argued in his recent study, The Civil War as a Theological Crisis (2006), the absence of an overarching religious authority in this country combined with the religious seriousness of the American people helped to provoke the Civil War and to intensify its bitterness. See id. at 111, 160-62.
differs from these more secular-minded approaches chiefly by seeking to use the fact of American religious pluralism – which gives rise to the risk of governmental preference and discrimination – as the means of *overcoming* that risk. Rather than attempting to ban religious expression from the public square altogether, or permitting it to enter only in the attenuated forms of civil religion or ceremonial deism, it *welcomes* it into the public square in all its robustness and variety.

In the specific context of legislative prayer, the Pluralist Polity approach begins by denying the tenability of any attempt to distinguish between constitutionally acceptable “non-sectarian” prayer and constitutionally unacceptable “sectarian” prayer. It is no more possible to pray without invoking a particular conception of the Supreme Being or Supreme Reality than it would be to speak without using the conventions of a particular language or sign system. Further, the Pluralist Polity approach argues that even if a tenable line could be drawn between “non-sectarian” and “sectarian” prayers, the effect of enforcing that distinction would be to
discriminate against those legislative chaplains (and other prayer-givers) who cannot conscientiously pray without drawing on the ideas, images, symbols and language of their own faiths. Finally, the Pluralist Polity approach suggests that the very effort to enforce a distinction between constitutionally valid and invalid prayer language may itself entrap the government in Establishment Clause violations. Accordingly, the Pluralist Polity approach recommends combining the fact of American religious pluralism with the tradition of American religious liberty to find a constitutional solution to the problem of legislative prayer.

II. Prayer Is Inherently “Sectarian”

There is a fundamental error in the very idea of “non-sectarian” prayer. The idea presupposes that some generic, “nonsectarian” prayer language can be disengaged from the

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76 Despite using the concept frequently, the Supreme Court has failed to provide a satisfactory definition of “non-sectarian” prayer. In Lee v. Weisman, 505 U.S. 577, 641 (1992), Justice Scalia, in dissent, characterized governmental endorsement as “sectarian” if it “specif[ied] details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ.” Apart from the oddness of describing “the divinity of Christ” as a “detail[ ]” that distinguished Christianity from other monotheistic faiths, Justice Scalia’s account could not provide an adequate definition of what makes prayer “sectarian,” if only because it restricts that concept to religions that assume “a benevolent, omnipotent Creator and Ruler of the world.” But a Hindu prayer to Vishnu would surely be “sectarian,” even though Hinduism does not make that assumption.
specific faith traditions and forms of worship that give prayer its vitality, power and inner meaning. That presupposition is false. Searching for a “non-sectarian” essence of prayer is not like stripping the husks from an ear of corn to find the kernels inside; it is like peeling off the layers of an onion until nothing is left but empty space.77

No prayer can escape making particular claims about the nature of the divine. Take, for example, the simple three-word prayer “God bless America.” Most courts would, if asked, likely consider this prayer to be “non-sectarian.” It is anything but that. It presupposes a deity who alone is divine, who is personal, who is willing to hear and respond to human petitions, who intervenes in human history and indeed controls its course, who grants or withholds blessings, and who sits in judgment on the nations.78

77 It is probably not coincidental that belief in the possibility of winnowing out “nonsectarian” from “sectarian” prayer closely resembles Thomas Jefferson’s belief that “what is really [the teaching of Jesus]” is “as separable” from “the rubbish in which it [was] buried” by his followers as removing “the diamond from the dunghill.” Letter from Thomas Jefferson to William Short (Oct. 31, 1819), in 15 The Writings of Thomas Jefferson 220 (Andrew A. Lipscomb ed. 1904-05).

78 “When we pray to God there are things . . . implicit in our action. First, there is the acknowledgement that God, albeit all-powerful and the creator of the universe, is not an impersonal force or source of energy or colossal agent of nature, but is an actual being, who can be addressed in a meaningful way. Prayer is directed to a personal God, who receives it and listens to it – and who may answer it. Second, prayer reflects the fact that our relationship with this personal, receptive God, who hears what we have to say,
are “sectarian.” They adopt the claims of some religious traditions and preclude those of others.

Two scholars who have studied the phenomenon of prayer closely and sympathetically have reached the same conclusion. They argue:

efforts to distinguish prayer from worship must inevitably fail. All prayer involves an element of worship, for it always entails the lower addressing the higher, and this higher assumes, in the mind of the believer, a particular form conforming to a particular faith. The “Letter to the Bishops of the Catholic Church on Some Aspects of Christian Meditation,” a particularly insightful 1989 Vatican document addressing interfaith prayer, notes that “Christian prayer is always determined by the structure of the Christian faith.” So, too, with prayers of other faiths; thus Hindu prayer to a god of the Hindu pantheon reflects Hindu theology, Hindu devotional history, and Hindu ideas about the methodology of prayer. . . . [T]o burn incense or pray to an image is always an act of worship, although the import differs from one faith to the next. Even silence comes under this rule: the silence of a Buddhist temple is not the silence of a Christian church, for the silence of each enclosure swarms with the spiritual gestalt of each tradition. With this understanding, the borders between prayer and worship become permeable or evaporate altogether. . . .

Religion, like cuisine, finds greatness in particularity. Each religion has its own specific genius, and to lump

is itself direct and personal . . . one-to-one, always.” Paul Johnson, The Quest for God: A Personal Pilgrimage 184 (1996).
them together is to risk a tasteless, unnourishing pudding of faith.[79]

The quest to find some “common denominator” prayer language will characteristically depend on overlooking two elementary but essential points: first, the fundamental difference between monotheistic religions (e.g., Judaism, Christianity and Islam) and non-theistic religions (Buddhism in some interpretations, and arguably, Hinduism); and second, the existence of ways of understanding and characterizing “God” that strikingly distinguish the main monotheistic religions from each other -- and, indeed, that distinguish believers even within each of the major monotheistic traditions.

[80] See John Hick, God Has Many Names 53 (1982). On one account, the Hindu belief that “the divine is not only beyond gender and name, but also beyond number” results in the manifestation of the divine “in many shapes and forms: as human or animal, as trees, or as combinations of these things.” Vasudha Narayanan, Hinduism: Origins, Beliefs, Practices, Holy Texts, Sacred Places 23 (2004). At the same time, Hindu scriptures also “refer to the supreme being as brahman, which is considered to be ineffable and beyond all human comprehension.” Id. at 25. Other accounts of Hinduism emphasize its resemblance to monotheistic traditions. See Nirad C. Chaudhuri, Hinduism: A Religion to Live By 267(1979) (arguing that “the God of the [Bhagavad] Gita” came “from Christianity”); see also R.C. Zaehner, Hinduism 92 (1966) (The Bhagavad Gita is “the most ‘seminal’ of Hindu scriptures.”). Still other interpreters maintain that while Hindu thought permits a “concrete and representational” conception of God to those who find in it a “life-sustaining meaning,” the “basic Hindu view of God” is of “[u]tter reality, utter consciousness, . . . utterly beyond all possibility of frustration . . . pure being . . . infinite with nothing excluded.” Huston Smith, The World’s Religions 60-1 (rev. ed. 1991). Hinduism has included “superb champions” of both “personal and transpersonal conceptions of God.” Id. at 62.
A. The Distinction Between Theistic and Non-Theistic Religions.

First, some religious traditions presuppose that ultimate reality is a personal God (as in monotheism), while other traditions presuppose that ultimate reality is impersonal. According to John Hick, the well-known philosopher of religion, “[m]an’s awareness of the Eternal One—like all our awareness of reality—is focused by concepts. There are in fact two different basic involved in the religious life of mankind. One is the concept of deity, or of the Eternal One as personal, which presides over the theistic modes of religion; and the other is the concept of the Absolute, or of the Eternal One as nonpersonal, which presides over the non-theistic or transtheistic modes of religion.”81 Thus, Ninian Smart, another prominent philosopher and student of comparative religion, has noted that:

81 Hick, supra n.--, at 52.

It must be acknowledged that some thinkers regard the distinction between theistic and non-theistic religions (or “Judaic” and “Indian” religions) as “not a difference in view, but one of emphasis.” Toynbee, supra n.--, at 17. As Martin Marty characterizes this view, it says, in effect: “Strip away the[ ] overlays and encrustations . . . and you will find revealed the warm and pulsing heart of all-religions-as-essentially-one.” Marty, supra n.--, at 166-67. Marty explicitly takes issue with Toynbee’s claims. See id. at 166.
two varieties at least of Buddhism are very different from theism: the Theravada . . . and Madhyamika, one of the mainstream forms of Mahayana Buddhism. . . . It was not for nothing that the Dalai Lama declared . . . “We Buddhists are atheists.” . . . [Buddhism] has deep spiritual books and philosophies. But it is still atheist: it rejects the notion of a creator God who will help us with our troubles.[82]

This basic distinction between monotheistic and other religions undermines the assumption that references to “a generic ‘God’”[83] cannot be construed as promoting a particular form of religious belief or as excluding the followers of another. As Justice Clarence Thomas has observed, “words such as ‘God' have religious significance. . . . [J]ust last Term this Court had before it a challenge to the recitation of the Pledge of Allegiance, which includes the phrase ‘one Nation under God.’ Th[is] declaration . . . necessarily entail[s] an affirmation that God exists. This phrase is thus anathema to those who reject God’s existence and a validation of His existence to those who accept it. Telling either nonbelievers or believers

[82] Ninian Smart, Dimensions of the Sacred: An Anatomy of the World’s Beliefs 27 (1996). See also Smith, supra n.--, at 114 (distinguishing ways in which Buddhism might and might not be considered a form of atheism); Christmas Humphreys, Buddhism 79 (3d ed. 1962) (“as between the theist and atheist positions, Buddhism is atheist . . .”).

that the words ‘under God’ have no meaning contradicts what they know to be true.”84 Accordingly, when a Jewish, Christian or Moslem cleric prays to “God” in a manner that implies personhood, a Buddhist may reasonably construe him- or herself to be “excluded” by that prayer. Conversely, a Buddhist cleric’s prayer quoting the Buddha’s statement, “Bliss, yes bliss, my friends is nirvana,”85 could reasonably be considered “exclusionary” by Jews, Christians and Moslems.

In her concurring opinion in Newdow, Justice O’Connor seemed to reject this line of thought. Directly contradicting an amicus brief filed on behalf of Buddhist Temples, Centers and Organizations, she peremptorily concluded there that the phrase “under God” as used in the Pledge of Allegiance “represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system.86 But what equips a judge to find that a public invocation of the divine under a particular

84 Van Orden v. Perry, 125 S. Ct. at 2866 (Thomas, J., concurring) (citation and internal quotation marks omitted.) Even earlier, the Court (Clark, J.) found that Congress had used the term “Supreme Being” rather than “God” in the Selective Service Act so as to be certain of “embrac[ing] all religions,” including Buddhism and Hinduism. United States v. Seeger, 380 U.S. 163, 165 (1965) (emphasis added).
85 Quoted in Smith, supra n.--, at 114.
86 542 U.S. at 42 (O’Connor, J., concurring in judgment).
name is “tolerable” to those who sincerely or even poignantly say that it offends their faith? The Buddhist amici had contended that “[w]hen children from Buddhist homes . . . recite the Pledge of Allegiance, they utter a phrase that is inconsistent and incompatible with the religious beliefs and ethical principles they are taught by their parents . . . . That phrase is that this is a nation ‘under God.’ . . . [W]hen public school teachers lead children in reciting the Pledge, the unmistakable message conveyed by the government is that Buddhism is an outcast religion.” 87 When Buddhist groups contend that the recital of the Pledge in a governmental setting “‘sends a message to [them as] nonadherents that they are outsiders, not full members of the political community,’”88 how can a judge -- especially one from a very different background – presume to tell them that they are misreading the message? No doubt Justice O’Connor was right to say that “adapting a subjective approach” to her favored endorsement test “would reduce the test to an absurdity.” But the difficulty is not

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87 Brief Amicus Curiae of Buddhist Temples, Centers and Organizations Representing Over 300,000 Buddhist Americans in Support of Respondents, 2004 WL 298116 at *3-4.
88 Id. at 34 (quoting Lynch v. Donnelly, 465 U.S. at 688 (O’Connor, J., concurring)).
solved by rudely dismissing the Buddhists’ complaint as the equivalent of “a ‘heckler’s veto’”\(^\text{89}\): the difficulty lies in the inherent arbitrariness\(^\text{90}\) and latent bias\(^\text{91}\) of the “endorsement test” itself. Deciding whether a governmental practice diminishes a religious minority’s sense of belonging to the larger political community can hardly be, as Justice O’Connor would have it, a matter of “a community ideal of social judgment”\(^\text{92}\) – that is, of viewing the question from an \textit{insider’s}

\(^{89}\) Id. at 35. Similarly, in her opinion for the Court in \textit{Lyng v. Northwest Indian Cemetery Protective Ass’n}, 485 U.S. 439, 452 (1988), in ruling against the claim of minority Native American religions that the Forest Service could not constitutionally construct a logging road over their ancient worship sites (thus effectively destroying their ability to practice their religions), Justice O’Connor wrote that “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires. . . . The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.”

\(^{90}\) See McConnell, supra n. -- , at 148 (“There is no generally-accepted conception of what ‘endorsement’ is, and there cannot be. . . . It is nothing more than an application to the Religion Clauses of the principle: ‘I know it when I see it.’”).

\(^{91}\) See id. at 152-54 (arguing that the “endorsement test” is biased both against religion in general and against non-mainstream religions in particular).

\(^{92}\) Id. As Justice O’Connor wrote elsewhere, the “collective standard” embedded in her endorsement test requires judgments similar to those of “the reasonable person in tort law, who is not to be identified with any ordinary individual, who might occasionally do unreasonable things, but is rather a personification of a community ideal of reasonable behavior, determined by the collective social judgment.” \textit{Capitol Square Review and Advisory Board v. Pinette}, 515 U.S. 753, 779-80 (1995) (O’Connor, J., concurring in part and concurring in judgment)(citations and internal quotation marks and brackets eliminated). But this “collective standard” – like the reasonable person standard in tort law -- necessarily reflects the values and perspectives of the dominant element in the community.

Justice O’Connor also interpreted her test as saying that if a governmental practice was “longstanding” and “nonsectarian,” it would be unlikely to “convey a message of endorsement of particular religious beliefs.” \textit{City of Allegheny v. ACLU, Greater Pittsburgh Chapter}, 492 U.S. at 630-31 (O’Connor, J., concurring). As (now) Judge Michael McConnell has pointed out, however, “[i]n our culture, most ‘longstanding’ symbols are those associated with Protestant Christianity, and those most likely to be perceived as ‘nonsectarian’ are symbols associated with liberal
perspective. That, of course, skews outcomes in favor of mainstream – or at least, familiar and well-recognized -- religious opinions and sensibilities.\textsuperscript{93} A test with such a built-in bias should not stand.\textsuperscript{94}

**B. **\textit{Differences Between the Main Monotheistic Religions.}

The monotheistic religions differ markedly, not only from non-theistic and polytheistic religions, but also \textit{from each}

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\textsuperscript{93} As Judge John Noonan has pointed out, the Supreme Court has displayed a similar unthinking bias in favor of the familiar in past Religion Clause cases. He cites the example of Arver v. United States, 245 U.S. 366 (1918), in which an unanimous Court brushed aside, without analysis or explanation, the objection to the Selective Draft Law of 1917 that it exempted members of historic Peace Churches (Quakers and Mennonites) from conscription, while not creating a similar exemption for sects such as the Jehovah’s Witnesses that were new at the time to the American religious scene. Noonan notes that while the historic Peace Churches “were not made to fight[,] members of newer sects . . . were prosecuted, convicted, and sentenced to prison because they were not exempted and had failed to comply with the statute establishing the national norm.” Noonan, supra n.--, at 222.

\textsuperscript{94} Justice O’Connor’s collective standard for evaluating minority religions’ Establishment Clause claims also cuts against the Court’s current jurisprudence in at least two ways. First, the Court has recognized the validity of a minority’s claim to be offended and isolated by a governmental practice even when those who press the claim are relatively few: indeed, the Court has observed that the very fact that a broad majority approves the practice may intensify the injury to the minority. See Santa Fe Independent School District v. Doe, 530 U.S. 290, 292 (2000). Second, the Court has treated the absence or rarity of complaints from minority religions about a governmental practice as evidence of the inoffensiveness of the practice and, hence, as tending to prove its constitutional legitimacy. See Van Orden v. Perry, 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment); see also Noah Feldman, \textit{Principle, History, and Power: The Limits of the First Amendment Religion Clauses}, 81 Iowa L. Rev. 833, 863 (1996) (criticizing Court’s practice). Justice O’Connor herself relied on the same criterion. Elk Grove Unified School District v. Newdow, 542 U.S. at 38 (O’Connor, J., concurring in the judgment) (“[T]he history of a given practice is all the more relevant when the practice has been employed pervasively without engendering significant controversy.”). Accordingly, if a religious minority does in fact complain that a governmental practice has exclusionary or isolating effects – as the Buddhist groups did in Newdow -- then the courts should be receptive to that complaint.
\end{flushright}
other. Even permitting legislative prayers to a generic “God” would not bridge over the differences between them. For one thing, “God” is only one of the names that monotheists give to the Supreme Being who is the object of their prayer and worship: invocation of other names – “Yahweh,” “Allah,” “Jesus” – brings deep differences to light. Furthermore, monotheistic prayer will necessarily characterize the Supreme Being in various ways. And virtually any characterization will introduce an understanding of the Supreme Being that is embedded in a particular faith tradition. As a practical matter, therefore, religious particularity cannot be purged from monotheistic prayer.

Again, we may cite John Hick:

The concept of deity, or of God, takes concrete form, and a “local habitation and a name,” in the life of a particular human community and culture as a specific divine persona or face or image or icon of the Eternal One. Yahweh of Israel is one such divine persona. He exists in relationship with the people of Israel, and cannot be characterized except in that relationship. He has to be described historically as the God of Abraham, of Isaac and of Jacob, who brought the children of Israel out of bondage in Egypt and led them into their Promised Land. You cannot abstract Yahweh from his historical
relation with this particular people. He is part of their history and they are a part of his.[95]

Courts that would impose a requirement that legislative prayer be “non-sectarian” likely assume, uncritically but mistakenly, that prayers may both (1) invoke “God” under that name or an assumed equivalent (including “Allah”) and yet (2) be framed so as to abstract “God” (or “Allah”) from any identifiable association with a particular people, church, faith tradition, or community of believers.96 That cannot be done. To illustrate the difficulty, we shall consider whether legislative prayer may be “non-sectarian” even if invokes the name “Allah.”

95 Hick, supra, at 52.
96 Thus, Justice O’Connor would apparently have been open to a “religious acknowledgement” that made “a simple reference to a generic ‘God,’” but not to one that referred to “Jesus” or “Vishnu.” Elk Grove Unified School District v. Newdow, 542 U.S. at 42 (O’Connor, J., concurring in the judgment).

In general, the courts hold that the use of the term “God” in legislative prayer (or other contexts) does not, as such, constitute an Establishment Clause violation. By contrast, prayer references to “Jesus” have not been generally validated. See, e.g., Snyder v. Murray City Corp., 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) (“the mere fact that a prayer invokes a particular concept of God is not enough to run foul of the Establishment Clause”); Van Zandt v. Thompson, 839 F.2d 1215, 1221 (7th Cir. 1988) (permitting reference to “God” in legislative resolution); Chaudhuri v. State of Tennessee, 130 F.3d 232 (6th Cir. 1997) (allowing reference in challenged prayer to God, but indicating that explicit or implicit references to Jesus Christ would make prayer unacceptable); G. Sidney Buchanan, Prayer in Governmental Institutions: The Who, The What, and the At Which Level, 74 Temp. L. Rev. 299, 350-51 (2001) (“Lower court decisions reinforce the Marsh holding that a reference to God, standing alone, neither contaminates a prayer nor removes it from the category of permissible legislative prayer . . . . What, then, of references to Jesus Christ, Muhammed, Buddha, or other leaders of particular religious faiths? Here, the verdict is still out in the lower courts.”).
C. The Name “Allah” and Prayers in the Islamic Tradition.

“Allah” is, of course, the Arabic name for God, and as such is used by Arabic speakers, including Christians and other non-Moslems, to refer to God in prayer or other discourse. It might thus appear to be no more (if no less) “sectarian” than the name “God” itself. On the other hand, in contemporary American culture, the term “Allah” surely comes freighted with specifically Islamic associations; and the use of that term by a Moslem believer in legislative prayer therefore seems as “sectarian” as would a Christian’s use of the term “Jesus.”

The history of the term “Allah” and its use in Moslem prayer and worship shed light on why it, no less than the term “Jesus,” reflects “sectarian” particularity. Even before

97 “It is a known fact that every language has one or more terms that are used in reference to God and sometimes to lesser deities. This is not the case with Allah. Allah is the personal name of the One true god. Nothing else can be called Allah. The term has no plural or gender. This shows its uniqueness when compared with the word god which can be made plurals, gods, or feminine, goddess.” Institute of Islamic Information and Education (III&E), III&E Brochure Series; No. 2, “Who is Allah?”, available at http://www.usc.edu/dept/MSA/fundamentals/tawheed/conceptofgod.html.

98 Islam distinguishes two main forms of prayer – salât or “ritual” prayer, which is “the essential element of Muslim worship,” and which is “an assemblage of rites, gestures and words, laid down by [Islamic] law,” and du’â, or “the personal and variable appeal that is addressed to God.” Maurice Gaudefroy-Demombynes, Muslim Institutions 70 (John F. MacGregor trans. 1961).
Islam, Allah (from al-ilah ‘the god’) was the name of God and the object of worship; individual men and women—they are called hanif in the Koran—had already taken the step towards monotheism.” 99 Yet despite that pre-Koranic linguistic usage, Moslem scholars argue that the Prophet Mohammed infused the term with new and distinctive content. “It is true that some [in the Arabian peninsula] had arrived at a monotheistic conception of religion [before Islam]; but there is absolutely no reason to believe that their One God was exactly the One God of Muhammad. For Muhammed’s monotheism was, from the very beginning, linked up with a humanism and a sense of social and economic justice whose intensity is no less than the intensity of the monotheistic idea.” 100 Moslem prayer and worship attach overriding importance to the name “Allah” and other Koranic names for God, much as Jewish and Christian traditions do with respect to their names for God. “The Quran asserts: ‘To God belong the most beautiful Names; call Him by these Names’ (7:180). The science of the Divine Names lies at the heart of all Islamic intellectual and religious disciplines—

metaphysics as well as cosmology, theology as well as ethics—and plays a central role in the practical aspects of religion and religious worship through the invocation and recitation of Divine Names, including the Supreme Name, Allah, particularly in Sufism.”¹⁰¹ For the Moslem believer, “[t]o remember God is to remember his divine name, radiant with his presence. Every chapter, or sūra, of the Qur’an except the ninth opens with the basmalah: ‘bismi-Llāhi-r-Rahmani-r-Rahim’ (In the name of Allāh, the Compassionate, the Merciful). The basmalah permeates the Islamic world, plastered on walls and fences and printed at the beginning of every book.”¹⁰² The basmalah “is used throughout the day by millions of Muslims all over the world, from starting a meal to opening a major business venture. Rahman and Rahim in the Muslim recitation are the first words a baby will hear, and probably the last ones a dying person will hear. Life thus begins and ends with the two most beautiful attributes of God.”¹⁰³

¹⁰² Zaleski & Zaleski, supra n.--, at 148.
While allowing that “Allah” may be translated into English as “God,” one prominent Moslem scholar cautions that, from the perspective of his faith, the terms are not truly interchangeable. “The Arabic word ‘Allah’ is . . . translatable as ‘God,’ provided this term is understood to include the Godhead and is not identified solely with Christian trinitarian doctrines.”\(^\text{104}\) The necessity for such caution from a Moslem perspective demonstrates the hazardousness of assuming that the terms “Allah” and “God” can simply be equated, without giving rise to religious friction. How is a secular court to determine whether a Moslem praying before a legislature and using the term “Allah,” is “includ[ing] the Godhead” and excluding “trinitarian doctrines” in that reference and, if so, whether the term used with that meaning “advances” Islam or “excludes” Christians?

These difficulties are compounded when one reflects on how “Allah” is described in Moslem reflection and prayer. Here, for example, are several well-known Koranic verses that

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\(^{104}\) Nasr, supra n.--, at 4 (emphasis added).
a devout Moslem might recite before a legislature,\textsuperscript{105} and that, on first inspection, might be considered “non-sectarian”:

\begin{center}
He, Allāh, is One. Allāh is He on Whom all depend. He begets not, nor is He begotten; and none is like Him.\textsuperscript{[106]}
\end{center}

Karen Armstrong, a prominent scholar of Islam, comments on these verses as follows:

Christians . . . had also insisted that only the Creator, the Source of Being, had the power to redeem. They had expressed this insight in the doctrines of the Trinity and the Incarnation. The Koran returns to a Semitic idea of the divine unity and refuses to imagine that God can ‘beget’ a son. There is no deity but al-Lah the Creator of heaven and earth, who alone can save man and send him the spiritual and physical sustenance that he needs.\textsuperscript{[107]}

Heard with this theological background in mind, even a prayer as seemingly “non-sectarian” as this is undoubtedly “exclusionary” with respect to Christians. And, of course,

\footnotesize
\begin{itemize}
\item \textsuperscript{105} When Siraj Wahaj, a Muslim imam, became the first Muslim in history to offer prayers before the U.S. House of Representatives as chaplain of the day on June 25, 1991, he recited verses from the Koran. See Eck, supra n.--, at 31-32. Interestingly, his prayers invoked the names of “Noah, Abraham, Moses, Jesus, and Muhammed.” 137 Cong. Rec. H4927-01 (June 25, 1991).
\item \textsuperscript{106} Maulana Muhammed Ali, The Holy Koran: Arabic Text, English Translation and Commentary 1219 (Sūrah 112) (1995). Our references to the Koran, unless otherwise attributed, will be to this translation.
\item \textsuperscript{107} Karen Armstrong, A History of God: The 4,000-Year Quest of Judaism, Christianity and Islam 149 (1993). One Moslem commentator states that the first of these four verses “proclaims the absolute Unity of the Divine Being, and deals a death-blow to all forms of polytheism, including the doctrine of the Trinity;” that the third verse “points out the error of those religions which describe God as being father or son, such as the Christian religion,” and that the fourth verse “negatives such doctrines as the [Christian] doctrine of incarnation, according to which a mere man is likened to God.” Maulana Muhammed Ali, The Holy Koran: Arabic Text, English Translation and Commentary 1219.
\end{itemize}
followers of non-theistic or polytheistic faiths, including Hinduism, would be likely to feel even more “excluded” by these monotheistic claims.

The difficulty of determining whether a prayer includes specifically “sectarian” references can be illustrated again by considering a famous Moslem prayer known as the “light verse”\textsuperscript{108}:

\begin{quote}
Allāh is the light of the heavens and the earth. A likeness of His light is as a pillar on which is a lamp — the lamp in a glass, the glass is as it were a brightly shining star – lit from a blessed olive-tree, neither eastern nor western, the oil whereof gives light, though the fire touch it not -- light upon light. And Allāh guides to His light whom He pleases. And Allāh sets forth parables for men, and Allāh is Knower of all things.[\textsuperscript{109}]
\end{quote}

Is this prayer “sectarian”? Initially, it might not seem so. But on closer inspection, the difficulties start to crowd in. To begin with, the prayer comes from the Twenty Fourth sūrah of the Koran, a specifically Moslem scripture. Having that source might alone justify considering it to be “sectarian.” Further, the verses imply that God predestines some but not all to be saved (“Allāh guides to His light whom He pleases”). They also

\textsuperscript{108}William Montgomery Watt, Companion to the Qur’an 165 (1994).
\textsuperscript{109} The Koran, sūrah 24:35.
implies that God is personal (the verses ascribe a “will” to God) and transcendent (he is said to speak to humans in “parables”). And, of course, God is described as “He”—a gendered term. All of these ways of characterizing God have provoked, and continue to provoke, passionate religious disagreements.


As Judge John Noonan has remarked, “historically, the bitterest division and keenest theological hatred have been between those who are close in their religious heritage and divided as to its interpretation.” Accordingly, even within a single monotheistic tradition, much traditional prayer language could readily be viewed as excluding other members of the very same tradition.

Even so apparently simple and uncontentious a matter as the use of the name “God” has been attacked by theologians writing within the Christian tradition. The liberal Protestant

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110 For the Moslem believer reciting these verses, “[s]o transcendent is [God] that we can only talk about him in ‘parables.’” Armstrong, supra n.--., at 143.
111 Noonan, supra n.--., at 94.
112 See Note, supra n.--., at 1068-69 (surveying diversity of theological views within contemporary American Christianity).
theologian Paul Tillich “was convinced that the personal God of traditional Western theism must go. . . . Tillich agreed with [Friedrich] Nietzsche that the personal God was a harmful idea and deserved to die. . . . An omnipotent, all-knowing tyrant is not so different from earthly dictators . . . . An atheism that rejects such a God is amply justified . . . . Tillich preferred the definition of God as the ground of being.” 113 A Tillichian would presumably find references to “God” (even in a prayer by a Christian minister) as unacceptably “exclusionary.”

Or consider traditional prayers and scriptures that depict God as terrifying or violent, or that implore his protection in time of trouble or war.114 One contemporary Roman Catholic theologian contends that the New Testament — like, in his view, the Hebrew Bible and the Koran — depicts a God whose “overwhelming character is that of a violent, punishing, pathological Deity who uses unfathomable violence to both reward and punish, either within history or at history’s

113 Armstrong, supra n.--, at 383.
114 For a survey and analysis of such Biblical language, see Tremper Longman III and Daniel G. Reid, God is a Warrior (1993).
end.”¹¹⁵ This scholar contends that “[t]he idea that God sent Jesus to die for our sins makes sense only if we embrace violent and punishing images of God featured prominently in Hebrew scriptures.”¹¹⁶ For non-traditional Christians such as this, prayers that seek God’s protection for the American nation or success for its military in time of war (surely common themes of legislative prayer) would likely be seen as promoting particular Christian perspectives and as disparaging others.

E. The Question of Judicial Competence

The theological questions posed by prayer are obviously of the greatest delicacy and sensitivity. That observation, moreover, may be especially true in a culture such as ours, which combines a marked commitment to equality and toleration with an extraordinary range of religions and forms of belief. Further, the skills required to address such questions may require some expertise in specialized disciplines such as theology, Biblical studies, comparative religion, or the history

¹¹⁶ Id. at 60.
or philosophy of religion, rather than in constitutional law. While individual judges may, of course, happen to have had the requisite training, the judiciary as a whole does not.  

The secular courts would nonetheless have to decide substantive theological questions in order to determine whether particular legislative prayer language does, or does not, meet the elusive standard of being “non-sectarian.” Judicial regulation of legislative prayer therefore runs the risk of being at once intrusive, obnoxious and incompetent.

The Supreme Court has long taught that the secular courts should not attempt decide “ecclesiastical questions.” And Marsh itself reinforced that counsel in the specific context of legislative prayer. Even assuming, then, that ruling on the “sectarian” nature of prayer is within the constitutional jurisdiction of a secular court (a question that may be

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117 See Lee v. Weisman, 505 U.S. at 616-617 (Souter, J., concurring) (“I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible,” than “comparative theology”).  
118 Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 446 (1969). See also Jones v. Wolf, 443 U.S. 595, 602 (1979) (“[T]he First Amendment prohibits civil courts from resolving church . . . disputes on the basis of religious doctrine and practice.”); Maryland & Virginia Eldership of the Churches of God v. Church of God, 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (Government may not engage in “consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.”)
debated), it is surely beyond the institutional *competence* of the judiciary.

**III. The Discriminatory Effects of Mandating “Non-sectarian” Legislative Prayer**

For many believers, prayer is an activity of the utmost seriousness and risk. The great Jewish theologian Abraham Joshua Heschel has likened a person at prayer to “someone [who has] unsuspectingly pressed a button and [set] a gigantic wheel-work . . . stormily and surprisingly . . . in motion.”

Heschel explains:

> To name Him is a risk, a forcing of the consciousness beyond itself. To refer to Him, means almost to get outside oneself. Every praying person knows how serious an act the utterance of His name is, for the word is not a tool but a reflection of the object which it designates.[120]

Further:

> Prayer is of no importance unless it is of supreme importance. It is one of those things which “stand on the summit of the world,” transcending the world and ascending to God, “and which men treat lightly.”[121]

Because men treat prayer lightly when they should not, and because they seek to use prayer as a “tool” for purely human ends, Heschel condemns merely ceremonial prayer:

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[120] Id.
[121] Id. at 70 (emphases deleted and citations omitted).
Customs, ceremonies are fine, enchanting, playful. But is Judaism a religion of play? . . . Let us be frank. Too often a ceremony is the homage which disbelief pays to faith. Do we want such homage? . . . Ceremonies are expressions of the human mind; what they express and their power to express depend on a mental act of man; their significance is gone when man ceases to be responsive to them. Ceremonies are like the moon, they have no light of their own.[122]

The dread of reducing prayer to the merely ceremonial and instrumental – to idolatry – unquestionably deters some faithful and conscientious believers from seeking to lead legislative prayers. Others, no less faithful and conscientious, have been willing to lead such prayers, provided always that they are free to pray by their own best lights and in the manner that they believe most honors God. They will pray even before a governmental body on an official occasion if they believe that (as Heschel put it) their prayer will truly “expand the presence of God in the world.”[123] It need hardly be said that believers who will pray only if such conditions are met will refuse to lead legislative prayers if they are handed a script by a secular court. They will not join disbelief in a ceremony in which it pays homage to faith.

122 Id. at 113-14.
123 Id. at 62 (emphasis in original).
Although believers of any faith are liable to be deterred from leading legislative prayer once it is subject to judicial restrictions, the most substantial effects are likely to be felt in the first instance by Christian clergy. This is because of judicial restrictions that rather pointedly prohibit any legislative prayer that invokes the name or asserts the Lordship of Jesus. Such rulings failed completely to understand the deeply rooted traditions that take such invocations to be an essential characteristic of Christian prayer. What follows outlines that prayer tradition.

A. The Divine Name in the Hebrew Scriptures

Throughout antiquity, it was a widespread belief that “the name is not just a label but part of the personality of the one who bears it. . . . The name carries will and power. One must know the names of gods to have dealings with them or power over them.” Ancient Israel also believed in the significance of names: thus, God names the stars (Ps. 147:4) and gives

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both Abram/Abraham (Gen. 17:5) and Jacob/Israel (Gen. 32:28) new names.

God also disclosed His own name to Abram/Abraham (Gen. 17:1) and to Moses (Ex. 6:2-3). The Third Commandment (by rabbinic reckoning) given to Moses on Mount Sinai forbade “swear[ing] falsely by the name of the LORD your God” (Deut. 5:11). “[F]rom where the sun rises to where it sets, My name is honored among the nations, and everywhere incense and pure oblation are offered to My name” (Mal. 1:11). Israel considered itself to be unlike “those who are not called by [God’s] name” (Is. 63:19). In the ancient Temple service, after hearing the priests recite the first sentence of the *Shema*, the assembled people responded: “Blessed is the name of His Glorious Majesty forever and ever.”125 Indeed, other than priests in the Temple, Jews never pronounced the name of God (the “Tetragrammaton”) as written; in later Jewish prayer, it is read as “*Adonai*” or “Lord.”126 Jesus

125 Donin, supra n.--., at 145-46.
126 Id. at 146 & n.*
himself—a devout Jew\textsuperscript{127}—reflected this sense of reverence for God’s name when he prayed, “Hallowed be Thy Name” (Mt. 6:9; Lk. 11:2).\textsuperscript{128}

\textbf{B. The Name of Jesus in the Apostolic Christian Church}

Christian believers from the very earliest times attached overriding significance to the name of Jesus, which in its Hebrew forms “Jeshua” (or “Jehoshua”) means “Jehovah is salvation.”\textsuperscript{129} “The authority of the divine name of Jesus informs the entire New Testament.”\textsuperscript{130} Matthew’s Gospel considers Jesus’ name to be divinely given, so as to attest to his role in God’s plan of salvation (Mt. 1:21). In the Joannine Gospel narrative, Jesus himself repeatedly desired and expected his followers to pray in his name (Jn. 14:13; 15:16; 16:23; 16:26). Indeed, John’s Gospel was written “that you may believe that Jesus is the Christ, the Son of God, and that

\textsuperscript{127} See, e.g., Geza Vermes, Jesus in his Jewish Context 47-49 (2003). The nature of Jesus’ Jewishness has been a major theme in recent Jewish and Christian Biblical scholarship. For a survey, see Leander E. Keck, Who is Jesus? History in Perfect Tense 22-64 (2000).


\textsuperscript{130} Zaleski & Zaleski, supra n. --, at 141.
believing you may have life in his name” (Jn. 20:31) (emphasis added). Christian scriptures say that in apostolic times, Jesus’ followers invoked his name to cast out devils (Mk. 16:17; cp. Mk. 9:38-40); to heal (Acts 3:6; 3:16; 4:7-10; 4:29-31; 9:34); to preach (Acts 8:12; 9:27; 9:29); to forgive sins (Acts 10:43); and to baptize (Acts 10:48; Rom. 6:3). The apostle Peter taught that “there is salvation in no one else, for there is no other name under heaven given among men by which we must be saved” (Acts 4:12). The apostle Paul taught that “at the name of Jesus every knee should bow” (Phil. 2:10). Christians in the Pauline churches were “washed,” “sanctified” and “justified” “in the name of the Lord Jesus Christ” (1 Cor. 6:11). “These statements about actions being performed in the name of Jesus are highly significant” for Christian theology, especially if they are “heard against the Old Testament background in which it is the name of Yahweh that functions in this way”: they lead to the “inevitable conclusion” that “the name of Jesus functions in the same way as the name of Yahweh and indeed replaces it.”

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C. The Name of Jesus in the Post-Apostolic Church

The same attitudes, beliefs and patterns of worship are amply evidenced beginning with the early, post-apostolic Christian church onwards. Christian patristic writing from the first and second centuries demonstrates the centrality to Christian worship and practice of the invocation of Jesus' name. The Letter of Ignatius of Antioch (d. 98-117) to the Smyrnaeans says that the sufferings of the believer “must all be in the name of Jesus Christ.”\(^\text{132}\) Polycarp, bishop of Smyrna (martyred 155-156), exhorted the Philippians, “if we suffer for the sake of [Jesus’ name, let us glorify him.”\(^\text{133}\) The Didache (purportedly the “Teachings of the Twelve Apostles”), an early Christian catechism, forbids anyone to “eat or drink of [the] Eucharist except those baptized in the Lord's name.”\(^\text{134}\) The First Apology of Justin Martyr, a second century Christian writer, reports that the “president of the brethren” officiating at the eucharist “sends up praise and glory to the Father of the universe through the name of the Son and of the Holy

\(^{133}\) Id. at 134-35.
\(^{134}\) Id. at 175.
Spirit.”135 “[T]he second-century *Shepherd* by the freed slave Hermas declares that ‘no one will enter the kingdom of God unless he receives the name of his Son.”136 “[T]he [Roman] Emperor Justinian says in his law-book: ‘In the Name of Our Lord Jesus we begin all our consultations.’”137

**D. The Name of Jesus in the Contemporary Church**

The name of Jesus continues to be invoked and venerated in all Christian traditions – Catholic, Orthodox and Protestant. The Roman Catholic Church, for example, celebrates the Feast of the Holy Name on the second Sunday after Epiphany.138 A Catholic nun, Sister Wendy Beckett, writes that “[t]here is power in the very Name, something all pagan religions know. To know someone’s name means to have power over them, however external: they will, after all, turn round for you if you name them aloud, stop in their tracks, look up. . . . Jesus has freely given us his name, which means ‘Saviour.’ It has extraordinary power: do we use

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135 Id. at 286.
136 Zaleski & Zaleski, supra n.--, at 141.
The Orthodox tradition has for centuries instilled the practice of constant repetition of “The Jesus Prayer,” which in its entirety is: “Lord Jesus Christ, Son of God, have mercy on me, a sinner.” Protestant congregations regularly sing Edward Perronet’s eighteenth century hymn, “All Hail The Power of Jesus’ Name!” An Evangelical author and pastor, Douglas D. Webster, writes that “[a]fter nearly two thousand years the name of Jesus is more popular than it ever was.”

E. The Effects of Banning Legislative Prayer “In Jesus’ Name”

Given the weight, age and authority of these Christian teachings and practices, as well as the significance that many contemporary clergy and believers attach to them, any governmental prohibition on invoking Jesus’ name in legislative prayer will undoubtedly prevent a substantial number of Christian believers from praying in a legislative forum. In an effort to avoid illegitimate governmental preference for any particular faith by suppressing

141 Douglas D. Webster, A Passion for Christ: An Evangelical Christology 75 (1987).
“denominational particularity,” governmental power would be wielded to discriminate against the nation’s largest faith community.

Furthermore, although such a prohibition would weigh heavily on Christian believers, the logic of such a mandate would prevent prayers by followers of other faiths as well. If Christian clergy cannot pray in the name of Jesus, then, presumably, rabbis could not pray in the name of “the God of Israel.” More broadly, a prohibition of “sectarian” names for God would make it impossible for a Jewish believer to pray as a Jew. “[W]hat makes Jewish prayer Jewish? Jewish prayer is prayer that uses the idiom of the Hebrew Bible and reflects the Jewish soul. It is prayer that expresses the basic values of the Jewish people and affirms the central articles of Jewish faith. It is prayer that reflects our historical experience and gives expression to our future aspirations. When the prayer of a Jewish person does not reflect one of these components, he

142 See Lee v. Weisman, 505 U.S. at 589 (“We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ”). Likewise, imams could not mention the name of the prophet Mohammed in prayer. And Hindu priests who were compelled, as a matter of conscience, to invoke the names of Brahma, Vishnu, Shiva, or Devi the goddess in prayer, could not do so.
may be praying, but it cannot be said that he is praying as a Jew.”

IV. Prohibiting Sectarian Prayer as a Potential Establishment Clause Violation

There is one further reason why courts and other governmental bodies should not demand that legislative prayer be “non-sectarian”: that requirement itself might well be (or lead to) an Establishment Clause violation.

The Supreme Court’s case law has repeatedly censured governmental efforts to prescribe the language of prayer. For example, in one of the early “school prayer” cases, Engel v. Vitale, the Court said that “the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.” Or again: “each separate government in this country should stay out of the business of

143 Donin, supra n. -- , at 7.
144 370 U.S. at 424.
writing or sanctioning official prayers and leave that purely religious function to the people themselves.”145

Further, the repeated failure of governments (or of chaplains attempting to follow governmental instruction or guidance146) to find “non-sectarian” prayers that meet general acceptance within the relevant political community underscores the risk that in attempting to preclude Establishment Clause challenges in this way, the government may instead merely provoke them. Geoffrey Stone has written that “even the Regents’ prayer in Engel embodies numerous sectarian presumptions – that it is appropriate to pray orally, in unison with others, and in public; that it is appropriate to invoke divine blessing for one’s parents; that the appropriate subject of prayer is a unitary, immanent, and metaphysical “God” who is “almighty”; that the appropriate relationship of human beings to “God” is one of supplication

145 Id. at 435.
146 See, e.g., the Guidelines for Civil Occasions at issue in Lee v. Weisman, or the high school principal’s recommendation in that case that the officiant, Rabbi Gutterman, deliver a “nonsectarian” invocation and benediction. 505 U.S. at 581, 588.
and dependence; and that it is appropriate to “beg”.” And William P. Marshall has rightly asked

whether the theological aspects of civil religion can be so thoroughly excised that its exercise becomes uncontroversial. The Regent’s Prayer in Engel v. Vitale, after all, held little, if any, more religious content than what is contemplated by civil religion. Yet any school prayer will inevitably raise passionate dissent. No matter how one frames it, there is theistic content in civil religion, and, as shown by the school prayer example, defining that content will likely raise [the question of] divisiveness. . . . .[148].

Granting that legislative chaplains or invited legislative guests do have the constitutional right to pray (if invited), any coercive attempt by courts or legislatures to direct them to pray in particular ways may therefore in itself raise substantial Establishment Clause issues.

The risk of such violations seems greatest if the court or other governmental body were to restrict prayers to those that were thought to align with American “civil religion.” In Lee v. Weisman, the Supreme Court, while acknowledging that “[t]here may be some support, as an empirical observation, to the statement . . . that there has emerged in this country a

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147 Stone, supra n.--, at 829.
civic religion, one which is tolerated when sectarian exercises are not,” also seemed to reject the idea that prayers in the idiom of civil religion would elude Establishment Clause difficulties: the Court stated that its precedents “caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses . . ., which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.”149

Unquestionably, the Court’s intuition was sound. Although the Court has never fashioned a comprehensive definition of “religion” for purposes of Establishment Clause analysis, it would seem that American “civil religion” would have to fall under that rubric. As we have seen, the Court’s jurisprudence entails that atheism counts as a “religion” under the Constitution. Moreover, at least one federal appellate court has indicated that secular humanism would

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149 Lee v. Weisman, 505 U.S. at 590 (emphasis added).
also do so. Although American civil religion is said to be “political” rather than “sacral,” we have seen that even Robert Bellah, the leading sociological exponent of the concept, has described it as “a genuine apprehension of universal and transcendent religious reality as seen in or, one could almost say, as revealed through the experience of the American people.”150 According to those who have sought to elucidate the concept, American civil religion has its sacred documents (the Declaration of Independence; the Gettysburg Address), its sacred sites (the Arlington National Cemetery), its feast days (Thanksgiving; Memorial Day), and most importantly its own conception of God and God’s relation to the American nation.151 If atheism and secular humanism count as religions under the Establishment Clause, then so should American civil religion.152

150 See supra, text at n.--.
151 American civil religion exhibits interesting differences from the civil religion of other nations, such as that of nineteenth century France, not least because it is not overtly hostile to historic Christianity. But French republican civil religion, like its American counterpart, instituted its own feast days (Bastille Day), sang its own hymns (the Marseillaise), built its own churches (the Panthéon) and worshipped at its own ceremonies – often spectacular public funerals, such as that in 1885 for Victor Hugo. See Michael Burleigh, Earthly Powers: The Clash of Religion and Politics in Europe, from the French Revolution to the Great War 340-41 (2005).
The historian Arnold Toynbee found that the “worship of one’s own collective human power, as embodied in a parochial community and organized in a parochial state, has been in truth the master religion” of Western civilization.\textsuperscript{153} One need not go as far as Toynbee to see that civil religion – even in its “kinder, gentler” American form – may be or become that very dangerous form of worship: the self-worship of political community. Indeed, the “birthing” of American civil religion – which the Yale historian Harry Stout has recently traced back to the need to sacralize the Civil War and give meaning to the immense suffering and loss of life it brought about\textsuperscript{154} – lends substance to the fear that it may be a covert form of worship of an all-too-earthly god. The strategic imperative of fielding

\textsuperscript{153} Toynbee, supra n. -- , at 27.

\textsuperscript{154} Harry S. Stout, Upon the Altar of the Nation: A Moral History of the Civil War (2006). “[M]any [Civil War-era observers] saw in the unprecedented destruction of lives and property something mystical taking place, what we today might call the birthing of a fully functioning, truly national, American civil religion. It was a meaning difficult for anyone to articulate at the time; yet some – including soldiers, clergy and, most notably, Abraham Lincoln – began to posit a moral high ground in the creation of a powerful national or ‘civil’ religion. As the Civil War progressed onto increasingly eroded moral ground, something transformative simultaneously took place that would render the war the defining phenomenon in American history. Patriotism itself became sacralized to the point that it enjoyed coequal or even superior status to conventional denominational faiths.” Id. at xvii-xviii (original emphasis).
enormous armies during the Civil War, the unexpected and calamitous scale of casualties in that War, the frequent reversals that occurred in battle and the prolonged stalemates that followed many campaigns required the Nation’s political leadership to mobilize the civilian population to endure those losses and to see the War through to the end. That political necessity fuelled the emergence of a mystical, sanguinary American nationalism that served to motivate and to sanctify the sacrifices on behalf of the American Nation-State that the War entailed.\textsuperscript{155} Abraham Lincoln can fairly be said to have invented a language, rich in religious themes and imagery, that sought to hallow this new nationalism. American civil religion is the offspring of Lincoln’s invention, and its origins in the political necessity of mobilizing and sustaining mass support for Lincoln’s strategy of “total war” ought not to be forgotten.

Reflecting on the effects upon nineteenth century publics of the nationalism fuelled by the wars of that period, Pierre-

Joseph Proudhon remarked in his *War and Peace* (1861) that “[f]or the masses, the real Christ is Alexander, Caesar, Charlemagne, Napoleon.” Nationalism, in other words, assumed the character and functions of religion. The recognition that American civil religion originated in the political and strategic needs of the Civil War yields a truer understanding of its nature. “The locus of American civil religion is not the church or the synagogue or the mosque. Rather it is the state, which uses sacred symbols of the nation for its own purposes and perpetuation. The appeal proves so powerful that some contemporary religious critics identify civil religion with idolatry.” American civil religion has freely appropriated Jewish and Christian language, themes and imagery to its own use, thus concealing the extent to which the true object of its worship is the American nation: “American civil religion borrows so heavily from the language and cadences of traditional faiths, many Americans see no conflict or distinction between the two. Many Americans

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157 Stout, supra n.--, at xix.
equate dying for their country with dying for their faith. In America’s civil religion, serving country can be coequal with serving God.”

Certainly, in the mind of Jean-Jacques Rousseau -- from whom the idea of civil religion derives – it was to be a form of self-worship of the national political community. Rousseau traced the development of civil religion through three major stages. In the first, pre-Christian phase, “each State, having its own cult as well as its own government, made no distinction between its gods and its laws . . . . [T]he provinces of the gods were, so to speak, fixed by the boundaries of nations.” The second phase was anticipated by the refusal of the Jews under the domination of Babylon and, later Syria, to recognize any God but their own; it came to fruition with the emergence of Christianity. “Jesus came to set up on earth a spiritual kingdom, which, by separating the theological from the political system, made the State no longer one, and brought about the internal divisions which have never ceased

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158 Id. at xviii.
159 Rousseau, supra n.--, at 295.
to trouble Christian peoples.”160 Although efforts were made to restore the older system (with some success, Rousseau concedes, in nations like England and Czarist Russia), “the spirit of Christianity has everywhere prevailed,” and “[t]he sacred cult has always remained or again become independent of the Sovereign.”161 From a political point of view, this has been extremely regrettable: “Christianity as a religion is entirely spiritual, occupied solely with heavenly things; the country of the Christian is not of this world.”162 Hence Christians must be poor citizens: the idea of “a Christian republic” is a contradiction in terms.163 “True Christians are made to be slaves.”164 Rousseau therefore envisages a third phase, in which the breach between Church and State is healed. In this stage, the Sovereign will fix the articles of “a purely civil profession of faith.”165 Although these articles are “not exactly . . . religious dogmas,” they are to be instilled as “social sentiments without which a man cannot be a good

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160 Id. at 297.  
161 Id.  
162 Id. at 301.  
163 Id. at 302.  
164 Id.  
165 Id. at 303.
citizen or a faithful subject.” 166 These “dogmas of civil religion” (as Rousseau calls them) are simple and few: “[t]he existence of a mighty, intelligent and beneficent Divinity, possessed of foresight and providence, the life to come, the happiness of the just, the punishment of the wicked, the sanctity of the social contract and the laws.” 167

American civil religion is not Rousseau’s civil religion. But the underlying resemblances are important. It seems fair to say that, despite its historical ties to millenarian Protestantism and its continuing outward similarity to it, American civil religion, like Rousseau’s, has at heart a vision that is distinct from – indeed, antithetical to -- Christianity’s.

The Court’s misgivings about civil religion in Lee v. Weisman are, therefore, true and sound. The “religion of the republic” is, indeed, a religion in the constitutional sense; and a governmental directive to use that religion’s prayer language is an unconstitutional establishment.

166 Id. at 303-04.
167 Id. at 304.
V. Constitutionally Valid Sectarian Legislative Prayer

If mandating that legislative prayer be “non-sectarian” would raise a host of practical and constitutional difficulties, would permitting “sectarian” prayer be any less problematic? Would not “sectarian” prayer put the government in the position of preferring (or appear to prefer) the faith of the chaplain who gives the prayer? Does not permitting “sectarian” legislative prayer cause, or risk causing, a constitutional violation?

The “Pluralist Polity” approach advocated in this paper denies that permitting sectarian legislative prayer would have those consequences. The approach seeks to weave together our tradition of religious liberty with our remarkable religious diversity to produce a solution that recognizes our different faiths but that does not unconstitutionally prefer, or even appear to prefer, any of them. The governing idea, as Judge (then Professor) Michael McConnell once put it, is that “[i]f members of minority religions (or other cultural groups) feel excluded by government symbols or speech, the best solution
is to request fair treatment of alternative traditions, rather than censorship of more mainstream symbols.”168

To demonstrate in more concrete detail how the approach would work, we shall consider what appear to be the three main models for sectarian legislative prayer, and examine the strengths and weaknesses of each from the pluralist perspective. The most attractive model from that perspective, it is submitted, is also the model that is most likely to withstand constitutional challenge.

The three models of sectarian legislative prayer are these.

First, as in *Marsh*, the legislature could designate a particular person as its regular or official chaplain, and require that person to lead it in prayers before the start of official business each day (or on stated occasions). That chaplain would likely be associated with a particular faith or denomination, and his or her prayers would likely reflect, at least to some degree, the beliefs of a specific faith tradition.

Second, individual members of the Legislature could take turns designating chaplains of the day to lead the

168 McConnell, supra n.--, at 193.
Legislature in prayer. Legislators would not be required to select chaplains of their own faiths (or the faiths of other legislators), although they might have some propensity to do so. Under this model of rotating chaplains, the underlying diversity of religious beliefs within the Legislature, and perhaps also the State at large, would be more likely to be captured than under the first model. The second model does, however, carry the risk that no chaplains would be selected from minority or unpopular religions.

The third model resembles the second, but rather than leaving the selection of rotating chaplains to the unfettered choice of individual legislators, it would employ some predetermined formula or device designed to ensure that minority or unpopular religions were not discriminated against or left unrepresented. As will be discussed below, any one of a variety of selection devices might be thought to serve this function.

169 This model is found in the pending Bosma case. A variant of the model would be a situation in which individual legislators themselves spoke or prayed in turn, thus reflecting whatever diversity of religious views existed within their own body.
The First Model. The strongest argument in favor of the first model is simply that it was upheld in Marsh. In that case, a board of the State Legislature chose an official, paid chaplain every two years. It so happened that the same chaplain – the Reverend Robert E. Palmer, a Presbyterian minister – had been repeatedly selected and had served for sixteen years. The Supreme Court noted that “[a]lthough some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.”\(^{170}\) The Court rejected the argument that “Palmer’s long tenure has the effect of giving preference to his religious views. We cannot . . . perceive any suggestion that choosing a clergyman of one denomination advances the belief of a particular church.”\(^{171}\) Justice Brennan, dissenting, found that “appointing one chaplain for 16 years may give the impression of ‘establishing’ one particular religion.”\(^{172}\) More trenchantly, Justice Stevens, also dissenting, remarked that “I would not expect to find a Jehovah’s Witness or a disciple of Mary Baker

\(^{171}\) Id. at 793. Some of Reverend Palmer’s specifically Christian prayers are quoted in Justice Stevens’ dissent. Id. at 823, n.2 (Stevens, J., dissenting).
\(^{172}\) Id. at 808, n.21 (Brennan, J., dissenting).
Eddy or the Reverend Moon serving as the official chaplain in any state legislature . . . . [I]t seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another.”

The Pluralist Polity approach shares Justice Stevens’ perspective on this point. It does indeed seem unlikely, even twenty three years after *Marsh*, that any State Legislature in the country would select a Jehovah’s Witness or a Christian Scientist – or a Muslim or Buddhist or member of Reverend Moon’s Unification Church – to be its official chaplain. From the pluralist standpoint, that deficiency is as regrettable and as discriminatory as muzzling a Presbyterian chaplain’s invocation of Jesus’ name in prayer would be. It is believed that the Court should not allow *stare decisis* considerations to lead it to reaffirm this aspect of *Marsh*.

*The Second Model.* From the Pluralist Polity perspective, the second model has several clear advantages over the first. To begin with, it is far more likely to avoid an unconstitutional

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173 Id. at 823 (Stevens, J., dissenting).
preference – or the appearance of a preference – for any particular faith or denomination. Rather, the model makes it virtually certain that voices from different religious traditions will be heard in prayer. It is most unlikely that members of any single religious denomination or faith will wholly dominate a State Legislature; and even if that happened to be so, the desire to reach out to other religious constituencies in the State would surely lead legislators to invite chaplains from other faiths to appear. Second, this model honors the consciences and prayer-lives of individual legislators much more than the first. The fact that legislative prayer is designed to be \textit{for} legislators – to solemnize their gathering, to assist them in their deliberations, and (in some conceptions) to implore Divine aid and counsel for them – should never be forgotten or dismissed. By enabling individual legislators to select their own daily chaplains, this model makes it more likely that each legislator will sooner or later hear prayers that suit, or are at least compatible with, his or her own convictions. Third, the model limits the risk of sectarian
contention among legislators over the choice of a chaplain – a risk that seems to be inherent in the first model.

Nonetheless, even the second model has defects from our Pluralist Polity perspective. The most serious of these defects is the risk that the voices of some faiths or denominations will simply never be heard. Whether intentionally or inadvertently, legislators may fail to invite chaplains from particular religious groups because those groups are politically isolated or unpopular, because their membership is small, or because they are recent arrivals on the local scene and therefore unfamiliar. (Indeed, all three of these characteristics may come together, as is likely to be the case with groups drawn primarily from recent immigrant communities: the Santeria church that successfully challenged a discriminatory local ordinance prohibiting its practice of animal sacrifice in *Church of the Lukumi Babalu Aye v. City of Hialeah*\(^{174}\) may have been such a case.) Whether or not this defect amounts to a constitutional violation (the exclusion may not be motivated by

any hostility\textsuperscript{175}), it runs contrary to the constitutional policy of not disfavoring or excluding any religion.

The third model is more complex than the first two and encompasses a variety of different forms within itself. This model in effect conceptualizes the question of legislative prayer as a matter of the reasonable and fair apportionment of a scarce government resource (public space or time or the opportunity to be heard) among persons of different viewpoints. Constitutional rules for apportioning such resources have been developed for different applications and – the theory is -- some of those rules (or combinations of features of them) might be adapted to serve here as well. Consider four of these apportionment rules and the analogies they might generate.

(1) Legislative chaplains or guests invited to pray might be chosen through some procedure analogous to non-invidious “demonstrated

\textsuperscript{175} See id. at 534-35 (considering the subjective motivation of lawmakers); id. at 558 (Scalia, J., dissenting) (objecting to Court’s consideration of motive); see also Marsh, 463 U.S. at 793 (upholding chaplain’s reappointment because no evidence of impermissible motive).
support” qualifications for the presence of political parties on the ballot.\textsuperscript{176}

(2) Selection might be required to reflect a “fair cross section” of the relevant political community’s religious demography, on the analogy of jury selection.\textsuperscript{177}

(3) Some non-numerical form of “diversity” akin to that used for student admissions to public post-graduate programs might be devised.\textsuperscript{178}

(4) Some analogy to \textit{Red Lion}’s “fairness doctrine” for political broadcasting on public airwaves might be adopted.\textsuperscript{179}

Other potentially relevant apportionment rules may readily come to mind. It is not the purpose of this paper, however, to identify and defend any \textit{particular} rule for selecting and rotating legislative chaplains; indeed, it is likely that any one of several \textit{different} rules could underpin constitutionally valid methods of selection. The bedrock claim here is that by

\textsuperscript{176} Williams v. Rhodes, 393 U.S. 23 (1968).
\textsuperscript{177} See, e.g., Smith v. Texas, 311 U.S. 128, 130 (1940).
giving expression to the diversity of the State population’s religious views by means of some such selection procedure, the Legislature can insure that no unconstitutional preference or endorsement arises.

To illustrate the third model, consider a selection procedure in which a Legislature selects its daily chaplains by permitting each legislator in turn to invite such a guest, but which also requires that the overall outcome of these individual invitations reflect the underlying religious diversity of the State. The Legislature could do this by compiling a list of the various religions180 within the State’s jurisdiction, requesting each of those religions to provide a list of names of its clergy or other members of that faith who would be willing to serve as a legislative chaplain for a day, and then permitting individual legislators to designate a legislative chaplain from the various lists of names, subject to the requirement that at

180 Assuming that Secular Humanism is a religion for Establishment Clause purposes, it should be included in the list; in any event, the Legislature could otherwise make provision for the legislators and residents of the State who reject any religious interpretation of human existence.
least one representative from each faith is selected during the course of the legislative year (or other relevant period). 181

In creating a list of the religions from which legislative chaplains may be drawn, the Legislature need not ensure that literally every religious viewpoint is heard, including “religions” of a single member. As in other First Amendment contexts, access need not be made so expansive that the program becomes “administratively unmanageable.” 182 By analogy to some of the Court’s ballot access cases, it would seem to be constitutionally defensible for the Legislature to limit the religious bodies from which it selects its chaplains to those that have a “significant modicum of support” 183 within the State as a whole. On the other hand, the threshold for listing should not deliberately be set at a level designed to exclude unpopular or unfamiliar minority religions: plainly, Lukumi Babalu Aye precludes such a purpose. 184 So if Wiccans

181 The proposal is partly based on the practice of the U.S. Army, which has been to “establish[] quotas [of Army chaplains] based on the denominational distribution of the population of the United States as a whole.” Katcoff v. Marsh, 755 F.2d at 225-26.
184 See McConnell, supra n.--., at 193 (“If a government refuses to cooperate with minority religious . . . groups within the community, there may be a basis for inferring
comprise, say, 1% of the State population, the threshold for listing may not be set at 2% in order to exclude them.\textsuperscript{185}

A Legislature implementing this selection procedure might take the further step of apportioning time among the listed religions in proportion to each religion’s share of the State population. Although the objectivity of such a formula might avoid controversies over perceived “over-” or “under-representation,” it does not seem to be required in order to avoid an unconstitutional preference for any single faith. To quote Judge McConnell again, “Courts should not encourage the proliferation of litigation by offering the false hope that perfect neutrality can be achieved through judicial fine-tuning. Judicial scrutiny should be reserved for cases in which a particular religious position is given such public prominence that the overall message becomes one of conformity rather than pluralism.”\textsuperscript{186} Moreover, such mathematical

\textsuperscript{185} See Eck, supra n.--, at 358-59 (describing controversy over the practice of accrediting Wiccan military chaplains, and quoting statement of military official that “[t]he Department of Defense does not evaluate, judge, or officially sanction any religious faith. It is not up to us to judge religions or make a list of denominations or religious groups that are officially acceptable”).

\textsuperscript{186} McConnell, supra n.--, at 193.
straitjacketing would limit the ability of individual legislators to designate the chaplains of their own choice – thus diminishing the chances that legislative chaplains will be serving the religious needs of the Legislature’s members.

The advantages of this form of the third model are (hopefully) obvious. First, it seems plainly unobjectionable on Establishment Clause grounds: no particular faith or religious tradition can be said to be “preferred” to any other when (effectively) all are given the opportunity to be heard. The fairness and (near-)comprehensiveness of the model should dispel both the fact and the appearance of unconstitutionality. Second, none of the main objections to “non-sectarian” legislative prayer can arise on this approach. The attempt to pursue the will o’ the wisp of “non-sectarianism” is abandoned; discriminatory effects on particular religions are avoided or minimized; there is no question of establishing a political “civil religion” in the guise of avoiding the establishment of “sectarian” religion; the risk of improper judicial micromanagement of the contents of legislative prayer is obviated. Third, including chaplains from minority religions
in the legislative program is likely to have salutary, integrative effects on their members, who will often be new citizens. In other words, open recognition of the pluralism of our religiously composite nation will serve to bind Americans of all religious opinions more closely together. This last point deserves some elaboration.

Harvard’s Diana Eck, a careful and informed scholar of American religious pluralism, has noted the effect on American Muslim opinion of the first appearance of a Muslim chaplain, Siraj Wahaj, before the U.S. Congress. Eck writes that “after many decades of Christian and Jewish prayers, the first Islamic prayers before Congress do indeed constitute a landmark in American public life.”187 She further notes that the weekly Muslim Journal tracks “dozens of other [similar] events, many of them local and regional, but all of them significant signals of changes that go almost unrecorded in the popular press,” such as the first-ever Muslim prayers before the Norfolk City Council or the opening of the California

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187 Eck, supra n.--., at 67.
Legislature’s session with a Muslim prayer.\textsuperscript{188} Eck has found that by inviting Muslims and other members of minority religious communities to participate in the public square in these and other ways, our government and our society are nourishing a stronger sense of identification with America and its values among the members of those communities. She recounts the experience of Dr. Rajwani Singh, a Sikh immigrant and naturalized citizen, who was asked to offer a prayer at the Lincoln Memorial to commemorate the anniversary of Dr. Martin Luther King, Jr.’s “I Have a Dream” speech. Dr. Singh later described to Professor Eck the powerful impact that participating in the event at the Lincoln Memorial had on him: “When I saw a hundred thousand people there, I could not believe that I had been asked to pray. For the first time, I felt America was my home.”\textsuperscript{189}

\textit{Conclusion}

The problem of legislative prayer is not marginal to Establishment Clause doctrine. Thinking through the consequences of permitting legislative prayer forces into the

\textsuperscript{188} Id.; see also id. at 353-56.
\textsuperscript{189} Quoted in id. at 68.
open fundamental questions about the right relationship between Church and State. Can the Church enter the public space of the legislative forum without compromising its duty and power to witness? And can the State permit the Church to enter that public space without losing the impartiality it must observe when dealing with religion?

If the argument of this paper is correct, the terms on which the Church and State may share this space preclude any attempt by the State to dictate to the Church what it may say. Either the Church must be free to speak its own truth, or it should remain silent. But, correspondingly, the Church must speak with many voices, not a single, authoritative one. Like “America singing,” the Church too must bring forth its own “varied carols.”

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190 Walt Whitman, “I hear America singing,” in Leaves of Grass (1900).