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Bad History, Bad Opinions: How "Law Office History" is Leading the Courts Astray on School Board Prayer and the First Amendment

*By Andrew L. Seidel**

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The last two years have seen an explosion of judges and lawyers adopting flawed history in cases involving prayer at public school board meetings. At least eleven federal circuit court judges have written or joined opinions relying on fallacious history that they have accepted and repeated without question.

This article traces that now pervasive bad history—"law office history"—to a single amicus brief written by the Family Research Council. I examine the history and find that it has no factual basis. I then look at the wider use of law office history in cases involving the First Amendment religion clauses, focusing on the original Supreme Court case to elevate history over legal principle, Marsh v. Chambers. *I conclude with suggested fixes. This article seeks to correct serious errors in the academy and to stop judges from employing self-interested, counterfactual history, which reflects poorly on our legal system. I wrote this article while litigating (and winning) the school board prayer case before the Ninth Circuit.*

I. INTRODUCTION

Judges and lawyers are not historians. When we start relying on history to argue and decide cases, proper scholarly and historical methods can get sacrificed on the altar of outcome. "Law-office history" is a term coined by historian Alfred H. Kelly in 1965 to describe history as written by legal advocates rather than dispassionate scholars—history that is manipulated and cherry-picked to achieve a legal end.[1] The courts are rife with law office history, particularly in cases involving religion and the government. As Professor Steven K. Green wrote nearly 15 years ago, "since 1947 lawyers and judges have used history with abandon to justify their arguments and decisions about the proper relationship between church and state."[2] The last two years have seen an explosion of judges and lawyers adopting severely flawed law office history—traced to a single, highly-biased source—in cases involving prayer at public school board meetings.

When the Supreme Court upheld prayer at legislative meetings in the face of a First Amendment Establishment Clause challenge, it did so on the basis of the practice's historical pedigree.[3] The Court explained in *Marsh v. Chambers* that the prayers dated back

1 *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 Sup. Ct. Rev. 119, 119–58.

2 Steven K. Green, *Bad History: The Lure of History in Establishment Clause Adjudication,* 81 Notre Dame L. Rev. 1717, 1717–18 (2006).

3 Marsh v. Chambers, 463 U.S. 783 (1983).

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to the First Continental Congress. This is a curious and problematic historical argument because when that body met, the colonies had not even declared independence from England, let alone written the Constitution that, by design, would separate state and church. The six-judge *Marsh* majority did not apply any constitutional test, but simply concluded that, because the framers hired a chaplain to pray around the time that they drafted the First Amendment (not when it was ratified or had legal effect), they must not have thought it a violation of the Constitution. Legal principle was set aside in favor of history, something Justice William Brennan and Thurgood Marshall highlighted in their dissent: "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."[4]

The *Marsh* decision was based on "what historians properly denounce as 'law office history,' written the way brief writers write briefs, by picking and choosing statements and events favorable to the client's cause."[5] Those seeking to breach the "wall of separation between Church [and] State,"[6] or working to tear it down altogether, are eager to expand the *Marsh* historical exception because the exception is more malleable than that metaphorical wall, even though the Supreme Court adopted the wall metaphor in 1878, and employed it in 1947, 1948, 1961 (three times), 1962, 1963, 1968, 1973, 1977, 1982, and again and again in countless concurrences, dissents, and lower court opinions.[7]

4 *Id.* at 800–01.

5 Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 842 (1986).

6 The wall metaphor comes from Thomas Jefferson's January 1, 1802 letter to the Danbury Baptists. Jefferson wrote: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State. [A]dhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties." Thomas Jefferson, *To the Danbury Baptist Association* (Jan. 1, 1802), *in* THE PAPERS OF THOMAS JEFFERSON, VOLUME 36: 1 DECEMBER 1801 TO 3 MARCH 1802, at 258 (Princeton University Press, 2009), https://jeffersonpapers.princeton.edu/selected-documents/danbury-baptist-association-0.

7 *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122–23 (1982); Wolman v. Walter, 433 U.S. 229, 236 (1977),

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Law office history is by definition self-interested and used to argue a point, not to expound historical truth.[8] When judges employ tactics that appear self-interested, it reflects poorly on the entire judiciary and our legal system. In our common law system, which relies on precedent, law office history can have other devastating consequences. Once a historical claim makes it into a court's opinion, it is more apt to be accepted uncritically as true and repeated by other judges. The higher the court, the more authority the repetition is given. And, like a children's game of telephone, subsequent repetitions are likely to lose nuance or detail, or even change the meaning. That is precisely what is happening right now with the history of prayer at school board meetings. Lawyers and judges have been uncritically repeating historical claims that lack any evidentiary or factual basis.

This article traces that increasingly common modern claim—that there is a history of school board prayer in America—back to a single amicus brief authored by a notoriously conservative, anti-LGBT, Christian nationalist organization, the Family Research Council (FRC).[9] Cases involving school board prayer are ongoing and arguments of a circuit split could land the issue before the Supreme Court in the near future.[10] The question then is whether one biased

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o*verruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Comm. For Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761 (1973); Epperson v. Arkansas, 393 U.S. 97, 106 (1968); Sch. Dist of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (less explicitly than elsewhere); Engel v. Vitale, 370 U.S. 421, 425 (1962); Torcaso v. Watkins, 367 U.S. 488, 493 (1961); Braunfeld v. Brown, 366 U.S. 599, 604 (1961); McGowan v. Maryland, 366 U.S. 420, 443 (1961); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); Reynolds v. United States, 98 U.S. 145, 164 (1878).

8 Allen Guelzo wrote in the introduction of his award-winning Abraham Lincoln biography, "nor is it going to be claimed here for the sake of difference that Lincoln was a philosopher, a theologian, a mystic (all of which have been tagged on Lincoln for reasons that have more to do with self-interested authors than with Lincoln)." Allen C. Guelzo, Abraham Lincoln: Redeemer President 19 (2002).

9 Brief of Amici Curiae Family Research Council & Louisiana Family Forum – Attorneys Resource Council in support of Defendants-Appellants' Supplemental Brief for Re-Hearing En Banc, Doe v. Tangipahoa Par. Sch. Bd., 478 F.3d 679 (5th Cir. 2007) (No. 05-30294) [hereinafter FRC Brief].

10 *Compare* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017) (approving school board prayer practice), *with* Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1152 (9th Cir. 2018), *petition for review en banc denied*, 910 F.3d1297 (9th Cir. Dec. 26,

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organization's woefully inadequate historical account will supplant reasoned legal argument when such a case comes before the highest court in the land.

Before tracing this historical claim about school board prayer to that brief (Section 3), I will lay out the legal landscape of legislative and school board prayer (Section 2). Next, I examine precedent to determine what evidence might be required in order to prove that there is, in fact, a history of prayer at school board meetings (Section 4). The article then critically examines the historical claims in that progenitor amicus, which is seriously wanting in scholarship and legitimate support for the historical claim it makes (Section 5). It will become clear that none of the evidence it offers shows that there is a history of school board prayer; quite the opposite in fact. Finally, I turn to the law office history in *Marsh* and conclude with some suggestions for curing this legal ailment (Sections 6 and 7).

An investigation into the propriety of using law office history to decide constitutional questions is more important now than ever before. In June 2019, for the first time ever, the Supreme Court applied this flawed historical approach to a state-church question outside the legislative prayer context when it decided the Bladensburg Cross case, and allowed a government-maintained, 40-foot concrete Christian cross to remain on government property because it had been there for 90 years.[11] The Court favorably invoked the law office history approach to First Amendment questions as laid out in *Marsh* and *Town of Greece v. Galloway*. [12] In other words, rather than curtailing the use of this flawed, manipulable inquiry, the Court is expanding it.

II. THE LEGAL LANDSCAPE OF LEGISLATIVE AND SCHOOL BOARD PRAYER

The modern debate over history in cases involving the Establishment Clause stems from the Supreme Court's 1983 decision in *Marsh v. Chambers*, which held that the Nebraska legislature's opening prayers did not violate the First Amendment's Establishment Clause.[13]

In so doing, and unlike every other Establishment Clause

2018) (holding school board prayer practice unconstitutional).

11 *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2078, 2084, 2087, 2089 (2019).

12 *See id.* at 2087–88.

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

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decision, *Marsh* abjured the defining principle of Establishment Clause jurisprudence: "[T]he principle that the 'First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.'"[14] As Justice Brennan wrote in his dissent: "[I]f the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause."[15] *Marsh* abandoned legal principle, granting government prayer constitutional immunity because it pre-dated the First Amendment.

However the courts may be trending now,[16] this method—if it can be called a method—makes the case an outlier, and a heavily criticized outlier at that. Professor Michael McConnell's criticism of *Marsh* is accurate and devastating:

> *Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some *principle* that explains *why* legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause.[17]

Within two years of *Marsh*, first in 1985 and then again in 1987, the Court declined to extend this "nod to history" approach to the public school context. In *Wallace v. Jaffree*, the Court recognized

14 McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

15 *Marsh,* 463 U.S. at 796 (Brennan, J., dissenting).

16 *See, e.g.*, *Am. Legion*, 139 S. Ct. 2067.

17 Michael McConnell, *On Reading the Constitution*, 73 Cornell L. Rev. 359, 362 (1988). *Marsh* has been criticized from all directions. *See, e.g.*, Laurence Tribe, American Constitutional Law § 14–15, at 1288–89 (2d ed. 1988); Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. Kan. L. Rev. 285, 335 n.144 (1994) (criticizing a historical approach of constitutional interpretation as weak). "The Supreme Court's decision in *Marsh* lasted less than ten pages and can be summarized as follows: 'The founders did it. Everyone since them has done it. No one is abusing it. Therefore it is constitutional.'" Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. Miami L. Rev. 713, 723 (2009) (quoting Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 Cal. L. Rev. 293, 338 (1993)).

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that there is no long, unbroken history of prayer in public schools or school boards.[18] Two years later, in *Edwards v. Aguillard*, the Court explicitly found that *Marsh*'s rationale was based entirely on the historical context:

> The Court based its conclusion in that case on the historical acceptance of the practice. Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.[19]

In these two cases, the Supreme Court treated government-organized prayers in a school context differently than government-organized prayer at the state legislature. The resulting clash of the hybrid issue—prayer at school board meetings—was inevitable.

Two circuit court decisions examined prayer at school board meetings after *Marsh*: *Indian River School District v. Doe* in the Third Circuit and *Coles v. Cleveland Board of Education* in the Sixth Circuit. Both circuits held that the *Marsh* exception did not apply to school board prayers. Relying heavily on the facts of the cases, the courts found that the context of school board prayers was more like that of prayer in public schools, not like prayer at a state legislature. In *Coles*, the "realities" of school board meetings dictated the holding: "These meetings are conducted on school property by school officials, and are attended by students who actively and regularly participate in the discussions of school-related matters."[20] Other important factors included involuntary student presence at and participation in the meetings,[21] the school-related purpose of school board meetings,[22]

18 Wallace v. Jaffree, 472 U.S. 38, 80 (1985).

19 Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987).

20 Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 381 (6th Cir. 1999).

21 Doe v. Indian River Sch. Dist., 653 F.3d 256, 264–65, 276 (3d Cir. 2011) ("It is true that attendance at the Indian River School Board meetings is not technically mandatory. Nevertheless, the meetings bear several markings of 'involuntariness' and the implied coercion that the Court has acknowledged elsewhere.").

22 *Id.* at 277–79; *Coles*, 171 F.3d at 381 ("What actually occurs at the school board's meetings is what sets it apart from the deliberative processes of other legislative bodies. Simply stated, the fact that the function of the school board is uniquely directed toward school-related matters gives it a different type of 'constituency' than those of other legislative bodies—namely, students.").

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the presence of a student representative sitting on the school board,[23] the student disciplinary action the board takes at the meetings,[24] and the fact that the meetings often take place on school property.[25]

Interestingly, neither the parties nor the amici in either *Coles* or *Indian River* tried to argue that there was a long and unbroken history of school board prayer in this country. They certainly argued that *Marsh* should encompass school board prayers, but nobody attempted to make the argument that, historically, school boards prayed. This is especially remarkable in *Indian River*, which featured amici from some rather notorious historical revisionists including Wallbuilders, the outfit run by David Barton,[26] and the Foundation for Moral Law, run by disgraced Alabama judge Roy Moore.[27] It was

23 *Indian River*, 653 F.3d at 277; *Coles*, 171 F.3d at 372.

24 *Indian River*, 653 F.3d at 264; *Coles*, 171 F.3d at 383.

25 *Indian River*, 653 F.3d at 278; *Coles*, 171 F.3d at 385–86 (noting the importance of government control over content).

26 Along with the Congressional Prayer Caucus Foundation, Wallbuilders is the main driving force behind Project Blitz. *See* Frederick Clarkson, *"Project Blitz" Seeks to Do for Christian Nationalism What ALEC Does for Big Business,* Rewire News (Apr. 27, 2018), https://rewire.news/religion-dispatches/2018/04/27/project-blitz-seeks-christian-nationalism-alec-big-business/. It is an organization committed to twisting history in order to sell a false narrative based on Christian exceptionalism and Barton is a disgraced wannabe-historian. Nate Blakeslee, *King of the Christocrats*, Tex. Monthly, Sep. 2006, https://www.texasmonthly.com/articles/king-of-the-christocrats/. Barton never apologized after getting caught repeatedly lying about earning a Ph.D. in history. *See, e.g.*, Mark Woods, *Did These Top Evangelicals Really Earn Their PhDs?*, Christian Today (Oct. 10, 2016) https://www.christiantoday.com/article/did-these-top-evangelicals-really-earn-their-phds/97596.htm (after it was revealed that Barton's degree came from a school with no history program: "Barton has not commented, and did not return requests for clarification from Christian Today."). He wrote a book, aptly titled *The Jefferson Lies*, that was so divorced from reality that the book's own publisher pulled it from bookstores after noting that "basic truths just were not there." *See, e.g.*, Elise Hu, *Publisher Pulls Controversial Thomas Jefferson Book, Citing Loss of Confidence*, Nat'l Pub. Radio (Aug. 9, 2012), https://n.pr/33Crrpc (the publisher noted that "There were historical details — matters of fact, not matters of opinion, that were not supported at all."). That year, a poll by the History News Network concluded that the book was "the least credible history book in print." David Austin Walsh, *What is the Least Credible History Book in Print?*, Hist. News Network (July 16, 2012), https://historynewsnetwork.org/article/147149. Undeterred, Barton shamelessly continues to sell this deceitful book, now published by Wallbuilders itself. That the Wallbuilders brief failed to argue for this history is telling.

27 This brief argues that the *Marsh* "analysis is fundamentally flawed" because it relied on history: "*Marsh* failed to offer the consistently applied principle of

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not until after these cases refused to expand *Marsh* that a history of school board prayer was first argued.

After those two decisions, the Supreme Court handed down *Town of Greece v. Galloway*. *Town of Greece* dealt with prayers at town council meetings and reinforced, but did not expand, *Marsh*. *Marsh* had been applied beyond the state legislature session before the Court decided *Town of Greece*, though importantly never to a school or school board.[28] *Town of Greece* also specifically distinguishes school settings:

> This case can be distinguished from the conclusions and holding of *Lee v. Weisman,* 505 U.S. 577 (1992). There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. *Id.,* at 592–594; see also *Santa Fe Independent School Dist.,* 530 U.S., at 312. . . . Neither choice represents an unconstitutional imposition as to mature **adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure."**[29]

While government prayer advocates have argued for an expansion of the historical exception laid out in *Marsh* and *Town of Greece*, courts have refused to apply the exception beyond its specific context of state and local legislatures. For instance, the following government-organized religious rituals have not been upheld:

- prayers at city-organized memorial or holiday events,

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the text of the First Amendment and instead simply analogized by historical examples." Brief Amicus Curiae of Foundation for Moral Law, on Behalf of Appellees, Doe v. Indian River School District, 653 F.3d 256 (3rd Cir. 2011) (No. 10-1819).

28 *See* Pelphrey v. Cobb Cty., 547 F.3d 1263, 1275–76 (11th Cir. 2008) (applied to county commission); Simpson v. Chesterfield Cty. Bd. of Supervisors, 404 F.3d 276, 278 (4th Cir. 2005) (applied to a county board of supervisors); Snyder v. Murray City Corp., 159 F.3d 1227, 1228 (10th Cir. 1998) (applied to a city council).

29 Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) (citing Marsh v. Chambers, 463 U.S. 783, 792 (1983)) (emphasis added).

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such as Memorial Day or Veterans' Day;[30]
- prayers that advance one faith;[31]
- prayers at dinner at a state military college;[32]
- prayers at school faculty meetings and in-service training;[33]
- prayers at state courts;[34]
- prayers in the school context;[35]
- prayer breakfasts;[36]
- prayer vigils;[37]
- religious speakers at police department events;[38]
- prayers at school board meetings.[39]

Despite the long history of courts refusing to expand the *Marsh* exception to the public school context, change may be coming to school board prayer law.[40] In the two most recent cases to involve school board prayer—both reaching the federal appellate level and both post-*Town of Greece*—judges claimed that there is a history of school board prayer sufficient to justify extending the historical exception to school boards.

III. THE CLAIM THAT THERE IS A LONG HISTORY OF SCHOOL BOARD PRAYER IN AMERICA TRACES BACK TO A SINGLE AMICUS BRIEF AUTHORED WITH NO HISTORICAL EXPERTISE.

30 Hewett v. City of King, 29 F. Supp. 3d 584, 630 (M.D.N.C. 2014).
31 Wynne v. Town of Great Falls, 376 F.3d 292, 302 (4th Cir. 2004).
32 Mellen v. Bunting, 327 F.3d 355, 369–70 (4th Cir. 2003).
33 Warnock v. Archer, 380 F.3d 1076 (8th Cir. 2004).
34 N.C. Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145, 1152–53 (4th Cir. 1991).
35 Lee v. Weisman, 505 U.S. 577, 596–97 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Wallace v. Jaffree, 472 U.S. 38 (1985).
36 Newman v. City of East Point, 181 F. Supp. 2d 1374, 1378–80 (N.D. Ga. 2002).
37 Rojas v. City of Ocala, 315 F. Supp. 3d 1256, 1278 n.16 (M.D. Fla. 2018).
38 Milwaukee Deputy Sheriff's Ass'n v. Clarke, 588 F.3d 523, 525–26 (7th Cir. 2009).
39 Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 371 (6th Cir. 1999); Doe v. Indian River Sch. Dist., 653 F.3d 256, 275 (3d Cir. 2011); Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1142 (9th Cir. 2018).
40 The Supreme Court recently demonstrated its willingness to expand the flawed historical analysis approach outside the prayer context in *Am. Legion v. Am. Humanist Ass'n*, discussed further below. *See generally Am. Legion*, 139 S. Ct. 2067.

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One attorney arguing in favor of school board prayer cited a "long established historical practice of using prayer to begin school-board meetings" to justify his argument.[41] A straight line can be drawn from this post-*Town of Greece* argument that a history of school board prayer exists to a single law review article. Quite a few judges on the Fifth and Ninth Circuits—the only two circuits to have taken up the issue after *Town of Greece*—have written opinions stating that the history exists. All the history in those opinions eventually traces back to the same article, *Prayer Is Prologue: The Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, which was penned by a rising third-year law student, Marie Wicks.[42]

Solely on the basis of Wicks's article, the Fifth Circuit accepted, at least to a certain extent, that a history of school board prayer exists in *American Humanist Association v. McCarty* in 2017.[43] That case initially challenged prayers at school board meetings; however, just prior to litigation the school board adopted a new policy that created a forum for a single student to deliver a personal message of their choosing—prayer, poem, or otherwise—at the board meeting.[44] This change could have shifted the panel into deciding the case on free speech grounds—the panel could have decided that the board had opened a forum for student expression—but the panel still looked to history.

As they were bound to do, Circuit Judges Smith, Clement, and Southwick agreed that the Supreme Court relied on history to uphold legislative prayer in *Marsh*.[45] The challengers agreed too, but argued that the school district's "invocation policy does not fit within the legislative-prayer exception because it lacks a 'unique history.'"[46] The panel both agreed and disagreed. Writing for the unanimous panel, Judge Smith recognized that the Supreme Court denied the existence of a history of school board prayers because free education did not exist at the time of the founding.[47] He "nonetheless" held that there was a dispositive, or at least probative, history "dating

41 Appellants' Reply Brief at 14, *Chino Valley*, 896 F.3d at 1132.
42 Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 527 n. 15 (5th Cir. 2017); Am. Humanist Ass'n v. Birdville Indep. Sch. Dist., 138 S. Ct. 470 (2017).
43 *McCarty*, 851 F.3d at 525–27.
44 The suit was filed in May 2015, and, according to the 5th Circuit, the change was made in March 2015. *Id.* at 523, 524 n. 5.
45 *Id.* at 525–26.
46 *Id.* at 527
47 *Id.*

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from the early nineteenth century, as at least eight states had some history of opening prayers at school-board meetings."[48] Eight states. Remember that number. To support this historical claim, Judge Smith cited only the Wicks law review article, *Prayer Is Prologue*.[49]

Other courts have not been convinced to adopt Wicks's history. In *Bormuth v. County of Jackson*, the Sixth Circuit characterized the Fifth Circuit panel's decision in a parenthetical as "applying *Town of Greece* to prayers before school boards," on the basis of "tradition."[50] However, as we have seen, before *Town of Greece*, the Sixth Circuit had refused to apply *Marsh*'s historical analysis to prayers offered at public school board meetings and instead applied the *Lemon* test.[51] Despite this characterization of *Town of Greece*, it did not revisit that earlier decision in *Bormuth*.[52]

In the 2018 *Chino Valley* case, which I litigated,[53] the Ninth Circuit distinguished the Fifth Circuit's *McCarty* decision on several factual bases and struck down bible-reading, proselytizing, and prayer by school board members at school board meetings.[54] The two cases were factually dissimilar. While *McCarty* involved what was essentially a free speech forum for students to say what they wanted, prayer or otherwise, *Chino Valley* featured board members overtly preaching and proselytizing alongside prayers—to "everyone who does not know Jesus Christ . . . go and find Him," urged one school board member.[55] The school board meetings in *Chino Valley* resembled a church service and there were reports of how the local mega-church, active in conservative politics, had captured the school

48 *Id.* (citing Marie Elizabeth Wicks, *Prayer Is Prologue: The Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & Pol. 1, 30–31 (2015)). The Fifth Circuit emphasized history in the next two sentences as well. *Id.* at 527 nn.16, 17.

49 *McCarty*, 851 F.3d at 527 n.15.

50 Bormuth v. Cty. of Jackson, 870 F.3d 494, 505 (6th Cir. 2017), *cert. denied sub nom.* Bormuth v. Jackson Cty., 138 S. Ct. 2708 (2018), *reh'g denied,* 139 S. Ct. 47 (2018).

51 Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 379–83 (6th Cir. 1999).

52 *Bormuth*, 870 F.3d at 505 n.4. This is to say, the Sixth Circuit did not revisit *Coles* in *Bormuth*.

53 Along with David Kaloyanides and FFRF's Legal Director, Rebecca Markert. *See* Fee Order, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018) (No. 16-55425).

54 *Chino Valley*, 896 F.3d at 1132, 1133, 1144, 1152.

55 *Chino Valley*, 896 F.3d at 1140.

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board.[56] The *Chino Valley* prayers followed the Pledge of Allegiance and occurred immediately before student performances for the board and the board's recognition of student achievement. Any students that wanted recognition, to perform for their community, or to sit on the board were present during those prayers.

The *Chino Valley* panel focused on these facts, though the school board's advocates repeatedly invited the Ninth Circuit panel to adopt the history of school board prayer in the Wicks article during both written and oral argument. In briefing, the Chino Valley School Board argued: "Undoubtedly, there is a long established historical practice of using prayer to begin school-board meetings."[57] The board cited *McCarty* for this claim, which in turn cites the Wicks law review article.[58] The reliance on Wicks was more explicit in oral argument. Judge Wardlaw asked the board at oral argument: "[W]hat record evidence do you have that invocations at school board meetings are embedded in the history and tradition of our country?. . . What historic evidence do you have?"[59] The board's counsel noted that both the board and an amicus cited in their respective briefs a law review article "that goes through a long history and identifies a significant history of invocations in school board settings."[60] He reiterated this on rebuttal.[61] The article referred to was, of course, Wicks's article.

It was not just the Chino Valley School Board and a single amicus, but *all* the board's amici that relied on the history in the Wicks article to make the historical argument that *Marsh* should apply to school boards. Three of the four amici cite the Wicks article by name; the fourth quotes *McCarty* (which cited Wicks) and some

56 Amy Julia Harris, *Megachurch Helps California School Board Blur Church-State Divide*, REVEAL NEWS (Apr. 29, 2015), https://www.revealnews.org/article/megachurch-helps-california-school-board-blur-church-state-divide/; Amy Julia Harris, *School Board's Lawyers In Prayer Fight Have Ties To Mega-Church Pastor,* REVEAL NEWS (Mar. 11, 2016), https://www.revealnews.org/blog/school-boards-lawyers-in-prayer-fight-have-ties-to-mega-church-pastor/.

57 Appellants' Reply Brief at 14, *Chino Valley*, 896 F.3d at 1132.

58 *Id.* ("Based on the history of legislative-prayer in general, and prayer at the opening of school-board meetings in particular, the fifth circuit rejected the argument that the Birdville Independent School District was required to demonstrate its own 'unique history'. *McCarty*, 851 F.3d at 527-28.")

59 Oral Argument at 8:21, *Chino Valley*, 896 F.3d 1132, https://www.youtube.com/watch?v=4TNeKJMNEkE.

60 *Id.* at 9:48.

61 *Id.* at 43:50.

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of the examples that appear in the Wicks article.[62]

The Congressional Prayer Caucus Foundation, a *Chino Valley* amicus and one of the three purveyors of the Christian nationalist legislative push named Project Blitz,[63] points to Wicks's article and, in particular, the Fifth Circuit's reliance on that article, to argue that "the constitutionality of school board prayer is supported by the historical pedigree . . . of these prayers."[64] The Prayer Caucus Foundation then praised Wicks as "intellectually honest about the historical record: prayer at school boards has a strong historical pedigree."[65] Its point being that the Fifth Circuit "was correct to take note of school board prayer's long-standing pedigree."[66]

The American Center for Law and Justice dubs Wicks a "scholar"[67] and the Justice and Freedom Fund cites her favorably.[68] Finally, the Alliance Defending Freedom, while not citing Wicks specifically, quoted *McCarty*, which in turn relies on Wicks,[69] and cites a few of Wicks's historical examples, including the Pennsylvania and Iowa examples debunked in Section 5 below.[70]

The Ninth Circuit panel rejected these historical proffers: "The history of public schools in the United States, and their intersection with the Establishment Clause, does not support the application of the *Marsh-Greece* exception to the practices of public school boards, including school-board prayer."[71] The Chino Valley

62 Amicus Curiae Brief for All. Defending Freedom in Support of Chino Valley Unified Sch. Dist. Bd. of Educ., et al., Urging Reversal at 9–11, *Chino Valley*, 896 F.3d 1132 (9th Cir. 2018) (No. 16-55425) [hereinafter ADF Amicus]; Brief of amicus Curiae, the Am. Ctr. for Law & Justice, in Support of Defendants-Appellants and Urging Reversal at 19–20, 24, *Chino Valley*, 896 F.3d 1132 (9th Cir. 2018) (No. 16-55425) [hereinafter ACLJ Amicus]; Brief of Amicus Curiae of the Cong. Prayer Caucus Found. In Support of Appellant Urging Reversal at 8–9, *Chino Valley*, 896 F.3d 1132 (9th Cir. 2018) (No. 16-55425) [hereinafter CPCF Amicus]; Brief of Amicus Curiae Justice and Freedom Fund in Support of Defendants-Appellants at 19, *Chino Valley*, 896 F.3d 1132 (9th Cir. 2018) (No. 16-55425) [hereinafter JFF Amicus].

63 Clarkson, *supra* note 26.

64 CPCF Amicus, *supra* note 62, at 8.

65 *Id.* at 9.

66 *Id.*

67 ACLJ Amicus, *supra* note 62, at 19.

68 JFF Amicus, *supra* note 62, at 19.

69 ADF Amicus, *supra* note 62 at 9 ("dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings.").

70 *Id.* at 9–10.

71 Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of

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School Board's request for an en banc rehearing was denied, but eight judges dissented from the denial, including Judge O'Scannlain who, as a senior judge, cannot vote on calls for rehearing cases en banc or formally join a dissent from failure to rehear en banc, but who wrote his own dissent anyway.[72] One section of the dissent focuses on history, charging that the panel "cursorily concludes that a historical analysis shows that an opening prayer at school board meetings does not fit within our nation's legislative prayer tradition" and calling that conclusion "absurd."[73] In that section, the eight judges repeated the Fifth Circuit's historical malpractice, writing, "[i]n fact, as our sister circuit has observed in considering the applicability of the tradition, 'dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings.'"[74] Eight states.

All eleven federal appellate judges[75] who have concluded that there is a substantial history of school board prayer cited the eight states figure from Marie Wicks's article. These judges are not alone. According to Wicks, Justice Kagan has expressed interest in the article.[76] Wicks's article has driven the post-*Town of Greece* argument that there is a history of school board prayer. This, in itself, is remarkable. First, at the time of writing her article, Ms. Wicks was not a lawyer or a historian, but a rising third-year law student with a Bachelor of Arts in International Studies and French.

Wicks's legal analysis of school board prayer in the wake of *Town of Greece* generally is reasonable, but she also makes bold and,

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Educ., 896 F.3d 1132, 1147–48 (9th Cir. 2018).

72 Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 910 F.3d 1297, 1298 (9th Cir. 2018) (O'Scannlain, J., opinion respecting denial of rehearing en banc). The dissents to the en banc were striking in how little they reflected the facts of the underlying case. None of the judges even mentioned that, in addition to overtly sectarian prayers, the school board itself also read the bible aloud and proselytized to students and the audience, urging them to convert. The second dissent, which discussed the panel's application of the *Lemon* test, stated that the "panel held that a nonsectarian prayer or invocation before the Chino Valley Unified School District of Education Board ("the Board") meeting violates the Establishment Clause under *Lemon*." The panel never even uses the words "sectarian" or "nonsectarian" and held instead that the Board's prayer *policy* violated *Lemon*, a small but significant distinction.

73 *Id.* at 1302–03.

74 *Id.* at 1303 (citing Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 527 (5th Cir. 2017).

75 *McCarty*, 851 F.3d at 527; *Chino Valley*, 910 F.3d at 1304–09.

76 *See* Wicks, *supra* note 48, at 1 n. introductory footnote.

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as we shall see, unsupportable historical claims: "In addition to the broader history of legislative prayer, school boards have enjoyed a more specific historical tradition of invocations at the start of meetings."[77]

The second reason the influence of this article is remarkable is because Wicks purports to prove that historical tradition in a single paragraph. On the basis of this one paragraph, Wicks concludes: "To the extent that an argument for school board prayer can be made based upon its historical tradition, these records show that school boards have long been solemnizing the beginning of their meetings with a brief invocation."[78] Even more remarkably, that lone paragraph includes no original scholarship or research. Instead, Wicks repeatedly cites an amicus brief by the Family Research Council and regurgitates the historical sources cited in the brief.[79]

Before looking at that brief, let's summarize: The Ninth Circuit en banc dissenters relied on the Fifth Circuit panel, which in turn cited Wicks's article for the proposition that there is a history of school board prayer. The article contains a single paragraph on this history and was written by a law student with no historical expertise. The student, in turn, cribbed the analysis from an amicus brief. At no point in this chain has a serious scholar or historian vetted the claim, but it nevertheless appears in several opinions, including a controlling opinion by a three-judge panel of the Fifth Circuit. It gets much worse when we turn to the original brief itself.

The FRC brief at the root of these historical claims was written for the *Tangipahoa* school board prayer case.[80] Two Doe students and their parent challenged prayers at school events, including prayer at school board meetings, eventually the only outstanding issue that needed a ruling. The district court found that school board prayers were outside *Marsh* and struck them down.[81] The Fifth Circuit panel assumed but did not decide that the school board could theoretically avail itself of *Marsh's* protection, but that its prayers still violated *Marsh*, and so struck them down anyway.[82] The school board asked

77 *Id.* at 30–31.
78 *Id.* at 31.
79 *Id.* at 30–31 (citing FRC Brief, *supra* note 9).
80 *Id.*
81 Doe v. Tangipahoa Par. Sch. Bd., 473 F.3d 188 (5th Cir. 2006), *vacated en banc*, 494 F.3d 494 (5th Cir. 2007); Doe v. Tangipahoa Par. Sch. Bd., No. Civ.A. 03-2870, 2005 WL 517341 (E.D. La. Feb. 24, 2005).
82 Doe v. Tangipahoa Par. Sch. Bd., 473 F.3d 188, 202, 205 (5th Cir. 2006), *vacated en banc*, 494 F.3d 494 (5th Cir. 2007).

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for an en banc rehearing[83] and it was at that point that the FRC and Louisiana Family Forum submitted their amicus brief.

The substance of the brief is less than eight pages and is poorly researched. It was solely authored by Joshua Carden. After homeschooling, Carden attended two highly religious Christian schools: Dallas Baptist University, receiving a Bachelor of Arts in Political Science, and then the law school founded by televangelist Pat Robertson, Regent University Law School.[84] Carden once worked at the Alliance Defending Freedom, an organization dedicated to promoting Christianity and which submitted an amicus brief citing Wicks in the *Chino Valley* case.[85] At the time Carden authored

83 Doe v. Tangipahoa Par. Sch. Bd., 494 F.3d 494, 496 (5th Cir. 2007) (en banc).

84 Joshua Carden, LINKEDIN, https://www.linkedin.com/in/joshua-carden-2960ab1; Regent University's "vision is to be the most influential, Christian, transformational university in the world. MISSION[:] Regent University serves as a center of Christian thought and action to provide excellent education through a biblical perspective and global context equipping Christian leaders to change the world." *Vision & Mission,* REGENT UNIV., https://www.regent.edu/about-regent/vision-mission/ (last visited Oct. 5, 2019). Regent Law's honor code states: "[I]t is imperative that Regent University faculty, staff, and students conduct themselves in a Christ-like and professional manner, and maintain an exemplary and involved lifestyle. Regular church and chapel attendance, and participation in activities of the Regent community and its founding organization, are encouraged for students and expected for faculty and staff." *Statement of Faith & University Honor Code and Standards of Personal Conduct*, REGENT UNIV. SCH. L., https://www.regent.edu/acad/schlaw/admissions/honorcode.cfm (last visited Oct. 5, 2019). Regent Law also partners closely with the American Center for Law and Justice (who dubbed Wicks a "scholar," see above), Jay Sekulow's Christian nationalist outfit. Sekulow is himself a Regent graduate. ACLJ is listed as a "center" of the university. REGENT UNIV., https://www.regent.edu/school-of-law/centers-initiatives/ (last visited Oct. 5, 2019). *See also About Jay Sekulow*, ACLJ, https://aclj.org/jay-sekulow (last visited Oct. 5, 2019). The vision of Dallas Baptist University is "[b]uilding a great Christian university that is pleasing to God by producing Christ-centered servant leaders who are transforming the world" and its chosen "theme scripture" is Jeremiah 29:11-13. *Mission Statement*, DALLAS BAPTIST UNIV., https://www.dbu.edu/about/mission (last visited Oct. 5, 2019).

85 *See Joshua W. Carden, Attorney at Law*, CARDEN L. FIRM, http://www.cardenlawfirm.com/bio (last visited Oct. 7, 2019). Under the "Professional Memberships and Activities," it is noted that Carden is an "Allied Attorney of the Alliance Defending Freedom" and a former "Blackstone Fellow," which is a program managed by ADF. *See Blackstone Legal Fellowship*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/training/blackstone (last visited Oct. 7, 2019). ADF is dedicated to this mission: "The legal system, which was built on a moral and Christian foundation, had been steadily

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the FRC brief in March 2007, he was a solo practitioner. Now, he practices employment law. He has no formal background in history or historical research.[86] In other words, Carden was a prime candidate to author a brief brimming with law office history. Unsurprisingly, when he wrote this brief for the FRC, he cherrypicked history to promote a specific religious agenda.

The sole and explicit purpose of FRC's amicus brief was to show that there was a history of school board prayer that brought the practice under the protection of *Marsh*:

> This brief – short in length and narrow in scope – targets only the conclusory statement by Plaintiff Doe that "there is no such historical acceptance of prayer for school board meetings." Doe's statement is absolutely wrong and should be ignored by this Court in its analysis and application of *Marsh*. As will be demonstrated, school boards and prayer enjoy a long-standing relationship. . . . To aid the Court in its historical analysis, Amici provides the following detailed examples from **eight states** that support the historicity of school board prayer.[87]

The conclusion is clear in what it seeks to prove, if not in the evidence it proffered:

> The most cursory examination of history's archives reveals the long-standing historical connection between school boards and religion in general, and opening prayer in particular. . . . Amici urges this Court to allow the time-honored tradition of the Tangipahoa Parish School Board's opening prayer to continue.[88]

This amicus brief provides the origin myth for the history of

moving against religious freedom, the sanctity of life, and marriage and family. And very few Christians were showing up in court to put up a fight." *Who We Are*, Alliance Defending Freedom, https://www.adflegal.org/about-us (last visited Oct. 7, 2019); ADF Amicus, *supra* note 62.

86 Carden, *supra* note 84.

87 FRC Brief, *supra* note 9, at 3 (internal citations and brackets omitted) (emphasis added).

88 *Id.* at 11.

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school board prayer. Eleven federal circuit court judges relied on a single paragraph in a law student's article, which itself is a repackaged amicus brief so deficient that it exemplifies the very worst of law office history. Eleven circuit court judges used this law office history to argue for expanding *Marsh* and *Town of Greece* to an entirely new arena—essentially arguing that this history trumps the protections embedded in the First Amendment—and a fair examination of that history shows that it simply does not exist.

Before we dive into that law office history, let us lay out ground rules for what would constitute historical evidence that would bolster the claim that there is a history of school board prayer in America.

IV. WHAT EVIDENCE WOULD SHOW A HISTORY OF SCHOOL BOARD PRAYER?

For the evidence to show a history of school board prayer that would be useful or legally significant under the *Marsh-Town of Greece* rubric, those cases tell us that it would have to show three things:

First, prayers. Simple religiosity of board members or ties to clergy or even bible reading in schools managed by the board would not be useful. Religiosity is irrelevant; religious people fulfill government roles and offices all the time without abusing those offices to promote or impose their personal religion. If religiosity were the key, it would have been enough for the *Marsh* Court to have pointed out that some of the framers of the First Amendment were religious men or that the first speaker of the House was a minister.[89] It was not. Nor would devotional bible reading, government-organized prayer, and teaching religious doctrine as truth in the public schools be useful evidence, especially since each is unconstitutional.[90] Prayers are a must-have.[91]

89 Frederick Muhlenberg was a Lutheran minister. ROBERT V. REMINI, THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES 15 (Harper Collins, 2007).

90 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 290 (2000); Edwards v. Aguillard, 482 U.S. 578, 597 (1987); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

91 *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786–91 (1983) ("The opening of sessions of legislative and other deliberative public bodies with prayer"; "[T]he Continental Congress . . . adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain"; "Clearly the men who wrote the First Amendment Religion Clauses did not view . . . opening prayers

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Second, school boards. The bodies saying the prayer need to be school boards or the antiquarian equivalent.[92] We can be charitable here, as there is no long history of public education requiring school boards at all. But there needs to be some sort of official government status to the praying entity, otherwise the First Amendment would not apply. For instance, a private meeting of people who think education is important or a private celebration at a church or a board governing a private school are not analogs that support the school board prayer historical argument. At a bare minimum, the purported school board must be made up of government officials bound by the Establishment Clause of the First Amendment, otherwise it would not be relevant to the constitutional analysis.

Third, the evidence needs to be reliable and accurate. This should go without saying, but it is one of the primary dangers of law office history. The historical record relied on must be accurate, verifiable, stable, and based on methodology that does not involve, for instance, simply locating keywords such as "prayer" or "invocation" in books that date to the 1800s and deal with education.

Only examples of school board prayer that check all three of these boxes should make the cut. Then, once all such examples have been collected, they can be measured against the *Marsh* standard: the history of the prayer cannot be sporadic, it needs to be an "unambiguous and unbroken history of more than 200 years . . . ."[93] Under the *Marsh* rationale, it should date back to the founding. After all, *Marsh* is based on the idea that the framers of the First Amendment saw no First Amendment problem with the prayers and that rationale does not apply if the practice was instituted after the time any particular amendment was framed. There might be a weak argument to be made for a practice dating back to the birth of a state constitution, but however far back it goes, it needs to show, the

as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption"; "[L]egislative prayer presents no more potential for establishment.").

92 In *Marsh,* it was not just prayer, but *legislative* prayer that was critical. *See, e.g.*, *id*. at 792 ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.").

93 *Id*. at 792, 795.

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Supreme Court explained, an "unbroken practice."[94]

In short, to show a history of school board prayer of the kind used in *Marsh* and *Greece*, researchers would need to show: **a long, unbroken, and unambiguous history of prayer (not simply religion), at meetings of official government bodies that manage public schools.**

V. EXAMINING THE ALLEGED HISTORY OF SCHOOL BOARD PRAYER IN DEPTH

While the Ninth Circuit rejected the Fifth Circuit's claim that there is a history of school board prayer and refused to extend *Marsh-Town of Greece*, the historical claim itself was not fully examined. Commenters have posited that even the Fifth Circuit may have "sens[ed] the weakness of this argument."[95] That may be true, because the historical claim crumbles under scrutiny.

A. The Wicks article and Family Research Council amicus do not, on their face, show that "eight states" have a history of school board prayer. At best, they claim five.

Without even examining the underlying historical record, nearly half of the history can be knocked away. Wicks claims that "[a]t least eight states demonstrate historical records of prayers that were recited during school board meetings, dating back to the early 19th century. These states include Pennsylvania, Massachusetts, Iowa, Missouri, North Carolina, Wisconsin, Michigan, and New York."[96] (Interestingly, none of those states were involved in any of the litigation the FRC amicus has tainted.[97])

The FRC amicus, *the only source on which Wicks relied*, does not say this. It discusses those eight states, but does not claim that the final three — New York, Michigan, and North Carolina — have a

94 "The unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states gives abundant assurance that there is no real threat 'while this Court sits.'" *Id.* at 795 (quoting Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)).

95 Phillip Buckley, *We Call Them School Boards for a Reason: Why School Board Prayer Still Violates the Establishment Clause*, 8 OXFORD J.L. & RELIGION 1, 15 (2018).

96 Wicks, *supra* note 48, at 30.

97 Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018) (involving California); Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir. 2017) (involving Texas); FRC Brief, *supra* note 9 (involving Louisiana).

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history of school board prayer. At most, those three states have "[c]onnections [t]o [r]eligious [e]xpression," but no evidence of school board prayer.[98] These "connections" turn out to be things such as a request for clergy to discuss "the need for improved public schools," clergy attending meetings of teachers associations, and the phrase "trustees of the Gospel and school lots" appearing in old records, which supposedly shows a "connection between school boards and people of faith."[99] So when Wicks claimed eight states had a history of school board prayer, she was wrong. And yet that "eight states" error gets repeated, without examination, by the Fifth Circuit and dissenting Ninth Circuit judges.

With just a cursory review of the amicus, without even digging into the history, three of the eight pillars of the historical school board prayer argument fall because they did not involve prayers at all. One need not look and see if the prayers were part of a long, unbroken history or to see if the prayers were delivered at a government body because there were no prayers. On their face, the Wicks article and the FRC amicus fail to show a history of eight states having school board prayer. At best, and again without examining the history to see if it is akin to *Marsh*, only five states are left. However, when all eight states are examined, as they are below, none are left.

1. Michigan

The historical evidence for school board prayer in Michigan, according to the FRC and Wicks, is that, circa 1842, "[i]n Detroit, the state board of education asked clergy to assist by speaking from the pulpit to raise awareness of the need for improved public schools."[100] This has nothing to do with prayer. FRC offers a second piece—hiring a preacher to be a teacher—that fails for the same reason.[101] Neither involves any meeting of a government entity or a prayer.

Obvious issues aside, this first piece of "evidence" is even

98 FRC Brief, *supra* note 9, at ii.

99 *Id.* at 9–11.

100 *Id.* at 10 (citing Sister Mary Rosalita, Education in Detroit Prior to 1850, at 325 (1928)).

101 FRC Brief, *supra* note 9, at 10 ("Detroit School Board hired an Episcopalian clergyman, W.C. Monroe, to teach the lone African-American School in the city"). Rosalita, *supra* note 100, at 339. FRC's single paragraph on the history of school board prayer in Michigan is two sentences with two citations. The brief is rife with innuendo and history that has no probative value.

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more problematic because the cited source does not back up this assertion. The original source FRC miscites[102] is a book by a Catholic nun, Mary Rosalita, and the call for clergy assistance is not as clear as FRC makes out. In the context of a discussion about Detroit's nascent public school system, Rosalita wrote, "[t]he clergy were asked to assist by exhortations from the pulpit."[103] Rosalita does not clarify *who* asked for help, and the context does not lead to an inference that it was, as FRC claims, the board of education that did so. The state board of education is mentioned in a footnote to this passive sentence, but only as unrelated testimony to the superiority of Catholic schools.[104]

Rosalita herself does not cite an original source for the claim that the clergy were asked to help but she might be referring to the *Detroit Board of Education Introductory Report* (1842), which she cited two pages earlier.[105] Apparently, physical copies of this report exist in only two libraries and it took me months to track down a copy, far longer than an attorney with a typical amicus brief deadline.[106] In other words, it is very unlikely FRC sought out this report to see if the Board of Education did, indeed, ask for help.

If FRC had done so, it would have seen a desperate board

102 FRC cites to page 323. The information about asking clergy for help is on page 325. Compare, ROSALITA, *supra* note 100, at 323, *with* ROSALITA, *supra* note 100, at 325.

103 ROSALITA, *supra* note 100, at 325.

104 *Id.* Rosalita wrote: "The Report from the Detroit Board of Education to the Superintendent of Public Instruction, Francis Shearman, in referring to the educational situation of 1841, has this to say: 'From these statistics disclosed at the time, it appeared that there were then in the City twenty-seven English schools, one French and one German school, but all of them exceedingly limited in numbers and scarcely deserving the name of schools, except the one with Ste. Anne's (Catholic) Church, which embraced nearly all of the children of Catholic families then resident in the city.'" *Id.*

105 *Id.* at 323 (citing DETROIT BD. OF EDUC., THE INTRODUCTORY REPORT OF THE BOARD OF EDUCATION FOR THE CITY OF DETROIT TOGETHER WITH THE RULES AND REGULATIONS UNDER THE ORGANIZATION: ACCOMPANIED BY THE LAW ESTABLISHING FREE SCHOOLS: MARCH 1842 (Bagg & Harmon 1842)). This cite appears two pages before the clergy ask and Rosalita does clearly point to this Introductory Report as the source for that call.

106 According to WorldCat.org, which is, of course, not exhaustive. *The Introductory Report of the Board of Education of the City of Detroit, together with the rules and regulations under the organization: accompanied by the Law Establishing Free Schools: March, 1842,* WORLDCAT, http://www.worldcat.org/oclc/17595742 (last visited Oct. 14, 2019) (listing available library copies of the report).

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writing a saccharine yet heartfelt appeal for improved public schools. Amid a storm of hyperbole about the terrible state of the public schools and the board's need for assistance, the report rhetorically asks, "What shall we do?"[107] The report seeks to "rouse" *all* citizens to do all they can, including "the liberal minded and generous spirits who adorn our city," "the palladium of liberty and conservator of free institutions, the public press," "our mothers, our sisters, our wives and our daughters,"[108] and yes, the clergy:

> Let there be public meetings and public lectures upon the system of education which we shall propose, and let the voice of our clergy ring out from their sanctuary with earnest distinctness in aiding us to open up the way for the introduction of a more glorious light, inviting all to the great feast of intelligence and freedom.[109]

Read in context, this is a flowery call to action. It is rhetoric, not a formal request of assistance from a school board to the clergy, as the FRC brief suggests. This report even undercuts FRC's more general point, that there exists "long-standing historical connection between school boards and religion in general."[110] Later in the report, the board explained "that nothing of a sectarian character will be permitted to intrude itself into these schools, through books or otherwise."[111] The board was also intent on keeping religious schools and religion separate from the public schools in other ways, to avoid confusion, distress, and destruction. In the report, it wrote:

> Religion has its teachers and its separate houses of instruction, open like ours to all who choose to come. . . . [B]ut no . . . religious sect, must attempt to interfere in our arrangements with their special tenets, nor cross the thresholds of these institutions with any other

107 Detroit Bd. of Educ., The Introductory Report of the Board of Education for the City of Detroit Together with the Rules and Regulations under the Organization: Accompanied by the Law Establishing Free Schools: March 1842, at 3 (Bagg & Harmon 1842) [hereinafter Detroit Report].
108 *Id.*
109 *Id.*
110 FRC Brief, *supra* note 9, at 11.
111 Detroit Report, *supra* note 107, at 8.

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> intent than to aid us in the performance of our duty. Whilst we hold sacred their high province, they must respect ours, and they should give us credit for this explicit determination, which is made and should be announced to avoid the confusion and distress which have grown out of improper influences that have been exerted in other cities and states to an extent in some instances totally destructive to *any* system of *scientific and moral education* whatever.[112]

So, from the outset, we see no evidence of school board prayer in Michigan and FRC advances weak historical evidence in sloppy statements. It gets worse.

2. New York

The New York history is just as tenuous. Again, no actual evidence of prayer is mentioned.

In 1789, the New York legislature passed an act for the sale of state lands that required a surveyor general to set aside two lots in each township, one for gospel purposes and one for school purposes.[113] The trustees of the gospel and school lots were just that: trustees of those two plots of surveyed land. They collected rent from tenants that went into a town school fund, which the trustees doled out to support the schools and the gospel. Today, the latter would be understood as unconstitutional.[114]

The FRC argued that an 1846 statute "notes that each town superintendent now has the school-related powers formerly held by each town's 'trustees of the Gospel and school lots'" and that "[t]he concept of a direct linkage between school superintendents and the Gospel demonstrates the historical connection between public schools and religion in New York."[115] But FRC fails to disclose that the 1846 statute it cited actually *abolished* the office that it claims

112 *Id.*

113 SAMUEL SIDWELL RANDALL, THE COMMON SCHOOL SYSTEM OF THE STATE OF NEW-YORK 5, 132 (1851) https://archive.org/details/cu31924032513412/page/n7.

114 RANDALL, *supra* note 113, at 132–33 (1851). *See also* Everson v. Bd. of Educ., 303 U.S. 1 (1947); Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664 (1970); Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Locke v. Davey, 540 U.S. 712 (2004).

115 FRC Brief, *supra* note 9, at 11 (citing STATUTES OF THE STATE OF NEW YORK RELATING TO COMMON SCHOOLS 9 (C. Van Benthuysen 1847).

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provided a direct link between schools and the "gospel": "The office of trustees of the Gospel and school lots in the several towns in this state, is hereby abolished; and the powers and duties now by law conferred and imposed upon said trustees, shall hereafter be exercised by the town superintendent of common schools."[116] Even if this were somehow relevant, this law proves that the history of this potential connection was far from "unbroken."

Instead of citing historical examples of school board prayers to show a history of school board prayers, FRC cited a law that mentioned an office that hinted at a link between religion and education without realizing or deliberately concealing that the statute actually abolished the office that supposedly proved the link. This does not prove a long, unbroken history of school board prayer.

3. North Carolina

Wicks and the FRC both claim that 17 attendees to an educational meeting in North Carolina were "ministers of the gospel." Wicks adds that "a large proportion of the teachers were preachers."[117] One need not even track down the original source to see that this has no bearing on a long, unbroken, unambiguous history of school board prayer. The claim is not that there was prayer, only that some attendees at one particular educational meeting were preachers. That is neither shocking nor relevant, and is entirely consistent with a separation of church and state that prohibits prayer at school board meetings.

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116 Statutes of the State of New York Relating to Common Schools 9 (C. Van Benthuysen 1847), https://books.google.com/books?id=Yw08sJDnpegC; *See also* Emerson W. Keyes, Laws of New York Relating to Common Schools 176 (1879), https://books.google.com/books?id=ocgSAAAAYAAJ&pg=PA176.

117 Wicks, *supra* note 48, at 31 n. 189; *Id.* at *9–10 (quoting M.C.S. NOBLE, A HISTORY OF THE PUBLIC SCHOOLS OF NORTH CAROLINA 175 (1930)) ("Sixty-five of the delegates were women and seventeen were ministers of the gospel – a matter of statistics which shows that . . . a large proportion of the teachers were preachers."); FRC Brief, *supra* note 10, at 9–10:

> In M.C.S. Noble's *A History of the Public Schools of North Carolina*, Chapel Hill: The University of North Carolina Press (1930), the author records that the Boards of County Superintendents throughout the state were required to send two delegates each to the state-wide meeting in 1859. *Id.* at 175. Seventeen of those delegates were "ministers of the gospel" (*Id.*), again demonstrating the historical, direct connection between school boards and people of faith.

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Even so, the FRC's history is not forthright because it portrays the meeting as official, mandatory, and statewide. The original source does not support this claim. It refers to a "State Educational Convention"[118] whose members met at annual meetings around the state. Other sources call this association an "organization for the teachers," what we might call a teacher's association today. It was "officially known as the 'Educational Association of North Carolina'" and was open to anyone concerned about education.[119] One source described some of the attendees as "friends of education."[120] FRC's original source noted that the association did *not* include many public school teachers: "Evidently there were very few common school teachers present . . . ."[121] However, the association "counted among its members private school teachers, common school teachers, common school officials, college professors, lawyers, doctors, editors, politicians, and business men . . . enlisted in the cause of education whether public, private, or denominational."[122] The very purpose of the association according to the source FRC cites was to unite the "friends and supporters *outside* the teaching profession."[123]

The organization eventually became an official government body, but not during the time period cited by FRC.[124] And it did not exist not for long. As the FRC source noted, "the Association met from year to year until it died under the pressure of the times during the closing days of the Civil War."[125] More importantly, FRC actually mentions the official government body, the Board of County Superintendents, but passes over this mention without comment, instead holding up this private association to the court.[126]

"Other annual meetings of the association before the collapse

118 M. C. S. NOBLE, A HISTORY OF THE PUBLIC SCHOOLS OF NORTH CAROLINA 168, 175 (1930).

119 EDGAR W. KNIGHT, PUBLIC SCHOOL EDUCATION IN NORTH CAROLINA 176 (1916) https://babel.hathitrust.org/cgi/pt?id=mdp.39015016896436;view=1up;seq=190.

120 *Id.*

121 NOBLE, *supra* note 118, at 175.

122 *Id.* at 170.

123 *Id.* at 168 (emphasis added).

124 It became an official body by an act of the legislature on February 23, 1861. KNIGHT, *supra* note 119, at 176 n.1. That is two years after the 1859 meeting FRC cites.

125 NOBLE, *supra* note 118, at 170. The Civil War ended when Robert Lee surrendered to Ulysses S. Grant at Appomattox on April 9, 1865.

126 FRC Brief, *supra* note 9, at 10.

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of the Confederacy were held," including "in Newbern, in 1859."[127] The FRC brief focuses on that one specific meeting, the "Newbern Meeting," the fourth annual gathering of the Convention.[128] That meeting took place on June 14, 1859 at 8 p.m. and involved 238 delegates attending from 38 counties.[129] In her article, Wicks claims that "a large proportion of the teachers [present] were preachers."[130]

Lawyers are also not statisticians, but one need not be a mathematician to reject Wicks's conclusion that "a large proportion of the teachers were preachers." Seventeen out of 238 delegates is not a "large proportion" to begin with—only about 7 percent—and on top of that, not all of the attendees were public school teachers: "[V]ery few common school teachers [were] present."[131] Even were this statistical tidbit important to show a history of school board prayer, there is no reason to believe that any of the "very few common school teachers" were also ministers.[132]

FRC also suggests that this was not just an official government meeting, but also mandatory: "[T]he author records that the Boards of County Superintendents throughout the state were *required* to send two delegates each to the state-wide meeting in 1859."[133] This "two required delegates" claim and its implication are deceptive. In truth, the source FRC cites tells a different story. Because there were "very few" teachers present at the Newbern meeting—the meeting FRC cites—the association voted on a resolution "requesting" that each school board, in the future, send "two representatives" to meetings of the association.[134] The school boards appear to have declined.[135] FRC implies that attendance at this meeting was required by the government, when in fact, so few government representatives were present that the private association decided to ask the government for help and was rebuffed. The "state-wide" aspect of this meeting is an oversell. Delegates came only from about 44 percent of counties—38

127 Knight, *supra* note 119, at 176.
128 FRC Brief, *supra* note 9, at 10.
129 *Id.*; Noble, *supra* note 118, at 170.
130 Wicks, *supra* note 48, at 31 n.189.
131 Noble, *supra* note 118, at 175.
132 *Id.*
133 FRC Brief, *supra* note 9, at 9–10 (emphasis added).
134 Noble, *supra* note 118, at 175.
135 The attendance at the next meeting was the smallest ever (85), again with very few teachers even though they chose a day on which the common schools were closed so teachers might attend. Noble, *supra* note 118, at 178. The next convention had fewer still; only 51 attended. *Id.* at 179.

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of the 86 North Carolina counties that existed in June of 1859.[136]

So there are significant problems with the veracity of FRC's portrayal of this piece of evidence, even if the evidence were probative. The North Carolina association was a group of people interested in both public and private education, not government officials required to attend or bound by the Establishment Clause of the First Amendment. The meetings did not have official government status. Much like the Congressional Prayer Caucus Foundation is not actually part of Congress, the State Education Convention was not an arm of the state.

In summary, the best evidence of school board prayer in North Carolina offered by Wicks and FRC is that, for about a decade, there existed an organization concerned with public, private, and denominational education, to which any member of the public could be a member, and, at its annual convention in 1859, that organization counted 17 ministers among its 238 delegates. This is so far removed from a long, unambiguous, and unbroken history of school board prayer as to be utterly unrelated to the question.

4. Missouri

The Missouri evidence at least centers on an "invocation," according to the FRC. Wicks cites FRC and FRC has one paragraph of four lines that cites an 1860 source — *Sixth Annual Report of the Superintendent and Secretary to the Board of St. Louis Public Schools* — that mentions an invocation: "After the invocation, offered by the Rev. Mr. Weaver, the exercises consisted of the reading of the reports by the Superintendent. . . ." [137] That short quote fails to set the stage for the invocation, with the book title alone offering the only context to infer that this was indeed a prayer at a local school board meeting. But, as the actual text shows, it was not.

The "report" was delivered to what may sound like a school board. However, the reported invocation occurred at the "closing exercises of the Night Schools . . . at the High School hall."[138] Attendees

136 NOBLE, *supra* note 118, at 175; *North Carolina County Formation*, STATE LIBRARY N.C., https://statelibrary.ncdcr.gov/ghl/genealogy/nc-county-formation (last visited Feb. 5, 2019).

137 Wicks, *supra* note 48, at 30 (citing the FRC brief rather than a specific source); FRC Brief, *supra* note 9, at 9 (citing IRA DIVOLL & C. P. E. JOHNSON, SIXTH ANNUAL REPORT OF THE SUPERINTENDENT AND SECRETARY TO THE BOARD OF ST. LOUIS PUBLIC SCHOOLS 41 (1860), https://archive.org/details/annualreportboa01diregoog/page/n240).

138 IRA DIVOLL & C. P. E. JOHNSON, SIXTH ANNUAL REPORT OF THE

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included all the students from the different schools, their teachers, and a wider audience. The honored guests on the dais included "[m]ost of the members of the School Board, and many persons who had been invited for the occasion."[139] In other words, this would be today something closer to a graduation ceremony, *not* a school board meeting. While invocations may have been typical for such closing ceremonies back then, the Supreme Court has been unequivocal that such prayers are unconstitutional.[140] This context, ignored or intentionally buried by FRC, shows an unconstitutional prayer that does nothing to bolster the argument for a history of *school board* prayer.

In researching this article, it became increasingly clear that the FRC's historical methodology consisted of searching old reports for keywords such as "prayer," "invocation," and the like. Employing a similar search of a compendium of every annual report of the Superintendent and Secretary to the Board of St. Louis Public Schools covering years 1859 through 1867 comes up with this single mention of prayer and one other.[141] The Fifth, Eighth, Tenth, Eleventh, Twelfth, and Thirteenth annual reports have no prayers

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Superintendent and Secretary to the Board of St. Louis Public Schools 41 (1860), https://archive.org/details/annualreportboa01diregoog/page/n240.

139 *Id.*

140 Lee v. Weisman, 505 U.S. 577, 598–99 (1992).

141 The Seventh Annual Report, covering 1860–1861 had one similar prayer that occurred at closing ceremonies:

> EXHIBITION OF THE EVENING SCHOOLS.
> The closing exercises of these schools took place the last night of the session, the 3lst of January, in the High School Hall. Besides the teachers and scholars of the evening schools, there were present the members and officers of the Board of Public Schools, and a large number of ladies and gentlemen, who manifest a lively interest in this department of public instruction — altogether filling the Hall to its greatest capacity.
> The Hon. Washington King, Chairman of the Evening School Committee, presided. The exercises opened with prayer by the Rev. Galusha Anderson, after which the Superintendent read various reports concerning the schools, and made such explanatory statements as the occasion called for.

Ira Divoll & M.C. Jennings, Seventh and Eighth Annual Reports of the Superintendent and Secretary to the Board of St. Luis Public Schools 26 (1862), https://archive.org/details/annualreportboa01diregoog/page/n322.

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or invocations. If anything, this evidence cuts against the argument that there is a history of school board prayer justifying an expansion of *Marsh-Town of Greece* because it shows that prayers rarely occurred (only twice), not at school board meetings, and not in ways that were constitutional.

5. Pennsylvania – Family Research Council Example #1

In their attempt to establish a history of school board prayer in Pennsylvania, FRC and Wicks both lift a line from the 1820 "Second Annual Report of the Controllers of the Public Schools of the First School District of the State of Pennsylvania":

> Desirous, notwithstanding, of being ever mindful that human exertions for advancing the welfare of mankind, can only prove availing through the interposition, and blessing, of the beneficent Ruler of all things, it is incumbent upon us to commend these humble efforts, and purposes, to the favour of Heaven.[142]

There are at least three problems with this example. First,

142 Wicks, *supra* note 48, at 31 n.186:

> *Id.* at *4 ("Desirous, notwithstanding, of being ever mindful that human exertions for advancing the welfare of mankind, can only prove availing through the interposition, and blessing, of the beneficent Ruler of all things, it is incumbent upon us to commend these humble efforts, and purposes, to the favour of Heaven." (quoting SECOND ANNUAL REPORT OF THE CONTROLLERS OF THE PUBLIC SCHOOLS OF THE FIRST SCHOOL DISTRICT OF THE STATE OF PENNSYLVANIA 7 (1820))).

FRC Brief, *supra* note 9, at 4:

> The Controllers of the Public Schools in Philadelphia, Pennsylvania were not shy about including the text of their prayers in the actual minutes of their meetings. For example, consider the S*econd Annual Report of the Controllers of the Public Schools of the First School District of the State of Pennsylvania*, Philadelphia: Board of Control (2d ed. 1820). The February 1, 1820 entry contains the following prayer:
> Desirous, notwithstanding, of being ever mindful that human exertions for advancing the welfare of mankind, can only prove availing through the interposition, and blessing, of the beneficent Ruler of all things, it is incumbent upon us to commend these humble efforts, and purposes, to the favour of Heaven. Id. at 7.

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even if this were a prayer, and perhaps some consider it so, it is in a written report, not spoken at a school board meeting in front of attendees.[143] In 1818, the state legislature passed a law to provide for the education of children in Philadelphia, particularly indigent children, at the public expense. The city and county of Philadelphia became that First School District. Through an overly complicated selection process, the Controllers then operated something like a school board.[144] The 1818 law required the Controllers to publish an annual statement in February detailing their expenses and the number of children in the schools.[145] The quoted sentence appears in the Controller of the Public Schools for the First School District's second report.[146] That is a mouthful, but the report itself is fairly short. It lists the number of students at each school, breaks down the cost of education for each child, and, toward the end, hits some lofty notes in lengthy sentences on the purpose of education that precede the "beneficent Ruler" quote, which concludes the report. Although this school board appears to have met regularly and was required to do so, FRC does not argue that those meetings had prayer, citing this written report instead.[147]

Secondly, it is unclear that this is a "prayer" in the vein of *Marsh* or *Town of Greece*. An argument can be made both ways. It's certainly not spoken. And, importantly, we cannot know that the author intended the flourish to be something more—that he intended it to be a prayer at all.

Thirdly, if this is considered a prayer, prayers happened

143 Roberts Vaux, Second Annual Report of the Controllers of the Public Schools of the First School District of the State of Pennsylvania 7 (1820), https://goo.gl/9dLBH4.

144 John Trevor Custis, The Public Schools of Philadelphia: Historical, Biographical, Statistical 9 (1897).

145 "An act to provide for the education of children at public expense within the city and county of Philadelphia, approved March 3, 1818," Acts of the General Assembly of the Commonwealth of Pennsylvania 126 (Harrisburg, Authority 1818), ("Sect. 7. . . . That the said controllers shall meet at least quarterly, and may call special meetings whenever the same may be deemed expedient. They shall keep regular minutes of all their proceedings, and shall keep regular books of accounts, which shall be examined and settled annually by the auditors of the county, and shall publish a statement in the month of February in every year of the amount of expenditure, and of the number of children educated in the public schools.").

146 Roberts Vaux, *supra* note 143, at 7.

147 Acts of the General Assembly of the Commonwealth of Pennsylvania, *supra* note 145, at 126; Roberts Vaux, *supra* note 143.

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rarely. One prayer a year hardly proves the long, unbroken history that the example is proffered to bolster. This is especially true when the single annual "prayer" was intermittent and eventually dropped altogether. The author of the report, Roberts Vaux, was a champion of public schools, judge, philanthropist, and Quaker. In the next annual report, Vaux tones down the concluding "prayer," writing that the goals of education "can only be accomplished through the blessing and protection of All Bountifull Goodness."[148] The fourth report concludes with a nod to "Divine Providence"[149] and the fifth report mentions the "favour of the parent of mercies."[150]

The FRC brief includes all these quotes, citing the second, third, fourth, and fifth reports.[151] FRC does not cite the first or sixth reports because they do not contain any language that can be even be argued to be a prayer.[152] Neither do later reports.[153] Vaux died in 1836 and his replacement, Thomas Dunlap, was sporadic too, writing in

148 ROBERTS VAUX, THIRD ANNUAL REPORT OF THE CONTROLLERS OF THE PUBLIC SCHOOLS OF THE FIRST DISTRICT OF THE STATE OF PENNSYLVANIA 6–7 (Philadelphia, 1821), https://hdl.handle.net/2027/chi.098201080.

149 ROBERTS VAUX, CHAMBER OF THE CONTROLLERS, FOURTH ANNUAL REPORT OF THE CONTROLLERS OF THE PUBLIC SCHOOLS OF THE FIRST DISTRICT OF THE STATE OF PENNSYLVANIA 8 (Philadelphia, 1822), https://hdl.handle.net/2027/uc1.a0004904660?urlappend=%3Bseq=53.

150 ROBERTS VAUX, CHAMBER OF THE CONTROLLERS, FIFTH ANNUAL REPORT OF THE CONTROLLERS OF THE PUBLIC SCHOOLS OF THE FIRST DISTRICT OF THE STATE OF PENNSYLVANIA 10 (Philadelphia, 1823), https://hdl.handle.net/2027/uc1.a0004904660?urlappend=%3Bseq=73.

151 FRC Brief, *supra* note 9, at 4–5; ROBERTS VAUX, *supra* note 148, at 6–7 ("Recurring to the highly interesting duties especially devolved upon them, the Controllers again solicit the co-operation of their constituents in the advancement of purposes so certainly identified with the welfare of this great community, the perfection of which, however, they know can only be accomplished through the blessing and protection of ALL BOUNTIFULL GOODNESS."); ROBERTS VAUX, *supra* note 149, at 8 ("above all the favour of Divine Providence."); ROBERTS VAUX, *supra* note 150, at 10 ("the all-sufficient favour of the PARENT OF MERCIES.").

152 *See* ROBERTS VAUX, FIRST ANNUAL REPORT OF THE CONTROLLERS OF THE PUBLIC SCHOOLS OF THE FIRST DISTRICT OF THE STATE OF PENNSYLVANIA (Philadelphia, 1819), https://hdl.handle.net/2027/chi.098201022?urlappend=%3Bseq=3; ROBERTS VAUX, SIXTH ANNUAL REPORT OF THE CONTROLLERS OF THE PUBLIC SCHOOLS OF THE FIRST DISTRICT OF THE STATE OF PENNSYLVANIA (Philadelphia, 1824), https://hdl.handle.net/2027/uc1.a0004904660?urlappend=%3Bseq=95.

153 *See, e.g.*, Roberts Vaux, *Twelfth Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania* (1830), *in* THE REGISTER OF PENNSYLVANIA 154–56 (Samuel Hazard ed., 1830), https://goo.gl/5jLLfD.

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the twenty-first report that "Heaven will continue to smile upon the undertaking . . ."[154] but, for instance, omitting such mentions from the twenty-second report.[155]

No such language appears in any annual reports after the twenty-sixth.[156] There is a rare passing mention of religion or a god, but the real substance of the reports often undercuts the claims about a history of prayer. The twenty-sixth annual report includes a December 9th, 1834 resolution that bears tangentially on this argument.[157] In it, the Board of Controllers of the public schools condemns religious exercise, religious books, or religious lessons in the public schools and declares them illegal.[158] The board did so for

154 Thomas M'Kean Pettit, Memoirs of Roberts Vaux 26 (Philadelphia, 1840), https://books.google.com/books?id=w4jtG7MHI6cC; Thomas Dunlap, Twenty-First Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania 11 (n.p. 1839), https://hdl.handle.net/2027/chi.098201145?urlappend=%3Bseq=14.

155 *See* Thomas Dunlap, Twenty-Second Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania 11 (Philadelphia, 1840), https://hdl.handle.net/2027/chi.098201145?urlappend=%3Bseq=40.

156 The 26th through 49th annual reports do not mention religious invocations or prayers. *See* Hathi Trust Digital Library, https://catalog.hathitrust.org/Record/008696942 (scroll to "Viewability" and click "Full View" to see each annual report organized by date) (last visited Oct. 16, 2019). Most of the reports from 1838 (21st) through 1912 (94th) are searchable, and do not mention religious invocations or prayers. *See* Hathi Trust Digital Library, https://goo.gl/yejmme (scroll to "Viewability" and click "Full View" to see each annual report organized by date) (last visited Oct. 16, 2019).

157 Henry Leech, Twenty-Sixth Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania 5–6 (Philadelphia, Mifflin & Parry 1844), https://hdl.handle.net/2027/nyp.33433076014004?urlappend=%3Bseq=13.

158 Other than using the bible as a textbook taught "without note or comment," as was typical at the time. *Id.* at 4. Dated June 30, 1844, the report was issued smack in the middle of the Philadelphia Bible Riots, which occurred in two spurts, in early May and early July of that same year. The resolution itself did not precipitate the riots and is from a decade earlier, but had it been stronger (had it even halted using the bible as a textbook "without note or comment") it might actually have stopped the riots. The disagreement between Irish Catholic immigrants, who wanted to read the Douay Bible, and Protestants, who preferred the King James Version, was fanned into a combustible controversy that led to the Bible Riots. *See generally* Vincent P. Lannie & Bernard C. Diethorn, *For the Honor and Glory of God: The Philadelphia Bible Riots of 1840*, 8 Hist. of Educ. Q. 44, at 47–48 (1968). To be fair, it was not just the Board of Controllers' exception that allowed for Bible-reading

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reasons we would recognize today, including that parents have the right to direct their children's religious education and ample means to do so, that it would be impossible for the state to select a religion appropriate to all citizens in such a diverse community, and that preventing religious indoctrination by the government violates no one's rights:

> *Whereas*, The Controllers have noticed, that the practice exists in some of the schools of introducing religious exercises, and books of a religious character, which have not been recommended or adopted by this Board, in the lessons prepared for the use of the scholars; and believing the use of such exercises or books may have a tendency to produce an influence in the schools of a sectarian character,
>
> . . .
>
> *Resolved*, That the Constitution of the State of Pennsylvania, which has provided for the establishment of public schools, has also wisely guaranteed the right of all to worship God according to the dictates of their conscience; and as the parents of children have both by law and nature the guardianship of them during their minority, so they alone are responsible for the effects of such guardianship; and their right to impress the minds of their children with such views of a religious nature as they, may think most important, ought not to be interfered with, especially by a body exercising its authority by virtue of the laws of the Commonwealth.
>
> . . .
>
> [W]hilst this Board is convinced of the utter impossibility of adopting a system of religious instruction that should meet the approbation of all religious societies, they are equally satisfied no injury need result to the pupils from confining the instruction in our schools to the ordinary branches of elementary education; inasmuch as ample facilities for religious improvement are presented for the choice

without comment, but also the 1838 state law that kept the bible in the public schools, that inevitably led to divineness, rancor, and eventually violence. *Id.*

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> of parents or guardians in Sabbath schools, and other establishments for that purpose, which are organized and supported by various religious communities.
> . . .
> [A]nd in prohibiting the introduction of religious forms in [public schools], this Board will invade the rights of *none*, but on the contrary, by so doing, will maintain the rights of *all*—and therefore
> *Resolved*, That this Board cannot but consider the introduction or use of any religious exercises, books or lessons into the public schools, which have not been adopted by the Board, as contrary to law; and the use of any such religious exercises, books or lessons, is hereby directed to be discontinued.[159]

This was written fourteen years after that non-prayer was included in the second annual report and belies the erroneous narrative that is popular in some quarters and which holds that religion was "pushed" out of the schools by the Supreme Court in the mid-Twentieth century.[160] The FRC itself promotes this

159 Leech, *supra* note 157, at 5–6.

160 There is a temporal tie between this resolution, Vaux, and *Vidal v. Girard's Executors*, a Supreme Court case beloved by Christian nationalists like those at FRC for its lines about teaching the Bible and this, "a Christian country." Vidal v. Girard's Ex', 43 U.S. 127, 198–200 (1844). Stephen Girard was one of the richest Americans ever and an atheist. He died in December of 1831. Vaux was chosen, along with two others, to manage the Girard Trust in September 1832. Joseph J. McCadden, Education in Pennsylvania 1801-1835 and its Debt to Roberts Vaux 138–39 (1937). In this capacity, Vaux "was called upon to help organize the educational institution that was to be founded for orphans under the provisions of the will of Stephen Girard." *Id.* Girard left "$10,000 to the Comptrollers of the Public Schools for the City and County of Philadelphia in his will." Stephen Girard, *The Will of the Late Stephen Girard, Esq.*, *in* Biography of Stephen Girard, with his Will Affixed 1, 2 (1832). The first of these resolutions is from December of 1834, shortly after Girard's death and after his will presumably began to pay dividends for the community.

That will became the subject of the *Vidal v. Girard's Executors* case and became famous because Girard included provisions that set up a huge trust to start a college and then banned clergy from teaching or visiting the school. *Id.* at 12. Daniel Webster argued in the Supreme Court to overturn Girard's will. Girard was an open atheist and Webster saw the case as "a defense of Christianity against the inroads of paganism and infidelity." Cheesman A. Herrick, Stephen Girard, Founder 154 (1923). As one president of Girard College

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narrative, publishing a sample sermon meant to help Christians "Have Maximum Patriotic Impact."[161] In that sermon, FRC dates the decline of America to the Supreme Court's removal of religion from the public schools in 1962:

> Unfortunately, the U.S. Supreme Court has ignored the original intent of the Founding Fathers, trashed four centuries of America's Judeo-Christian heritage, and turned a statement in one of Jefferson's private letters on its head in declaring a two-way "Wall of Separation" between church and state.
>
> The Result: Black robed tyrants feel compelled to remove all religious influences from public institutions. The High Court outlawed public prayer in the schools in 1962, out went public Bible reading in 1963, and in 1980, down came the Ten Commandments from school house walls! This agenda of radical secularization has not only been zealously prosecuted by the activist courts, but by extension, the various public entities, school boards, educators, and teachers.[162]

We can see from this 1834 resolution—and from all the FRC's examples—that it is actually the FRC that is twisting and

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and Girard biographer observed a century later, "[a] study of Webster's argument in the Girard Will case shows that, realizing he had a weak case in point of law, he made a bold attempt to go outside of the law and to substitute for legal arguments what has well been termed 'an impassioned appeal to emotion and prejudice.'" *Id.* While outside the scope of this article, it seems possible that Girard, or the provisions of his will, or simply the influence of his a-religious generosity, may have influenced the Board of Controllers' resolutions.

161 This sermon appears at least twice on the FRC website and on other websites with thanks given to FRC. The likely author is Kenyn Cureton, as it appears in his FRC manual. KENYN CURETON, FAMILY RESEARCH COUNCIL, CULTURE IMPACT TEAM RESOURCE MANUAL: HOW TO ESTABLISH A MINISTRY AT YOUR CHURCH 121–30 (2011). As a stand-alone essay it appears on FRC's website in a 10-page PDF. *Christian Citizenship Sunday: How You Can Have Maximum Patriotic Impact*, FAMILY RESEARCH COUNCIL, https://downloads.frc.org/EF/EF12C62.pdf. *See also* Frederick Clarkson, *A Manual to Restore a Christian Nation that Never Was*, PUB. EYE Q., Winter 2018, at 17–23.

162 Cureton, *supra* note 161, at 128.

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distorting history.

6. Pennsylvania – Family Research Council Example #2

FRC makes a second argument about Pennsylvania school board prayers, again citing a written report: Rev. Gilbert Morgan's 1837 *Report on Public Instruction in Pennsylvania*. Morgan was a clergyman who flitted from school to school.[163] At or near the time he authored the report, he was president of Western University, which would become the University of Pittsburgh, but his "term was short and unsuccessful; he could not manage an effective compromise in the eternal conflict between theoretical and practical education. The state did not give money, nor did the city, nor did the alumni, nor did the community. By 1837 only two professors remained . . ."[164]

In this instance, there is no argument that the report included a prayer. It did not. According to FRC:

> In his *Report* . . . Rev. Gilbert Morgan states that the members of the state board of education "should be a fair representation of the geographical divisions of the State, and what is more important, of the great religious communities of the people." *Id.* at 18 (emphasis added). Clearly, the religious connection with the state board is not only assumed – it is mandated. The state board also resolved to "solicit the hearty cooperation of the clergy of all denominations in promoting the general objects of this Report; and, that a copy be transmitted to every clergyman in the State." *Id.* at 4.[165]

Morgan recommended two things in his report: "a plan for a Teacher's Seminary [school] and for a Board of Public Instruction."[166]

163 At the time he authored this report, he was at Western University (which became the University of Pittsburgh), and prior to that, he was at Union College in Schenectady, New York. Robert C. Alberts, Pitt: The Story of the University of Pittsburgh, 1787–1987, at 17 (1986). After less than two years at Western, he "accept[ed] a position in North Carolina in a school for young ladies." *Id.* at 18.

164 Alberts, *supra* note 163, at 18.

165 FRC Brief, *supra* note 9, at 5 (citing Gilbert Morgan, Report on Public Instruction in Pennsylvania (1836), https://books.google.com/books?id=5VNJ9fVqOjUC).

166 Morgan, *supra* note 165, at 5.

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It was presented at a public meeting in Philadelphia and other meetings around the state.[167] The Philadelphia meeting adopted the main recommendations in the report, including creating a Board of Public Instruction, a state level body tasked with dealing with the broad strokes of the state's education.[168] The Board of Public Instruction would have "duties which the legislature will transfer to their board" and which deal mostly with higher education.[169] The report itself was clear, this delegation of power "implies no intermeddling with the internal management committed to local boards," essentially saying that a board or legislature at this level "cannot give advice, suggest improvements, [or] point out evil tendencies"[170] as it is too far removed from local boards.

Morgan's report listed seven duties of the board,[171] none of which were religiously-based, and suggested characteristics it should possess, including permanent board members, who were "a fair representation of the geographical divisions of the State, and what is more important, of the great religious communities of the people."[172] Although the FRC brief implies that inculcating religion was the goal of this inclusion, a full reading of the report shows this was actually intended to ensure that the interests of the diverse schools in the state were represented.

At the time the report was written, Pennsylvania was unique in its religious, ethnic, and linguistic diversity. Regarding religion, "[b]y the eve of the American Revolution . . . Pennsylvania was home to an

167 JAMES PYLE WICKERSHAM, A HISTORY OF EDUCATION IN PENNSYLVANIA 614 (1886) ("[M]eetings were subsequently held at Harrisburg, Pittsburgh and other places, to forward the project.").

168 MORGAN, *supra* note 165, at 3 ("[W]hile we do not mean to express our judgment upon every suggestion contained in the details of the Report, we do give our unqualified sanction and strongest recommendation to the establishment of a Board of Instruction . . . .").

169 *Id.* at 16.

170 *Id.*

171 *Id.* at 16–17.

172 *Id.* at 18 ("Its members should be a fair representation of the geographical divisions of the State, and what is more important, of the great religious communities of the people. These have appropriated their own earnings to found and cherish the colleges. The constitution, charters and laws all claim for these communities equal privileges. There is no way of educating the people by repelling those who alone can render that education sure and favourable to public virtue. The policy of the State is to make the best of all we have, to distribute funds in proportion to the people benefitted, and to require like responsibility in the universal success of the public system.").

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extraordinarily diverse number of congregations, including Lutheran (142), German Reformed (126), Presbyterian (112), Quaker (64), Mennonite (64), Baptist (24), Anglican Episcopalian (24), Moravian (13), Roman Catholic (11), Methodist (7), and Jewish (2)."[173] No other colony "had such a mixture of languages, nationalities, and religions. Dutch, Swedes, English, Germans, Scotch-Irish, Welsh; Quakers, Presbyterians, Episcopalians, Lutherans, Reformed, Mennonites, Tunkers, and Moravians, all had a share in creating it."[174] The report explains in its very first paragraph that it was motivated in part to weave these diverse threads into a unified tapestry by "bringing separate languages and divided communities into one homogeneous and educated commonwealth."[175]

Though the major recommendations were adopted, the report had no recognizable impact. In one exhaustive, nearly 700-page history of Pennsylvania schools published in 1886, it gets a paragraph that does not even mention the proposed board.[176] No Board of Public Instruction was formed and, obviously, there were no prayers at the meetings it did not have. The report's other significant recommendation—a seminary or normal school for teachers—was not implemented until the surge in interest in education in the 1850s at about the same time the state formed the public education system, some 20 years after the report.[177]

Morgan's report consisted of recommendations, which had little to no impact, and the FRC brief built that into a religious connection with the state board that was "mandated." This is representative of FRC's brief, building up nothing in an attempt to show a history that does not exist. And because this is simply false, it actually disproves the FRC argument.

7. Massachusetts – Family Research Council Example #1

Wicks gives a single example of a Massachusetts prayer:

173 William C. Kashatus, *William Penn's Legacy: Religious and Spiritual Diversity*, 37 Pa Heritage Mag. 2 (2011).

174 Sydney George Fisher, The Making of Pennsylvania, at iii (8th ed 1908).

175 Morgan, *supra* note 165, at 5. This is also why the author suggested having college presidents on the board: "They represent every portion of the State, and in a very just proportion the religious communities." Morgan, *supra* note 165, at 18–19.

176 Wickersham, *supra* note 167, at 614.

177 *Id.* at vi. The Department of Common Schools was created 20 years later. *Id.* at 345–46.

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> In Massachusetts, the *Common School Journal* for the year 1842 explained that public school boards in Massachusetts could have clergymen as members.[178]

The Wicks citation reads:

> *Id.* at *6 (citing *Fifth Annual Report of the Secretary of the Board of Education,* 4 COMMON SCH. J. 321, 323 (1845) (stating that the State Normal School at Bridgewater dedication ceremony began after a reverend delivered an introductory prayer)).[179]

Something was lost in the translation from the FRC amicus brief to the Wicks article. The FRC brief reads:

> *The Common School Journal for the Year 1845, Volume VII,* Edited by Horace Mann, Secretary of the Massachusetts Board of Education, Boston: William B. Fowle and N. Capen (1845), records that the dedication of the State Normal School at Bridgewater proceeded "[a]fter an introductory prayer by the Rev. Joseph Allen. . . ." *Id.* at 280. That same ceremony also included "the singing of another original hymn" (*Id.*), and "prayer by the Rev. Mr. Gay" (*Id.* at 281).[180]

The citations do not agree in volume, year, or page numbers.[181] It is hard to know where to look. But even if one looks in both places, neither of those poorly-cited sources mention the dedication ceremony for the State Normal School at Bridgewater, let alone a prayer at that ceremony.[182] That is because the new State Normal

178 Wicks, *supra* note 48, at 31.

179 *Id.* at 31 n.187.

180 FRC Brief, *supra* note 9, at 6.

181 Wicks cited volume 4, whereas FRC cited volume 7. In her text, Wicks referred to the 1842 journal, but cited to the journal published in 1845. FRC cites the 1845 journal in both. Wicks cites pages in the 320s while FRC cites pages in the 280s. Wicks, *supra* note 48, at 31; FRC Brief, *supra* note 9, at 6.

182 The report of this prayer cannot be found in either of the sources cited. The *Fifth Annual Report* contains a report from the Bridgewater Normal School, but that report is not on the school's dedication. 4 THE COMMON SCHOOL JOURNAL FOR THE YEAR 1842, at 314 (Horace Mann ed., Boston, William

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Schoolhouse at Bridgewater was dedicated *after* those sources were published, on August 19, 1846.[183] The dedication ceremony of that new schoolhouse *is* recorded in *The Common School Journal for the year 1846*.[184] This appears to be the ceremony to which FRC and Wicks meant to refer.[185] The ceremony, which was very clearly not

B. Fowle and N. Capen 1842). The *Fifth Annual Report* does not mention anything about a prayer at a dedication ceremony anywhere. Not on page 323, not on any page, and not in any version of the report. *See, e.g.*, 7 The Common School Journal For the Year 1845, at 61 (Horace Mann ed., Boston, William B. Fowle and N. Capen 1845), https://hdl.handle.net/2027/uiug.30112041478428?urlappend=%3Bseq=300; 4 The Common School Journal For the Year 1842, at 314 (Horace Mann ed., Boston, William B. Fowle and N. Capen 1842), https://goo.gl/9rrDQC; *Report on the Bridgewater Normal School, in* Fifth Annual Report of the Board of Education Together with the Fifth Annual Report of the Secretary of the Board 11 (1842), https://goo.gl/RVXenT.

There is no record of a dedication of the Bridgewater Normal School in the Fifth Annual Report. The Common School Journals cited in this section can all be found on the Hathi Trust Digital Library. *The Common School Journal*, Hathi Trust Digital Library, https://catalog.hathitrust.org/Record/000045540. The same holds true for Volume VII of *The Common School Journal for the Year 1845*. No record of any prayer or dedication ceremony at page 280 or 281. No record of a prayer at a dedication ceremony on any page. 7 The Common School Journal For the Year 1845, at 61 (Horace Mann ed., Boston, William B. Fowle and N. Capen 1845), https://hdl.handle.net/2027/uiug.30112041478428?urlappend=%3Bseq=300.

183 8 The Common School Journal For the Year 1846, at 280 (Horace Mann, ed., Boston, William B. Fowle 1846), https://hdl.handle.net/2027/mdp.39015014701950?urlappend=%3Bseq=290.

184 *Id.* at 273–88. The dedication ceremony appears on 280–88, and the moments Wicks and FRC meant to cite appear at 280–81.

185 Here is what it says:

> It was just the day for comfort and enjoyment, and there was abundance of both. Early in the morning, two or three hundred of the present and past pupils of the school had collected, with an unusually large number of the friends of education from every part of the State. The Governor was there, the Hon. Mr. Bates, and the Rev. Mr. Hooker, of the Board of Education, and many clergymen, teachers, and professional gentlemen, whom I will not attempt to name. The new schoolroom was filled with pupils, but the procession of invited guests and citizens was ingeniously squeezed in. *After an introductory prayer by the Rev. Joseph Allen, of Northborough, and the singing of an ode, written for the occasion, we believe, by the Rev. Mr. Rodman*,—and well written and well sung it was, — the Hon. Mr. Bates delivered the Dedicatory Address, in which the argument for the necessity of Normal Schools was irresistibly enforced, by the necessity of general education in a

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a school board meeting, included parades, toasts, three speeches, including one by the governor, and the dedication of a new building. Gov. John Reed, the hundreds of students and alumni, guests, and Horace Mann all attended.[186] Citing to prayer at a one-time event does not suggest that prayer was typical at school board meetings, let alone part of a long, unbroken history. If anything, it shows FRC could not unearth a long history of prayer at school board meetings.

This should raise serious red flags about the quality of the historical research. Both Wicks and FRC failed to cite to a source that made their point. FRC missed the volume number and year by a hair (it was VIII, not VII, and it was 1846, not 1845). Wicks noticed and tried to correct FRC's error, but got farther away from the original source.[187]

Wicks pulled, or tried to pull, a single Massachusetts example from the FRC's brief, but FRC cited three more examples that must be examined.

8. Massachusetts – Family Research Council Example #2

The FRC's second example strengthens the suspicion that their primary research methodology involved locating old books

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land so free as ours, — the necessity of a *good* education, — and the consequent need of competent and accomplished teachers, — men trained to the work, as men are trained to all other professions.

After the singing of another original hymn, the Governor addressed the pupils in the plain, unostentatious, but earnest and feeling manner peculiar to him ; and we mistake if he ever did a better day's work in his life. By advice, by encouragement, by examples, he urged them to prosecute in earnest the all-important work they had undertaken ; and the eager attention of the young teachers is the only guaranty needed to insure a faithful recollection of the latter, and a devoted carrying out of the spirit of the Governor's exhortations.

The procession was then re-formed, and proceeded to the new meeting-house, where, after prayer by the Rev. Mr. Gay, an address was delivered by Amasa Walker, Esq., at the request of the Bridgewater Normal Association. . . . Although the third address, of an hour's length, to which the audience had listened, it was heard with pleasure, and spoken with effect.

The company, enlivened by an excellent band of music, then marched to the Town Hall, where a sumptuous collation was prepared for all the pupils and their numerous guests.

Id. at 280–81 (emphasis added).

186 *Id.* at 280–82.

187 FRC Brief, *supra* note 9, at 6; 8 THE COMMON SCHOOL JOURNAL FOR THE YEAR 1846 (Horace Mann, ed., Boston, William B. Fowle and N. Capen 1846); Wicks, *supra* note 48, at 31 n.187.

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using certain keywords (board, education, meeting, school) and then searching those books for prayer keywords (prayer, reverend, invocation). This example is from a small volume that recorded "proceedings" from a "meeting" about equal "school" rights, a meeting that included a "prayer" and a "benediction." The FRC brief declares:

> Another Boston transcript, *Triumph of Equal School Rights in Boston: Proceedings of the Presentation Meeting held in Boston, Dec. 17, 1855* (1856), states, "Prayer was offered by Rev. Charles W. Upham (editor of *The Christian Watch-man*,) after which the President briefly addressed the assembly. . . ." *Id.* at 2. The document also records, "The benediction was then pronounced by Rev. L.A. Grimes, and the exercises terminated." *Id.* at 24.[188]

This example centers on some fascinating and often overlooked history. William Cooper Nell was an African American author and abolitionist.[189] He studied law and could have been a lawyer, but he refused to take an oath to uphold the U.S. Constitution because of its pro-slavery articles. For a time, he published *North Star*, Frederick Douglass's paper. After decades of work, he scored a major victory on April 28, 1855, when the Massachusetts legislature abolished segregated schools, fulfilling Nell's childhood resolution, according to one biographer.[190] The Supreme Court handed down *Dred Scott* twenty-three months later, but in the interim, the black citizens of Massachusetts celebrated Nell and his major victory.

The source the FRC cites is an example of such a celebration. This was not a school board meeting. This was "a meeting of colored citizens of Boston" held "for the purpose of presenting a testimonial to Mr. WILLIAM C. NELL, for his disinterested and untiring exertions in procuring the opening of the public schools of the city to all the children and youth within its limits, irrespective of complexional differences."[191]

188 FRC Brief, *supra* note 9, at 6. *See* original source cited *infra* note 190.

189 Robert P. Smith, *William Cooper Nell: Crusading Black Abolitionist*, 55 J. Negro Hist. 182–84 (1970) www.jstor.org/stable/2716420.

190 *Id.* at 186–96.

191 Triumph of Equal School Rights in Boston: Proceedings of the Presentation Meeting held in Boston, Dec. 17, 1855,

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The celebration "was held in the Southac Street Church," which "was crowded by a finely-appearing and evidently intelligent audience, all of whom appeared to take a lively interest in the proceedings."[192] Nell was escorted in with an honor guard, the meeting was called to order, and officers were chosen. Flowers were presented, plaudits bestowed, more flowers presented, followed by an elegant gold watch inscribed with a tribute, an address by Nell, who was followed by two attorneys, and then William Lloyd Garrison and Charles Lenox Redmond.[193] The cited benediction terminated the meeting, but there's a postscript noting that, the next morning, Harriet Beecher Stowe presented Nell with an inscribed copy of *Uncle Tom's Cabin*.[194]

This was a celebration of desegregation in a church, not a school board meeting. This is a group of private citizens getting together to celebrate a monumental achievement. It had no government authority or imprimatur. The meeting was in no way bound by the First Amendment. Interesting history? Absolutely. Useful history to further the argument that school board prayer is commonplace in American history? Not at all.

9. Massachusetts – Family Research Council Example #3

FRC's next example comes from an unnamed article or excerpt, again from Horace Mann's *Common School Journal*, that, according to FRC, "contemplates that school boards – referred to as 'school committees' – could have actual clergymen as members."[195] Even assuming that this formulation of the unnamed article were true, it does not prove the school board prayer point. It is irrelevant to the question at hand. If, instead, clergymen were *prohibited* from serving on school boards, this would run afoul of the Constitution.[196]

Besides, the truth of this claim is dubious, or at least difficult to verify thanks to FRC's rough scholarship and law office history. The original cited source does not contain anything similar to FRC's

at 1 (Boston, R.F. Wallcut 1856) https://hdl.handle.net/2027/miun.abj5662.0001.001?urlappend=%3Bseq=1.

192 *Id.*

193 *Id.* at 1–24.

194 *Id.*

195 FRC Brief, *supra* note 9, at 6 ("*The Common School Journal for the Year 1842, Volume IV*, Edited by Horace Mann, Secretary of the Massachusetts Board of Education, Boston: William B. Fowle and N. Capen (1845) contemplates that school boards . . . .").

196 *See* McDaniel v. Paty, 435 U.S. 618, 629 (1978).

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claim. FRC cited "*The Common School Journal for the Year 1842*, Volume IV, Edited by Horace Mann . . . (1845) . . . at 323."[197] But clergy are not mentioned within a hundred pages of the cited page of Volume IV (which was published in 1842, not 1845), and two of the rare mentions of clergy in that volume, point out that American clergy support state-church separation.[198]

Perhaps FRC intended to cite the volume actually published in 1845, which was Volume VII? Unfortunately, no mention of clergy appears on the cited page of Volume VII.[199] The report that appears on that page contains no real discussion of who should sit on school committees; however, two pages later, it discusses the qualities of good school masters and clergy do pop up. According to the report, a good school master:

> [S]hould be acquainted with the scholars, should visit them at their home, and show an affectionate, parental interest in their welfare. Surely he may be likened to a clergyman in this; that his power depends not more upon the intelligent performance of his public and required duties, than on the thousand attentions that are prompted by the law of love.

The same page mentions "clergymen" once more: "But the old proverb is true in reference to teachers as well as clergymen, 'Like priest, like people.'"[200] The point is, at most, that good schoolmasters

197 FRC Brief, *supra* note 9, at 6. This may also account for the error in Wicks citation, as she may have conflated this citation with the earlier one. Wicks, *supra* note 48, at 31 n.187.

198 4 The Common School Journal For the Year 1842, at 224 (Horace Mann, ed., Boston, William B. Fowle and N. Capen 1842), https://babel.hathitrust.org/cgi/pt?id=uiug.30112108066629&view=1up&seq=234. ("English clergy believe in the union of church and state,– that is, that the civil arm should uphold and enforce ecclesiastical authority. But the Episcopal church in this country believe no such thing."). *See also id.* at 222. While "committees" are discussed on pages 322–26, they do not appear to be official school boards but rather groups of concerned citizens. *Id.* at 322–26. For instance, on page 323, they are described as "the friends of education, assembled from the vicinity, have invariably been consulted as to the topics for discussion, and through the medium of a committee have generally proposed them." *Id.* at 323. Clergy are nowhere to be found in the discussion of these committees. *Id.* at 322–26.

199 *Id.* at 323.

200 *Id.* at 325.

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have similarities to good clergy.

Given what we have seen of FRC's lax methodology, it seems possible that these two mentions of clergymen on page 325 (not 323) of Volume VII (not IV) tripped FRC up. I cannot find another example that goes to FRC's argument.[201] Whatever the case, this is the "scholarship" federal courts relied on to help prove a history of school board prayer.

10. Massachusetts – Family Research Council Example #4

The American Annals of Education was an educational journal filled with articles, textbook reviews, proposed reforms, stories, letters, poetry, criticism, and more. The wide-ranging collection of ephemera centering on education rose to prominence in the 1830s. As its final Massachusetts example, FRC cites to an "approving reprint of an article" in the 1837 *Annals*.[202] According to FRC, this source asserts that "'commissioners' of the schools should 'rigidly inspect the teacher's method of bringing the great truths of Christianity to bear on the minds and hearts of his pupils.' A failure to do so was taken as a violation of the commissioner's oath of office."[203]

First, again, this has nothing to do with school board prayer. It is an obscure reference to a questionable, at best, and likely unconstitutional suggestion. The *Annals* reproduced, as one of its many items in this particular 500-plus-page volume, an anonymous

201 Except perhaps 7 THE COMMON SCHOOL JOURNAL FOR THE YEAR 1845, at 1 (Horace Mann, ed., Boston, William B. Fowle and N. Capen 1845). Here, the publishers address the reader and they do state, "Next to teachers, the clergymen of our State have taken the most active part in behalf of our schools." *Id.* They go on to note, "...induced many of them . . . add[ed] the duties of a school committee man to the already onerous duties of the pastoral office." *Id.* at 2. And while this goes better to Wicks's and FRC's parenthetical point, it appears on pages 1–2 and seems too far removed from their intended citation, being off by three full volumes and more than 300 pages. FRC Brief, *supra* note 9, at 6; Wicks, *supra* note 48, at 31 n.187.

202 FRC Brief, *supra* note 9, at 7.

203 *Id.*

> *The American Annals of Education and Instruction for the Year 1837, Volume VII*, Conducted by Wm. A. Alcott, Boston: Otis, Broaders & Co. (1837), in an approving reprint of an article from 1799, notes that the "commissioners" of the schools should "rigidly inspect the teacher's method of bringing the great truths of Christianity to bear on the minds and hearts of his pupils." *Id.* at 110. A failure to do so was taken as a violation of the commissioner's oath of office.

Id. at 136.

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pamphlet that was originally "written by a citizen of Pennsylvania" and published in Philadelphia.[204] Why FRC chose to cite the Pennsylvania pamphlet in the Massachusetts section is a mystery, other than perhaps because the *Annals* was published by a Boston printer and FRC's methodology was so poor. The *Annals* presents the pamphlet with little discussion, other than to point out that the prejudices and motivations of an anonymous author cannot be known.[205]

In the *Annals,* the anonymous excerpt concludes about 25 pages before the mention of a violation of a commissioner's oath of office and that mention comes in an entirely different article, an article about resolutions passed by teachers in Maine, not Massachusetts.[206] As one would expect from a collection such as the *Annals*, it features quite a few intervening articles, including thoughts on "Public Institutions for Destitute Children," the "Honor Due to Aged Teachers," a fictional conversation between two new graduates, and answers to questions about writing desks, among other notes.[207] The business about the oath occurred at the Penobscot Association of Teachers meeting held in Exeter, Maine; the teachers passed thirteen resolutions and the eighth appears to be what drew FRC's eye (or keyword search):

> 8. That our Superintending School Committees violate their oaths, in permitting teachers of doubtful *morals* or *qualifications*, to engage in schools under their supervision, and that it is exceedingly desirable that they should understand the branches of education upon which they "certify" teachers "well qualified."[208]

FRC's description—that failing to "rigidly inspect teacher's

204 7 American Annals of Education and Instruction for the Year 1837, at 103 (William A. Alcott & William C. Woodbridge, eds. 1837), https://books.google.com/books?id=iQwCAAAAYAAJ; *see also* A Citizen of Pennsylvania, Thoughts on the Condition and Prospects of Public Education in the United States 34 (Philadelphia, A. Waldie 1836), https://books.google.com/books?id=hCmcAAAAMAAJ.

205 7 American Annals of Education and Instruction for the Year 1837, at 103 (William A. Alcott & William C. Woodbridge, eds. 1837), https://books.google.com/books?id=iQwCAAAAYAAJ.

206 *Id.* at 111, 136.

207 *Id.* at 111–36.

208 *Id.* at 136.

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method of bringing the great truths of Christianity to bear on the minds and hearts of his pupils" was viewed as a violation of their oath—is completely unsupported.[209] The claim can only be seen as dishonest or willfully ignorant. And if it was simply failing to read the pages between keywords, it should never have been submitted to a federal court, to whom we attorneys owe a duty of candor.

11. Iowa

Here, FRC cites the Board of Education of the State of Iowa's 1859 resolutions to invite several local clergymen to open the sessions with prayer and thank them for doing so, and lists "seventeen recorded instances of prayer."[210] This, finally, begins to resemble a claim that would support a history of school board prayer; but the body referred to here was not a local school board. It is a division of the state legislature, more akin to a committee.

This body dealt with state-level matters, not the day-to-day nitty-gritty of local school boards. There is no evidence that students or even citizens attended the meetings. The presiding officer was the lieutenant governor, the governor was an *ex officio* member, the state constitution set the time and place of its first meeting and the General Assembly set the time and place for subsequent meetings.[211] The group met in the Senate Chamber of the capitol building in Des Moines. Members of this state board were sworn in by the state chief justice, and they met during a single month for a maximum of 20 days each year. Interestingly, this board met during December. It worked a full day on Friday, December 24, reconvening for an evening session that began at 7p.m., and began working again on Saturday, December 25, Christmas, at 9a.m.. This board dealt with statewide legislation, the courts, and state universities. It even set up subcommittees "[o]n Revision . . . On Judiciary . . . On School District Organization and Elections . . . On State University . . . On

209 FRC Brief, *supra* note 9, at 7.

210 *Id*. (*"The Journal of the Board of Education of the State of Iowa, At Its Second Session, December, A.D. 1859*, Des Moines: John Teesdale, State Printer (1860), alone records the following two resolutions and seventeen recorded instances of prayer."). Wicks, *supra* note 48, at 31 n.188 ("Brief of Amici Curiae, *supra* note 184, at *8 ('*Resolved*. That the several clergymen of this city be invited to open our sessions by prayer, in such order as the President of the Board may think proper.' (quoting JOURNAL OF THE BOARD OF EDUCATION OF THE STATE OF IOWA, AT ITS SECOND SESSION, DECEMBER, A.D. 1859, 5 (1860))).").

211 *See* IOWA CONST. of 1857, art. IX.

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Printing . . . On Engrossed Bills . . . On Enrolled Bills."[212]

The "long, unbroken history" is not here. The very first meeting of that body was not during the colonial or founding era, as in *Marsh*, but in 1858, a generation after the framers and more than a decade after Iowa achieved statehood.[213] Most importantly, this body was abolished in 1864, having existed for less than a decade.[214] So what limited value these prayers had for school board history, they cannot be said to be long or unbroken. They are a historical aberration.

12. Wisconsin

FRC cites prayers at the second and third days of the Board of Regents of Normal Schools and concludes, on this basis, that, "[c]learly, Wisconsin was not opposed to Board members praying at meetings."[215]

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212 *See* Iowa Const. of 1857, art. IX; The Journal of the Board of Education of the State of Iowa, At Its First Session 3 (Des Moines, John Teesdale, State Printer 1858) https://goo.gl/SmQpcC.

213 *See* Marsh v. Chambers, 463 U.S. 783 (1983); The Journal of the Board of Education of the State of Iowa, *supra* note 211.

214 *See* 1864 Iowa Acts 53.

215 FRC Brief, *supra* note 9, at 10:

> In the *Proceedings of the Board of Regents of Normal Schools and the Regulations Adopted at Their First Meeting Held at Madison, July 5, 1875*, Madison: Atwood & Rublee (1857), the entry for the "Second Day" records that the meeting was "opened with prayer by Rev. A. Brunson." *Id*. at 6. The entry for the "Third Day" notes that the meeting was "opened with prayer by Doct. Cook." *Id*. at 11. Of special note is Dr. Cook's capacity as a member of the Board of Regents and part of one of its special committees. *Id*. at 5–6, 10. Clearly, Wisconsin was not opposed to Board members praying at meetings.

There is a minor error in the FRC cite. The proceedings of a board that met in 1875 could not have been printed in 1857. A rather obvious but understandable error. FRC accidentally transposed the final digits on the meeting year in the title it cited, which should have been 1857, not 1875. The citation on page iii of the FRC brief also lists the incorrect year in the title. Wicks corrected the mistake in the title.

Wicks, *supra* note 48, at 31 n.190:

> *Id.* (citing PROCEEDINGS OF THE BOARD OF REGENTS OF NORMAL SCHOOLS AND THE REGULATIONS ADOPTED AT THEIR FIRST MEETING HELD AT MADISON, JULY 15, 1857, 6 (1857)).

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As with the Iowa citation above, this body is not akin to a local school board but is essentially a committee of the state legislature dealing with higher education. Until 1971, there were two Boards of Regents in Wisconsin. Both dealt strictly with higher education, college-level and above. The first was the Regents of the University of Wisconsin, the flagship school in Madison. The second was the Board of Regents of Normal Schools, which managed state universities and colleges outside Madison that awarded degrees in education; it managed the schools that taught teachers. The systems merged in 1971.[216]

The differences in the structure and duties of the Board of Regents of Normal Schools and local school boards are significant. The Board of Regents of Normal Schools was a state-level body, organized directly by the legislature, that reported to the governor, and oversaw optional higher education, not mandatory public education.[217] Students wishing to attend normal schools had to apply for admission; the Wisconsin state treasurer was treasurer of that board; courses at the schools it managed included lectures on advanced subjects such as "chemistry, anatomy, physiology, astronomy, the mechanic arts, agriculture;" and the purpose of normal schools was partly to mint new teachers for the public schools.[218]

More importantly than its structure, there is no evidence to show that the Board of Regents has the long, unbroken history of prayer required by *Marsh*. Wicks cites this same information, citing the FRC brief, for the proposition that "minutes from board meetings dating back to 1857 denote opening prayers, as well as the names of the reverends that delivered them, including some members of the board themselves."[219] That is quite a leap from the less definite claim in the FRC amicus, which cites only two examples of prayer:

> [T]he entry for the "Second Day" records that the meeting was "opened with prayer by Rev. A.

216 *See* UNIV. OF WIS., 2017-18 FACT BOOK 2 (2019). *See generally*, ALBERT SALISBURY, HISTORICAL SKETCH OF NORMAL INSTRUCTION IN WISCONSIN (n.p., 1893), https://books.google.com/books?id=n8qgAAAAMAAJ.

217 1866 Wis. Sess. Laws 160–65 (incorporating the board of regents of normal schools in Section 14, for example); *See* UNIV. OF WIS., 2017-18 FACT BOOK 3 (2019).

218 1866 Wis. Sess. Laws 164–65.

219 Wicks, *supra* note 48, at 31.

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> Brunson." The entry for the "Third Day" notes that the meeting was "opened with prayer by Doct. Cook." Of special note is Dr. Cook's capacity as a member of the Board of Regents and part of one of its special committees.[220]

Two prayers do not constitute a long, unbroken history. And in fact, FRC starts by citing the second day because no prayer was recorded on the first.[221] Brunson, who gave the prayer on the second day, was a member of the board, representing Prairie Du Chien. He also chaired the rules committee, which proposed rules that were adopted on the second day. The rules do not include a daily prayer in the order of business or any other rule.[222] The third day began with a prayer by Cooke, who represented Appleton. The board voted to adjourn later that day. They met for those three days only.[223]

The next *Board of Regents of Normal Schools* report to the governor (1859), its second annual report, does not mention any prayers.[224] Cooke of Appleton was still on the board, having been re-appointed after his commission expired in 1858, but Brunson of Prairie Du Chien was not; his commission expired in 1859.[225] Perhaps Brunson, the Methodist minister who gave the prayer just before he presented his proposed rules and served as chairman on the first day, was the driving force behind the prayer and it fell out of favor without his presence.[226] Or perhaps the prayers happened but were not worth mentioning. Or perhaps there were no more prayers. History is ambiguous as to why the prayers were abandoned; the history of the prayers themselves is clear and short. Those were the

220 FRC Brief, *supra* note 9, at 10 (citations omitted).

221 Public Documents of the State of Wisconsin, Being the Biennial Reports of the Various State Officers, Departments and Institutions app. at Document O (Madison, Atwood and Rublee 1885).

222 *Id.*

223 *Id.* "Cooke" is the proper spelling.

224 *See* Bd. Of Regents, Second Annual Report of the Board of Regents of Normal Schools of the State of Wisconsin, 2nd Sess., (1859), https://books.google.com/books?id=0K5I8OZT4TMC.

225 *Id.* at 5; Public Documents of the State of Wisconsin, Being the Biennial Reports of the Various State Officers, Departments and Institutions app. at Document O (Madison, Atwood and Rublee 1885).

226 *See generally* Ella C. Brunson, *Alfred Brunson, Pioneer of Wisconsin Methodism,* The Wis. Mag. Hist., Dec. 1918, at 129–48.

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only times this board prayed.

The Wisconsin Historical Library at the State Historical Society in Wisconsin has the proceedings of this Board of Regents, some in heavily-battered volumes.[227] These are not annual reports, but meeting minutes of the times the board met, usually for a few days a few times a year. The daily business nearly always began the same way: a call to order, roll called and recorded, minutes of previous meeting approved, and then usually a report is read or officers elected. In one particularly exciting meeting, no secretary was present so "Regent A.D. Andrews was designated to act as Secretary *pro tem.,* and called the roll of members."[228] I could find no prayer in any of the proceedings from 1874 (the earliest available) through 1920. A search of the University of Wisconsin Board of Regents archival meeting minutes, which stretches from 1921 through 1991 failed to reveal any prayers or invocations.[229] The merged Board of Regents does not currently pray, according to its meeting minutes.[230]

FRC cites the nascent Board's first annual report, which happened to include the minutes. In later years, reports and minutes were kept separately. The reports from 1859 through 1922,[231] including the seven reports immediately following FRC's prayer report, were found at the Wisconsin Historical Society, the University of Wisconsin, or online. None show prayers at the school board meetings. William Harold Herrmann's thousand-page, two-volume opus of a doctoral dissertation, *The Rise of the Public Normal School System in Wisconsin,* only mentions prayers in relation to a famous

227 Proceedings of the Bd. of Regents of Normal Schools (Wis. 1874-1892); Proceedings of the Bd. of Regents of Normal Schools (Wis. 1893-1898); Proceedings of the Bd. of Regents of Normal Schools (Wis. 1898-1904); Proceedings of the Bd. of Regents of Normal Schools (Wis. 1905-1909); Proceedings of the Bd. of Regents of Normal Schools (Wis. 1910-1916); Proceedings of the Bd. of Regents of Normal Schools (Wis. 1916-1920).

228 BD. OF REGENTS, ABSTRACT OF PROCEEDINGS OF THE BOARD OF REGENTS OF NORMAL SCHOOLS 1 (Madison, n.p., 1885).

229 UNIVERSITY OF WISCONSIN BOARD OF REGENTS COLLECTION, http://digicoll.library.wisc.edu/UWBoR/Search.html.

230 UNIVERSITY OF WISCONSIN SYSTEM BOARD OF REGENTS MEETING MATERIALS, https://www.wisconsin.edu/regents/meetingmaterials/.

231 The annual reports published in 1859 through 1865 constituted the Second annual report through Eighth annual report, and the annual reports published in 1879 through 1882 were unnumbered. Annual reports were not published from 1866 through 1878 and/or could not be located. From 1882 through 1922, biennial reports were issued (the 1st Biennial Report was for the years 1882-1884; the 20th biennial report was for the years 1920-1922).

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1890 Wisconsin case striking them down in the public schools.[232] Newspaper accounts of early meetings of the Board fail to mention prayers.[233]

In short, from the beginning of this body through the present, there is no evidence of prayers other than the two mentioned by FRC. Two prayers at hundreds of meetings. That is it. If one is looking to history as a guidepost, this history points away from prayers. Wisconsin's history of injecting religion into mandatory public education for younger citizens does little to support the historical arguments. In that rather famous 1890 case brought by Catholic families and students—Justice Brennan cited it in his *Schempp* opinion[234]—the Wisconsin Supreme Court ruled that the Wisconsin Constitution prohibited bible readings in the public schools:

> The only object, purpose, or use for taxation by law in this state must be exclusively secular. There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution, and war, and all evil in the state, as religion. Let it once enter into our civil affairs, our government would soon be destroyed. Let it once enter into our common schools, they would be destroyed.[235]

B. The Family Research Council history proves precisely what it is meant to disprove: there is no history of school board prayer.

If we apply the evidence offered by FRC and Wicks to the rubric presented in Section 3 to determine if the evidence shows a history of school board prayer in any legally significant way, it fails mightily. The third aspect of that rubric—the accuracy and validity of their evidence—is nonexistent. In various places, FRC and Wicks are guilty of citing the wrong pages, years, and volumes of sources (Michigan, Massachusetts #1 and #3); citing private meetings as

232 2 William Harold Herrmann, The Rise of the Public Normal School System in Wisconsin 364–69 (1953).

233 *Action of the Normal School Regents,* Wis. State J. (Apr. 12, 1860), https://newspaperarchive.com/madison-wisconsin-daily-state-journal-apr-12-1860-p-1/; *Normal School Department,* Wis. State J. (Jul. 18, 1863).

234 Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 292, 275 n.51 (1963) (Brennan, J., concurring).

235 State *ex rel*. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of Edgerton, 44 N.W. 967, 981 (1890) (Orton, J., concurring).

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though they are government meetings to which the separation of state and church would apply (North Carolina, Massachusetts #2); treating entirely different works that happen to appear in the same volume as if by one author with one theme (Massachusetts #3); failing to track down original sources for factual statements (Michigan); citing parts of a statute without mentioning other parts that directly contradict the proposition for which it is cited (New York); fudging the numbers (North Carolina); conflating requests with requirements (North Carolina, Pennsylvania #2); misstating a call for diversity and representation as a mandatory connection to religion (Pennsylvania #2); citing prayers at bodies that were defunct a few years later (North Carolina, Iowa); and citing two errant prayers in 150 years as the norm, rather than the exception (Wisconsin). The underlying methodology appears to have been a keyword search designed to bolster the end result, rather than an honest historical investigation of the claim.

Most of their evidence does not even involve prayers, failing the first prong. Only a few of the cited examples truly have prayers akin to those that are the subject of modern litigation (Missouri, Massachusetts #1 and #2, Iowa, and Wisconsin). In Missouri and Massachusetts, the prayers were not even at school board meetings, but at one-off school and community events or a private meeting of private citizens.

That leaves FRC with only its Iowa and Wisconsin examples, which at least involve prayers at a government body that can be called a school board (even if at a higher, state legislature level). But both examples are still incredibly weak because the prayers were short-lived. Iowa's board disbanded after a few years and Wisconsin's board prayed twice the first three days it met but never again in its hundreds of meetings.

Not a single piece of evidence the FRC amicus and the Wicks article present meets the requirements for showing a long unbroken history of prayer at school board meetings, as the *McCarty* court claimed. Instead, they show the opposite. The examples reveal only sporadic, isolated mentions of prayers in documents that deal with education—often only tangentially—and prove nothing like a long, unbroken history, let alone an unbroken history dating to the founding or even to the creation of the public educational system. In an ultimate irony, the history in the amicus at the root of this claim actually *disproves* the point the Fifth Circuit, Wicks, FRC, and the Ninth Circuit en banc dissenters were trying to make. FRC did

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not just swing at the school board prayer pitch and miss, the bat came back around and hit it in the head.[236] FRC inadvertently proved that there is no history of school board prayer. In the end, the few oblique references show that school board prayer is a practice that barely registered in the historical record. The conclusion that school board prayer has a history akin to the history posited in *Marsh* must be rejected.

VI. LAW OFFICE HISTORY IN MARSH

The fallacious school board prayer history—and that it was adopted by so many judges at such a high level—highlights the problem with *Marsh*'s historical approach. Where legal principles are meant to be inflexible to ensure justice regardless of sex, race, religion, sexual orientation, wealth, and more, history is malleable. The legal principle at issue in *Marsh* would have required striking down the prayers. That principle is the separation of state and church: "Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped."[237] Instead, *Marsh* downplayed some aspects of our history while accentuating others, an error some justices repeated when rehashing *Marsh* in the Bladensburg Cross decision in 2019.[238] This allowed the Court to circumvent that wall and the legal principle it represents. There is no history of school board prayer, but even if there were, that history should not control the outcome when a clear legal principle exists, even if the outcome of a case might be politically unpopular.

It is worth looking deeper at the *Marsh* decision because the historical gerrymandering the majority employed is fundamentally flawed, as is the decision. The history presented in *Marsh* is not as deficient as the FRC or Wicks history of school board prayer that is gaining popularity in the courts. However, *Marsh* still sets a low bar for what constitutes acceptable historical analysis.

The simple truth is that *Marsh* was wrongly decided—and

236 *See, e.g., David Wright Hits Himself With Bat While Swinging In Mets-Braves Game (VIDEO)*, Huff. Post (Jul. 25, 2013, 3:41 PM), https://www.huffingtonpost.com/2013/07/25/david-wright-hit-bat-himself-head_n_3654121.html. David Wright is an all-star, but here, he swung hard and the bat broke and hit him in the back of the head. That he hit into a double-play makes the metaphor more apt.

237 Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948).

238 *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2078, 2084, 2087, 2089 (2019).

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therefore *Greece* and the Bladensburg cross case were too.[239] In particular, *Marsh's* history is unsound. The Court missed significant facts and distorted others. *Marsh* relied on congressional chaplaincies but overlooked the divisiveness that office engendered. *Marsh* relied on the First Congress's approval of chaplaincies to discern the framers' intent, but ignored framers' stated legal opinions against government prayer. *Marsh* relied on colonial prayers that were given years before the Constitution and First Amendment were adopted, but minimized the fact that the framers did not pray during the Constitutional Convention. In other words, the *Marsh* majority used law office history to reach a result and then it characterized that cherry-picked history as "unambiguous."[240]

The *Marsh* majority opinion omitted history.[241] For instance, *Marsh* concluded that the framers did not "perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church,"[242] but John Quincy Adams wrote that people believed *precisely* that in 1821:

> Mr. Sparks, the Unitarian['s], . . . election as to the House of Representatives . . . has been followed by unusual symptoms of intolerance. Mr. Hawley, the Episcopal preacher at St. John's Church, . . . preached a sermon of coarse invective upon the House, who, he said, by this act had voted Christ out-of-doors; and he enjoined upon all the people of his flock not to set their feet within the Capitol to hear Mr. Sparks. . . . Patterson, a member from the State of New York, moved that the House should proceed to the choice

239 The arguments that follow appeared for the first time in the Freedom From Religion Foundation brief to the Supreme Court in *Town of Greece*. Brief for Freedom from Religion Foundation as Amicus Curiae Supporting Respondents, Town of Greece v. Galloway, 572 U.S.565 (2014) (No. 12-696), 2013 WL 5348583. I was the brief's primary author, especially for the historical analysis recapitulated here, but it was a team effort. Rebecca Markert, Patrick Elliott, and Elizabeth Cavell provided invaluable insight and Richard Bolton acted as counsel of record (I was not admitted to the Supreme Court bar at the time).

240 Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 842 (1985); *see also* McCreary v. ACLU of Ky., 545 U.S. 844 (2005); Marsh v. Chambers, 463 U.S. 783, 792 (1983).

241 *See, e.g.*, Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY L. REV. 1171, 1173 (2009) (noting that the majority's history "does not really capture the whole story.").

242 *Marsh*, 463 U.S. at 793.

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of another Chaplain.[243]

John Quincy Adams was writing after the founding, but even earlier chaplain elections were divisive, including some congressmen voting for Thomas Paine, one of the leading critics of religion, to take up the post.[244] This divisiveness is certainly worthy of mention and was known to the *Marsh* Court.

Law office history often omits history, but it also minimizes and misconstrues it to reach incorrect conclusions. *Marsh* relied almost exclusively on two misconstrued historical facts: (a) the First United States Congress approving a bill for congressional chaplains and (b) a colonial tradition of prayer, including prayer at the First Continental Congress.[245]

1. Marsh *relied on the First Congress approving chaplaincies to discern their views on government prayer, but ignored the framers' stated legal opinions against government prayer.*

The Supreme Court is rightfully fond of citing James Madison. When deciding *Marsh*, it had access to Madison's *Detached Memorandum*, which condemns congressional chaplains and prayers, stating: "The establishment of the chaplainship to [Congress] is a palpable violation of equal rights, as well as of Constitutional principles."[246] Madison was equally critical of "[r]eligious proclamations" by the government, calling them "shoots from the same root."[247]

The *Marsh* majority relegated Madison's legal opinion opposing chaplains to a footnote on an unrelated sentence disposing of opposition to prayer at the Continental Congress.[248] It is not just that the Court discounted Madison's legal opinion, which might be forgivable, but the *Marsh* majority selectively filtered Madison's opinion, ignoring his legal analysis on government chaplains while

243 5 John Quincy Adams, Memoirs of John Quincy Adams 458–59 (Philadelphia, Charles Francis Adams, ed., 1875).

244 Theodore Dwight, President Dwight's Discussions of Questions discussed by the Senior Class in Yale College, in 1813 and 1814, at 114, 229 (New York, 1833).

245 *Marsh*, 463 U.S. at 787–88, 790, 794.

246 Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 Wm. & Mary Q. 534, 558 (1946).

247 *Id.* at 560.

248 *Marsh*, 463 U.S. at 791 n.12.

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citing his vote on, and passage of, a general appropriations bill that included chaplains.[249] The bill approved chaplains, but was not about chaplains—it authorized salaries for government officials, including salaries for those voting on the bill.[250] The *Marsh* majority cites this bill and Madison's vote even though Madison specifically condemned the chaplaincy section, writing later that "it was not with my approbation, that the deviation from it took place in [Congress] when they appointed Chaplains, to be paid from the [National] Treasury."[251]

Partly from passage of the appropriations bill, the *Marsh* majority concluded that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer."[252] That is a dubious oversimplification. It is also possible that Congress acted in simple self-interest. The men voting on the bill had been serving at their own expense and were probably focused on the salaries attached to their positions rather than the legality of a chaplaincy buried in the fourth of seven sections of the bill. This interpretation agrees with other facts, such as the poor attendance for the prayers: the Reverend Ashbel Green, "one of the chaplains for eight years from 1792 on, complained of the thin attendance of members of Congress at prayers. He attributed the usual absence of two-thirds to the prevalence of freethinking."[253] (That poor attendance continues to this day. While it cannot be seen on C-SPAN, attendance is abysmal at the daily prayers in the House and Senate. U.S. Rep. Mark Pocan said that during the opening prayers, the House is "pretty much an empty room.")[254]

249 Though, admittedly, also doing so in a footnote. *Id.* at 788 n.8.

250 Act of Sept. 22, 1789, ch. 17, 1 Stat. 70; 1 ANNALS OF CONG. 950 (1789) (Joseph Gales ed., 1834) (referring to "The Appropriation bill…").

251 Letter from James Madison to Letter to Edward Livingston (July 10, 1822), *in* 9 THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND PRIVATE CORRESPONDENCE, INCLUDING LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED, 1819–1836, at 100 (Gaillard Hunt ed., 1910) [hereinafter Letter from James Madison to Edward Livingston].

252 *Marsh*, 463 U.S. at 791.

253 ANSON PHELPS STOKES & LEO PFEFFER , CHURCH AND STATE IN THE UNITED STATES 457 (rev. one-vol. ed. 1950).

254 During a televised interview, the author asked Rep. Pocan, "How many actually sit through the prayers?" He responded, "It's done at the opening of the session, but that's not when you're there unless you're there to deliver a one-minute or a five-minute speech that we often start sessions, no one's in the room. So it's pretty much an empty room." Andrew Seidel, Annie Laurie

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Or perhaps the First Congress "saw no real threat to the Establishment Clause" because they did not look for one. The First Congress approved chaplains and prayers without vetting them through the First Amendment, which would not have any legal effect for another two years. Those founders who did consider the legality of government prayer came down against it.

The vote on the appropriations bill that the *Marsh* majority found so significant was followed by a debate on government prayer, specifically presidential thanksgiving proclamations. Those opposing government prayer appealed to the Constitution and the law; those in favor of prayer relied on "holy writ," the Bible, and prayers at the Continental Congress. Much like the divided Court in *Marsh*, one side cited legal principles, the other tradition and religion. Thomas Tucker (S.C.), who spoke out against government prayers, thought:

> [T]he House had no business to interfere in a matter [prayer] which did not concern them. Why should the President direct the people to do what, perhaps, they have no mind to do? . . . it is a business with which Congress have nothing to do; it is a religious matter, and, as such, is proscribed to us.[255]

Roger Sherman (Conn.) countered Tucker with the Bible, he "justified the practice of thanksgiving . . . as warranted by a number of precedents in holy writ; for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple."[256] The only other speaker in favor, Elias Boudinot (N.J.), who would later help found the American Bible Society, relied on pre-Constitutional "precedents from the practice of the late Congress," a mistake *Marsh* repeated.[257] Madison, as we have seen, opposed government prayers and the chaplaincies as constitutional violations.

Madison and Tucker are the only framers in the congressional debates *Marsh* cited to consider the legality or constitutionality of government prayer. Both thought it unconstitutional. *Marsh's*

Gaylor, interview with Mark Pocan, *Freethought Matters* (produced by the Freedom From Religion Foundation, aired nationally November 17, 2019), https://youtu.be/4vph3C_IaZk.

255 1 Annals of Cong. 950 (1789) (Joseph Gales ed., 1834).

256 *Id*.

257 *Id*.

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historical conclusion that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause" is wrong.[258]

2. Marsh*'s reliance on pre-Constitutional prayers is illogical and historically inaccurate.*

Like Elias Boudinot, *Marsh* relied on the Continental Congress's prayers to uphold the current practice.[259] The *Marsh* majority based its constitutional interpretation on prayers given fifteen years before the Constitution was ratified. The colonies had not declared independence and were still part of Great Britain and its established church. The prayers' legality could not possibly be determined when the document, legal system, and country constraining them had not yet been established.

Second, the pre-Constitutional prayers were not an outpouring of piety; they were a political expedient. John Adams recorded the prayers as a political calculation. He wrote that during dinner with Samuel Adams and fellow-delegate Joseph Reed, Reed said "[w]e never were guilty of a more Masterly Stroke of Policy, than in moving that Mr. Duchè might read Prayers."[260] One reason the framers later chose to separate state and church was to prevent religion being used—and thereby sullied—for political ends.[261]

Finally, *Marsh* claimed that the colonial prayer tradition was unbroken.[262] It was not. After reaping the political benefit of the first prayer on September 10, 1774, the Continental Congress had no further prayers for eight months, until May 11, 1775.[263] The sporadic prayers given between March 1, 1781, and June 21, 1789, occurred under the Articles of Confederation. The Articles were seriously defective and replaced by the Constitution after eight years.

Significantly, there were no prayers at the Constitutional Convention. But the law office history in the *Marsh* majority opinion

258 *Marsh*, 463 U.S. at 791.

259 *Id*. at 787–91.

260 John Adams, *John Adams's Diary (Sept. 10, 1774)*, *in* 1 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 60 (Paul H. Smith ed., 1976). Jacob Duché himself has a dark history, because he betrayed the cause of American Independence. *See* ANDREW L. SEIDEL, THE FOUNDING MYTH: WHY CHRISTIAN NATIONALISM IS UN-AMERICAN 94–96 (2019).

261 Letter from James Madison to Edward Livingston, *supra* note 250, at 100–03.

262 *Marsh*, 463 U.S. at 792.

263 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 13 (Worthington Chauncey Ford ed., 1905). *See also* DIARY OF JOHN ADAMS, *supra* note 259 at 60 (recounting the first prayer on September 10, 1774).

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minimizes this fact with nine words[264] in a footnote calling the lack of prayer "an oversight."[265] *Marsh* quotes Ben Franklin's prayer proposal, mistakenly claiming it was rejected for a lack of funds.[266] Funding was part of the debate, but Franklin himself noted that prayer was rejected because "[t]he Convention, except three or four persons, thought Prayers unnecessary."[267] This notation appears on the same page in the original source that the majority favorably cited to point out Franklin's prayer proposal.

If pre-Constitutional history is important, the history of the Constitutional Convention should be given far more weight than any colonial history. And history shows that the framers purposefully drafted our entirely godless and secular Constitution without prayers or divine appeals. They deliberately rejected the call to prayer finding it unnecessary.[268]

3. Marsh *wrongly elevated history over legal principle.*

While "the world is not made brand new every morning," history is not static.[269] New historical evidence can undermine constitutional interpretation based on bad history. For example, in *Van Orden v. Perry*, the "determinative" factor of Justice Breyer's controlling opinion upholding a Ten Commandments monument on public land was the apparent absence of divisiveness during the monument's history:

> 40 years [have] passed in which the presence of this monument, legally speaking, went unchallenged . . . . Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage . . . . This display has stood apparently uncontested

264 *Marsh*, 463 U.S. at 787 ("Although prayers were not offered during the Constitutional Convention . . . .").
265 *Marsh*, 463 U.S. at 788 n.6.
266 *See id.*
267 1 The Records of the Federal Convention of 1787, at 452 n.15 (Max Farrand ed., 1911).
268 *Id.* ("The Convention, except three or four persons, thought Prayers unnecessary.").
269 McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

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for nearly two generations. [270]

This history is wrong. Citizens challenged the legality of the monument in 1977 and possibly earlier, but Texas ignored those challenges. Madalyn Murray "O'Hair asked [the Governor] to request an attorney general's opinion on the constitutionality of displaying a creche scene in a public building and having a monument inscribed with the Ten Commandments on Capitol grounds, but the governor's aides refused."[271] The Foundation I work for, the Freedom From Religion Foundation, and our Texas membership wrote multiple letters of complaint to Texas governors from the time co-founders Anne Nicol Gaylor and Annie Laurie Gaylor first visited the Texas Capitol in 1977, until our final letter, sent in September 2001, prior to Mr. Van Orden's lawsuit.[272]

Moreover, the inference Breyer draws from the lack of challenge is almost certainly wrong. Historically, those who stand up to government endorsements of religion face a vicious and often violent backlash that ranges from being fired, to death threats, to proxy violence against their pets, to physical assault, and even firebombing of their houses.[273] The more likely inference is that people did not vocally or publicly challenge the monument precisely because it was religious and to challenge a religious monument was to invite the wrath of religious residents.[274]

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270 Van Orden v. Perry, 545 U.S. 677, 702–04 (2005) (Breyer, J., concurring).

271 *O'Hair Wants Nativity Scene Out*, THE GALVESTON DAILY NEWS, Nov. 16, 1977, at 16B (emphasis added). See also Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernisms*, 61 CASE W. RES. L. REV. 1211 (2011); *Atheist Leader Disapproves*, CORPUS CHRISTI TIMES, Nov. 16, 1977, at 4A (showing O'Hair in front of the Van Orden monument 28 years before the decision) ("Atheist leader disapproves . . . said the tablet, containing the Ten Commandments, violates the principle of separation of church and state.").

272 *See* Declaration of Annie Laurie Gaylor at 7–9, Freedom From Religion Foundation v. Weber, No. 9:12-cv-00019-DLC (D. Mont. Feb. 13, 2013).

273 ROBERT S. ALLEY, WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS 84–89 (1996); Benjamin P. Edwards, *When Fear Rules in Law's Place: Pseudonymous Litigation as a Response to Systematic Intimidation*, 20 VA. J. SOC. POL'Y & L. 437, 439, 463–67 (2013).

274 As Professor Edwards notes, "[a]t some point, the volume and severity of past reprisals reaches a point where objectively reasonable people will simply decide to 'bite their tongues and go about their lives' instead of facing the risk." Edwards, *supra* note 273, at 455 (quoting Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2171 (1996) ("Simply stated, the ostracism that befalls plaintiffs who challenge cherished

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In short, the "determinative factor" in the controlling opinion—forty years of non-divisive history—was wrong. (Unfortunately, Justice Breyer used a similar peaceful history and drew the same mistaken inference from it when upholding the Bladensburg cross.)[275] The true legacy of *Marsh* is that it elevated history, or rather, law office history, over legal principle. This approach is dangerous. *Marsh* treated the chaplaincy legislation that was adopted contemporaneously with the First Amendment as automatically constitutional because of its temporal connection to the framers of the First Amendment. As the Supreme Court later observed, *Marsh* "noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press and religion [were discussed and] [w]e saw no conflict with the Establishment Clause . . . ."[276] Applying this same rationale elsewhere would yield terrible results.

At least **twenty-two** members of the Congress that proposed the First Amendment were also members of the Congress that passed the Sedition Act (of the notorious Alien and Sedition Acts).[277]

governmental endorsements of religion is so extreme that most who are offended by these practices bite their tongues and go about their lives.")).

275 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2091 (2019) (Breyer, J., concurring) ("[T]he Cross has stood on the same land for 94 years, generating no controversy in the community until this lawsuit was filed. Nothing in the record suggests that the lack of public outcry 'was due to a climate of intimidation.'").

276 Lynch v. Donnelly, 465 U.S. 668, 674 (1984) (discussing *Marsh*).

277 This number was arrived at by comparing the rolls of the First and Fifth U.S. Congress, which proposed the First Amendment and the Alien and Sedition Acts respectively. Biographical Directory of the United States Congress 1774-2005, H.R. Doc. No. 108-222, at 45–46, 54–56 (2005), https://www.govinfo.gov/content/pkg/GPO-CDOC-108hdoc222/pdf/GPO-CDOC-108hdoc222.pdf.

	Name	State	1st Cong. Chamber	5th Cong. Chamber
1	Baldwin, Abraham	GA	House	House
2	Bloodworth, Timothy	NC	House	Senate
3	Brown, John	VA/KY	House	Senate
4	Foster, Abiel	NH	House	House
5	Foster, Theodore	RI	Senate	Senate
6	Giles, William B.	VA	House	House
7	Goodhue, Benjamin	MA	House	Senate
8	Gunn, James	GA	Senate	Senate
9	Hartley, Thomas	PA	House	House
10	Henry, John	MD	Senate	Senate

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Other members of that First Congress occupied higher federal posts, including John Adams, who was both President of the Senate that proposed the First Amendment and the man who signed the Sedition Act into law.[278] All told, significantly more First Amendment Founders approved of the Sedition Act than the seventeen the Court found significant in *Marsh*. Under the *Marsh* rationale, this history should "lea[d] us to accept the interpretation of the First Amendment draftsmen who saw" the Sedition Act as conforming to the First Amendment.[279] Under the *Marsh* approach, the Sedition Act ought to be automatically constitutional.[280] Yet, the Sedition Act is

11	Langdon, John	NH	Senate	Senate
12	Laurance, John	NY	House	Senate
13	Livermore, Samuel	NH	House	Senate
14	Parker, Josiah	VA	House	House
15	Schureman, James	NJ	House	House
16	Schuyler, Philip	NY	Senate	Senate
17	Sedgwick, Theodore	Ma	House	Senate
18	Sinnickson, Thomas	NJ	House	House
19	Smith William L.	SC	House	House
20	Sumter, Thomas	SC	House	House
21	Thatcher, George	MA	House	House
22	Vining, John	DE	House	Senate

This number only looks at overlap in the Congresses, not any role in the legislation or debate or when the legislator took his seat. That makes the number somewhat flexible, especially at a time when it could be months before they assumed their seat. See the footnotes in the above sources. John Henry and Philip Schuyler did not finish out their terms in the Fifth Congress, while in the First Congress William Giles took over Theodorick Bland's term after Bland's death. *See* H.R. Doc. No. 108-222, at 46 nn.31–32, 54 n.16, 55 n.25. Henry and Schulyer were strong Federalists that likely supported the acts.

278 Seven members went from the House to the Senate during that time: Bloodworth, Brown, Goodhue, Laurance, Livermore, Sedgwick, and Vining. See the table in the previous note. Laurance and Sedgwick were not only senators, but Presidents Pro Tempore of the Senate. *See* H.R. Doc. No. 108-222, at 54. Others from the First Congress went on to other important and powerful posts in which they could have theoretically undermined or even struck down the laws, including Oliver Ellsworth who became Chief Justice of Supreme Court and William Paterson, who became an Associate Justice of the Supreme Court Justice. *See* H.R. Doc. No. 108-222, at 45–46; Fed. Judicial Ctr., Biographical Directory of Article III Federal Judges, https://www.fjc.gov/history/judges (last visited Oct. 29, 2019).

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

280 The convoluted law read, in part, "[no] person shall write, print, utter or publish . . . any false, scandalous and malicious writing . . . with intent to defame the . . . government." Sedition Act of 1798 (expired 1801), http://

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now universally condemned, both "in the court of history" and "by Justices of this Court."[281] This universal condemnation shows that the *Marsh* approach is tragically flawed.

Of course, other practices contemporaneous with the adoption of other amendments have been declared unconstitutional. In *Brown v. Board of Education*, this Court heard "[r]eargument . . . largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868" including exhaustive coverage of "then existing practices in racial segregation, and the views of proponents and opponents of the Amendment."[282] But *Brown* did not use the rampant history of segregation at the time the Fourteenth Amendment was passed to determine the constitutionality of school segregation; instead, it applied a legal principle to contemporary circumstances.[283]

The Court has also declared unconstitutional other practices dating from colonial history. Until *Loving v. Virginia*, "[p]enalties for miscegenation" were common and had been "since the colonial period."[284] Instead of relying on history, *Loving* relied on legal principles and the self-evident truth that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[285] The Court correctly rejected the idea that a long history of anti-miscegenation could limit the right to marry.

The Court had refused to allow history to overrun principle in other cases involving the religion clauses:

> At one time it was thought that [the freedom of conscience] merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying

avalon.law.yale.edu/18th_century/sedact.asp.

281 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

282 Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954).

283 "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." *Id.* at 492–93.

284 Loving v. Virginia, 388 U.S. 1, 6 (1967).

285 *Id.* at 12 (citations omitted).

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> principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.[286]

The Court had been reasonably consistent in adhering to this interpretation, even though the framers may have had a different interpretation.[287]

Had school-related Establishment Clause cases been decided like *Marsh*, students' rights of conscience would be violated daily. *McCollum v. Board of Education* ignored the lone dissent of Justice Reed, who specifically argued that devotion to "principle . . . should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people . . . the history of past practices is determinative of the meaning of a constitutional clause . . . ."[288] *Abington v. Schempp* noted the "long history. . . . [of] Bible reading and daily prayer in the schools" from private sectarian schools in 1684 until "free public schools gradually supplanted [them] between 1800 and 1850" and beyond,[289] but correctly treated this as a history of violation, not validation. *Lee v. Weisman* overturned prayers "at public-school graduation ceremonies . . . a tradition that is as old as public-school graduation ceremonies themselves."[290] The Court relied on principle, specifically: "that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."[291]

4. The Court expanded this veneration of history over legal principle in the Bladensburg Cross case.

286 Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (footnotes omitted).

287 *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 27–28 (1997) (Blackmun, J., concurring) ("[The] government may not favor religious belief over disbelief"); Everson v. Board of Ed., 303 U.S. 1, 18 (1947) ("[Government must] be a neutral in its relations with groups of religious believers and non-believers."). The new conservative bloc on the Court may be looking to overturn this interpretation.

288 Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 256 (1948).

289 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 267–68 (1963) (Brennan, J., concurring).

290 Lee v. Weisman, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting).

291 *Id.* at 587.

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The Supreme Court doubled down on this retrogressive approach—despite its dangers—in June 2019 in the Bladensburg cross case, *American Legion v. American Humanist Association*.[292] The decision was fractured, yielding seven different opinions. Justice Alito's plurality opinion used *Marsh* to argue by analogy that a towering Christian cross, initially dedicated as a WWI memorial and later rededicated to all service members, could remain on government land and be maintained at taxpayer expense.[293] Perhaps recognizing *Marsh's* historical holes after decades of scholarly criticism, Justices Alito, Roberts, Kavanaugh, and Breyer joined together to shore up the law office history in *Marsh* and *Greece*, while using those cases to address the cross.[294] Unfortunately, they magnified the historical mistakes in *Marsh* and made some new ones.

Instead of applying the *Lemon* test, Alito's Bladensburg opinion "look[ed] to history for guidance. Our cases involving prayer before a legislative session are an example."[295] In doing so, Alito shipwrecked his opinion on an unyielding contradiction. Alito muses on the ineffability of original purpose and intent behind some government actions, going so far as to say "[w]e can never know for certain what was in the minds of those responsible for the memorial" cross.[296] But, as in *Marsh* and *Greece*, he could easily discern the intent of the founders regarding legislative prayer because "the decision of the First Congress to provide for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society."[297] Alito found that legislative prayer was permissible because he could discern what the founders were thinking 230 years ago, then found that a massive Christian cross on government land was permissible even though he could not discern what those who erected it were thinking 90 years ago.[298] In the

292 *See generally* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087–88 (2019); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017). The American Humanist Association litigated both cases.

293 *Am. Legion*, 139 S. Ct. at 2077, 2087.

294 *Id.* at 2089.

295 *Id.* at 2087 (brackets and internal quotation marks removed).

296 *Id.* at 2090.

297 *Id.* at 2087 (brackets and internal quotation marks removed).

298 *See Id.* at 2081–85. While it is true that some of the founders' thoughts on legislative prayer were perhaps more well-documented than the thoughts of those who erected the cross, the Court also ignored those founders' thoughts, as detailed above.

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end, he did even more, giving the cross "a strong presumption of constitutionality." [299]

Contradiction aside, Alito sought to show both that the framers believed that legislative prayer comported with the First Amendment and that "[t]he prevalence of this philosophy at the time of the founding is reflected in other prominent actions taken by the First Congress."[300] It is those new historical tidbits—the "other prominent actions"—that the opinion uses to attempt to shore up the flawed history the Court adopted in *Marsh*. They are a thanksgiving proclamation and language relating to "religion and morality" being "indispensable supports" to "political prosperity" in Washington's Farewell Address and in the Northwest Ordinance. [301]

Alito claimed that "[t]he First Congress looked to these 'supports' when it chose to begin its sessions with a prayer."[302] But this is inaccurate from the first. There is nothing in history, let alone in Alito's opinion, to suggest that the founders *looked to* those "supports" when examining the legality of legislative prayer, or as discussed above, that they deeply considered that question at all. Indeed, it would be odd if Washington's Farewell Address, which he delivered seven years after the House vote on the chaplaincy that so influenced the Court in *Marsh*, somehow influenced the First Congress that had adjourned half a decade earlier. Instead, it appears that Alito himself selected these supports and attributes his reliance on them to the First Congress.

And these supports are not all that helpful to the claim that legislative prayer or religious displays comport with the First Amendment. The mentions of religion are just that, lip service with no real legal effect. That Alito can only fortify *Marsh's* already deficient history with rhetorical window dressing shows that the historical argument and record fail to support his position.

In fact, some of Alito's historical supports suggest the opposite of what he intends. For instance, a fair reading of Washington's Farewell Address shows that the founders viewed religion and morality as two separate entities. To them, religion was a *substitute* for morality appropriate for the masses, not the *source* of morality, especially for the educated elite such as themselves.[303]

299 *Id*. at 2085.
300 *Id*. at 2087.
301 *Id*. at 2087–88.
302 *Id*. at 2088.
303 *See generally* SEIDEL, *supra* note 260, at 40–52.

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This means that the founders would not have used religion to frame our government, but also that they would have supported "total separation of the Church from the State" because doing so would have a more religious populace.[304] A secular state fostered a religious people; a seeming paradox that has been borne out.[305]

Alito's Northwest Ordinance history is also misleading. The ordinance was drafted and adopted by the *Continental* Congress a couple years before the Constitution and First Amendment. The *First* U.S. Congress re-adopted it in late July and early August 1789 with little if any debate.[306] Thomas Jefferson drafted the original ordinance in 1784 and it did not include the mention of religion Alito cited.[307] A committee proposed some language that would reserve property in each town "for the support of religion."[308] But this failed, much to James Madison's delight, as he explained in a letter to James Monroe. Madison wrote that reserving public land for religion was unjust, bigotry, and outside the power of the government, another legal opinion of his that the Supreme Court chose to ignore:

304 *Id. at* 40–52, 276–77. *See also* The Writings of James Madison, Retirement Series 427–32 (David B. Mattern, et al. eds., 2009) (explaining that "[i]t was the universal opinion of the Century preceding the last, that Civil Govt. could not stand without the prop of a Religious establishment, & that the Xn religion itself, would perish if not supported by a legal provision for its Clergy. The experience of Virginia conspicuously corroborates the disproof of both opinions. The Civil Govt. tho' bereft of every thing like an associated hierarchy possesses the requisite Stability and performs its functions with complete success: Whilst the number, the industry, and the morality of the priesthood & the devotion of the people have been manifestly increased by the total separation of the Church from the State.").

305 *See* Seidel, *supra* note 260, at 267–77.

306 *See, e.g.*, H. Journal, 1st Cong., 1st Sess. 61–64 (1789); S. Journal, 1st Cong., 1st Sess. 51–54 (1789).

307 *See Editorial Note: Plan for Government of the Western Territory*, Founders Online, https://founders.archives.gov/documents/Jefferson/01-06-02-0420-0001 (last visited Nov. 11, 2019); *III. Report of the Committee, 1 March 1784*, Founders Online, https://founders.archives.gov/documents/Jefferson/01-06-02-0420-0004 (last visited Nov. 11, 2019); *IV. Revised Report of the Committee, 22 March 1784*, Founders Online, https://founders.archives.gov/documents/Jefferson/01-06-02-0420-0005 (last visited Apr. 11, 2019); *V. The Ordinance of 1784, 23 April 1784*, Founders Online, https://founders.archives.gov/documents/Jefferson/01-06-02-0420-0006 (last visited Nov. 11, 2019); *Am. Legion*, 139 S. Ct. at 2067.

308 Journals of the Continental Congress 1774-1789, at 254–55, 293–96 (Kenneth E. Harris & Steven D. Tilley eds., 1976).

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> It gives me much pleasure to observe . . . [that the Continental] Congs. had expunged a clause . . . for setting apart a district of land in each Township, for supporting the Religion of the Majority of inhabitants. How a regulation, so unjust in itself, so foreign to the Authority of Congs. so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Commtee is truly [a] matter of astonishment.[309]

Madison thought it unjust and beyond the power of the government—even the Continental Congress—to give public land over to the support of religion. We can be fairly certain that Madison would disagree with Alito about the constitutionality of a soaring Christian cross on public land maintained with hundreds of thousands of taxpayer dollars.

Neither the Ordinance nor the farewell address grant the government any "particle of spiritual jurisdiction," something explicitly withheld from the federal government in our constitutional system, as Alexander Hamilton explained.[310] The Ordinance and farewell address mention religion as a societal necessity, not a government power.[311] They are, at least in terms of trying to claim such a power for the government, weak.

Justice Alito's opinion also provides a curious defense of the Congressional chaplaincy, which he describes as "stand[ing] out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination. . . ."[312]

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309 THE PAPERS OF JAMES MADISON 285–287 (Robert A. Rutland et al., eds., 1973).

310 THE FEDERALIST No. 69 (Alexander Hamilton).

311 The founders were wrong. Religion is not, in fact, a societal necessity. *See* SEIDEL, *supra* note 260, at 40–52.

312 *Am. Legion*, 139 S. Ct. at 2089. Alito began this inclusivity discussion with a Sam Adams quote that is not quite authentic. Alito cites Samuel Adams' line about an Episcopal clergyman delivering a prayer at the Continental Congress in 1774: "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." *Am. Legion*, 139 S. Ct. at 2088. Tracing Alito's sources back to an original, we find that this is not truly a Sam Adams quote but rather John Adams recounting to Abigail Adams something that Sam said, so it reads slightly differently: "Mr. S. Adams arose and said he was no Bigot, and could hear a Prayer from a Gentleman of Piety and Virtue, who was at the same Time a Friend

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This whitewashes history. The congressional chaplaincies are not bastions of diversity and inclusion. No non-Christian has ever been a congressional chaplain. No woman has ever been a congressional chaplain. Every chaplain save one has been white—the first and only African American to hold the post was not elected until 2003.[313] As Professor Lund has explained, "the chaplaincies have sometimes been the locus of significant religious and political conflict. . . . The congressional chaplaincies are, in some sense, the closest thing we have ever had to a national religious establishment, and so we should probably not be surprised at how the history of the chaplaincies has some dark elements."[314]

What little diversity the chaplaincy has seen has come through the guest chaplain programs, and mostly in the last 20 years.[315] But this program has brought out those dark elements, including heckling, protests, and arrests.[316] FRC itself attacked the non-Christian prayers in Congress because the founders "never intended to exalt other religions to the level that Christianity holds in our country's heritage."[317] In *Greece*, the majority upheld the town's

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to his Country." Letter from John Adams to Abigail Adams, 16 September 1774, 1 The Adams Papers 156–57 (Lyman H. Butterfield ed., 1963). This is not a huge mistake, but Alito is incorrect. Though "John Adams said that Sam Adams said he was 'no bigot…,'" does not have the rhetorical power as Alito's rendition, it would have been accurate. A subtle change to the historical record, but it shows history can be an unpredictable guide, especially when relying on it instead of constitutional principles themselves.

313 Lund, *supra* note 248, at 1173. Barry Black is still serving as the Senate Chaplain today. *Office of the Senate Chaplain*, U.S. Senate https://www.senate.gov/reference/office/chaplain.htm (last visited Oct. 28, 2019).

314 Lund, *supra* note 241, at 1174.

315 *See id.* at 1205 nn.173–76 and accompanying text. Some of the inclusion goes back three decades. *Id.* at 1204 nn.170–71 and accompanying text.

316 *Id.* at 1205–1207 nn.179–88 and accompanying text.

317 FRC was quick to delete traces of this statement from its website, but it was picked up in the news. *See, e.g.*, *Family Research Council Condemns Hindu Prayer in Congress*, Religion News Serv. Daily Digest (Sept. 23, 2000), https://religionnews.com/2000/09/23/rns-daily-digest2371/. Pieced together, the statement read: "Alas, in our day, when 'tolerance' and 'diversity' have replaced the 10 Commandments as the only remaining absolute dictums, it has become necessary to 'celebrate' non-Christian religions even in the halls of Congress . . . . And while it is true that the United States of America was founded on the sacred principle of religious freedom for all, this liberty was never intended to exalt other religions to the level that Christianity holds in our country's heritage. . . . Our founders expected that Christianity—and no other religion—would receive support from the government as long as that support did not violate people's

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prayer practice in part because the town "at no point excluded or denied an opportunity to a would-be prayer giver" and "maintained that a minister or layperson of any persuasion, *including an atheist*, could give the invocation."[318] But the House of Representatives fought to exclude an atheist, sponsored by his U.S. Representative, from delivering a secular invocation,[319] even though 40 percent of all invocations in the previous fifteen years had been delivered by guest chaplains.[320] It successfully justified the discrimination in court, preventing an invocation that would have "[c]elebrat[ed] the wondrous fact that the sovereign authority of our great nation is not

consciences and their right to worship . . . . They would have found utterly incredible the idea that all religions, including paganism, be treated with equal deference." *Id.*

318 Town of Greece v. Galloway, 572 U.S. 565, 571 (2014) (emphasis added). The non-discrimination principle can be found throughout the *Town of Greece* opinions. Recounting procedural posture, the majority highlighted it: the district court "not[ed] that the town had opened the prayer program to all creeds and excluded none," and the fact that most invocation presenters were Christian reflected demographics "rather than an official policy or practice of discriminating against minority faiths." *Id.* at 573. The majority also noted that the chaplain policies of the House of Representatives posed no threat to the Establishment Clause because "no faith was excluded by law, nor any favored." *Id.* at 576. It also explained that Congress "acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds," citing congressional invocations given by a Buddhist monk, a Jewish Rabbi, a Hindu Satguru, and an Islamic Imam. *Id.* at 579. The Court thought it acceptable that guest chaplains were overwhelmingly Christian, "[s]o long as the town maintains a policy of nondiscrimination." If the policy "reflected an aversion or bias against minority faiths," it would be constitutionally suspect. *Id.* at 585. Justices Alito and Scalia concurred, so long as the exclusion "was not done with discriminatory intent" it was fine, but cautioned that they would view the case "very differently" if the town had intentionally omitted synagogues. *Id.* at 597.

319 Secular invocations, which do not invoke a god or deity, have become increasingly popular after the *Town of Greece* decision. Many have been given at various local and state government meetings across the country. *Invocations,* CENT. FLA. FREETHOUGHT COMMUNITY, https://www.cflfreethought.org/invocations (last visited Oct. 31, 2019). In fact, shortly after *Town of Greece* was decided, an atheist delivered a nonreligious invocation to that town board. He invoked the signers of the Declaration of Independence and We the People, not any god or deity. Meaghan M. McDermott, *Atheist Gives "Historic" Invocation in Greece*, DEMOCRAT & CHRON. (July 14, 2014).

320 Barker v. Conroy, 921 F.3d 1118, 1122 (D.C. Cir. 2019). The author litigated this case along with Samuel T. Grover of the Freedom From Religion Foundation and Rich Bolton of Boardman & Clark, LLP.

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a monarch, lord, supreme master or any power higher than 'We, the people of these United States.'"[321]

This division and discord is even more widespread when non-Christians deliver prayers at the state level, and in the months before Alito's opinion was published, prayers divided state legislatures in Arizona, Pennsylvania, Virginia, Georgia, and elsewhere.[322] One Pennsylvania legislator used her prayer to intimidate the first female Muslim legislator being sworn in, quickly dividing the state House along religious lines, forcing legislators to take sides and either support or condemn the prayer.[323]

Alito sees the first Continental Congress prayer—the prayer that he argues spawned the chaplaincy—as a moment when religion unified our nation. He points to the founders' ability to pray together, despite a "diversity of religious sentiments."[324] He glosses over the thoughtful objections of John Jay and Rutledge, the first two chief justices of the Supreme Court, and focuses on what he sees as inclusion.[325] But Sarah Vowell was closer to the mark when she noted the delegates' *disagreement* over the prayer as actually more striking. She drily observed, "[a] couple of dozen white, Anglo-Saxon male

321 Barker v. Conroy, 282 F. Supp. 3d 346, 351 (D.D.C. 2017), *appeal dismissed in part*, No. 17-5278, 2018 WL 3159047 (D.C. Cir. Jun. 13, 2018), *and aff'd,* 921 F.3d 1118 (D.C. Cir. 2019); Complaint at Exhibit B, Barker v. Conroy, 921 F.3d 1118 (D.C. Cir. 2019) (No. 17-5278), https://ffrf.org/uploads/legal/BarkervConroy _Exhibits.pdf.

322 Arizona in particular has a problem with this. Two state legislators, Juan Mendez and Athena Salman, have delivered several secular invocations, including in February 2019, April 2017, March 2016, and May 2013. Each time the invocations have been mocked by other legislators or other, Christian invocations have been delivered to repent for those non-Christian invocations. *Arizona House Still Disparaging Nonreligious Legislators, FFRF responds*, Freedom From Religion Found. (Feb. 14, 2019), https://ffrf.org/news/news-releases/item/34157-arizona-house-still-disparaging-nonreligious-legislators-ffrf-responds. *See* Andrew L. Seidel, *Government Prayer Isn't Inclusive—Let's Not Pretend Otherwise*, Rewire News, (Apr. 22, 2019), https://rewire.news/religion-dispatches/2019/04/22/government-prayer-isnt-inclusive-lets-not-pretend-otherwise/ (discussing other recent examples, including in Georgia and Virginia).

323 Andrew L. Seidel, *Penn. Legislator's Jaw-Dropping Prayer Showcases America's Christian Nationalism Problem*, Rewire News (Mar. 27, 2019), https://rewire.news/religion-dispatches/2019/03/27/penn-legislators-jaw-dropping-prayer-showcases-americas-christian-nationalism-problem/.

324 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2088 (2019).

325 Letter from John Adams to Abigail Adams, 16 September 1774, 1 The Adams Papers 156–57 (Lyman H. Butterfield ed., 1963).

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Protestants [we]re too diverse to pray together."[326]

We have a separation of state and church because we are a diverse nation. Government neutrality on religion is not only constitutionally mandated, but also a way to ensure that our government functions smoothly. It removes one of two *verboten* topics, religion, from the other, politics. "Government prayer doesn't bring We the People together, it drives us apart."[327] Legislative prayer and congressional chaplaincies showcase the problem with mixing religion and government, not inclusivity.

Alito's history of the congressional chaplaincy misses one other telling fact. The man that delivered that first prayer for the Continental Congress was not the "friend to his country" Sam Adams thought, but as John Adams wrote, "an Apostate and a Traytor."[328] Jacob Duché, the chaplain whose position and prayers were so important to the majorities in *Marsh* and *Greece* and to Alito,[329] defected to the British, and condemned the Continental Congress that gave him the appointment.[330] He slandered the Continental Army as

326 Alan Alda, *Sarah Vowell on Writing with Clarity (and Shenanigans)*, CLEAR + VIVID, (March 5, 2019), https://www.aldacommunicationtraining.com/podcast/sarah-vowell-writing-clarity-shenanigans/.

327 Seidel, *supra* note 321. *See also* Lund, *supra* note 241, at 1176 ("Legislative prayer does indeed offend atheists and agnostics. But it may well be that legislative prayer's harshest impact is not on nonbelievers, but rather on believers who find themselves outside society's zone of acceptance—people like Charles Constantine Pise, the nineteenth-century Catholic chaplain who faced intense opposition from nativist Protestants, and Rajan Zed, the twenty-first century Hindu guest chaplain who endured similarly intense opposition from Christian protesters. Legislative prayer is often framed as pitting nonbelievers against believers, but that is an oversimplification. Having legislative prayer means committing religious decisions to a majoritarian governmental process, which has deep ramifications for all religious minorities.").

328 *Letter from John Adams to Abigail Adams (Oct. 25, 1777)*, in 2 ADAMS FAMILY CORRESPONDENCE 1, 359–60 (L. H. Butterfield ed. 1963); *Letter from John Adams to Abigail Adams (Sept. 16, 1774)*, in 2 ADAMS FAMILY CORRESPONDENCE 1, 359–60 (L. H. Butterfield ed. 1963) ("Mr. Samuel Adams arose and said he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.").

329 Town of Greece v. Galloway, 572 U.S. 565, 583–84 (2014) (mentioning Duché and recounting the text of his prayer). *See also* Marsh v. Chambers, 463 U.S. 783, 797 (1983); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2088 (2019).

330 SEIDEL, *supra* note 260, at 95–96.

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"undisciplined" and "without principle, without courage."[331] And he begged Washington to rescind "the hasty and ill-advised declaration of Independency."[332] Duché was no patriot or friend to America. But, at one time, when the colonies were still colonies, he was selected for political reasons to say a prayer by men he later denigrated and in service of a cause he despised. Hardly a history that speaks to an American tradition.

The most alarming aspect of Alito's opinion in the Bladensburg cross case is that he did nothing to bridge the gap between the founding generation and the 20th century religious display to show that such displays also comport with the *Marsh* version of founders' First Amendment understanding. In other words, *Marsh* purported to show an unambiguous and unbroken history stretching back to the founding, dubious though it was. But there was no attempt to make such a showing for Christian crosses. Alito nodded in this direction when he pointed out that in *Greece,* the town's new prayer practice "lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment."[333] Alito suggests that the prayers in *Greece* did not date to the founding, so, by analogy, this cross need not either. This rings a bit hollow given the historical claims made in *Greece* and *Marsh*. Alito baits with the flawed history the Court adopted for ceremonial prayer and switches to religious displays with no attempt to show those displays stretch back as far.

This bait and switch dramatically expands the use of law office history as a replacement for constitutional principles such as religious neutrality. If not addressed by the judiciary and academy now, it will only get worse.

VII. FIXING THE PROBLEM

Law office history should be excluded from our jurisprudence. Fixing this problem is critical to avoid the perception that a judge is, for instance, using law office history to avoid a politically unpopular but legally necessary decision. But it is also vital to ensure that those decisions are correct. Three basic steps need to be taken.

First, in the school board prayer context, the Fifth and Ninth Circuits should edit their opinions with clear corrections and remove this bad history. This failure must be recognized and amended or it

331 *Id.*
332 *Id.*
333 *Am. Legion,* 139 S. Ct. at 2088.

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will continue to breed. As for the Bladensburg cross case, Justice Alito, whose opinion is still new, should consider some judicious edits as well.

Second, if history is truly important to deciding a legal question, judges must fully vet history presented by attorneys. Better yet, get historians. If the Fifth Circuit wished to rely on a cogent historical case for an unbroken history of school board prayer —in spite of the language in *Wallace v. Jaffree* and *Edwards v. Aguillard* —it should have asked the parties to present actual evidence from historians, scholars, and academics at the appropriate stage of the case. Nothing prevents a judge from seeking genuine historians to weigh in on a case or even a draft opinion. Yet, even here there is a danger. FRC has deep ties to Christian nationalists who are notorious for their poor grip on genuine history, including David Barton, who could be proffered to the courts, but who is no expert and no historian.[334]

Historical evidence must be vetted like other evidence. Perhaps courts should consider something akin to a *Daubert* test for historical analyses and evidence.[335] The distortion of the history regarding school board prayer outlined above is because a single attorney was essentially permitted to testify as an expert historian, had no credentials or background to do so, and nobody bothered to check the citations. Courts and attorneys must begin to conceive of historical evidence as real evidence, that is, evidence which must meet the standards in the Federal Rules of Evidence, including rules 701 through 706. Courts should stop treating history as something of which they can simply take notice, especially where the evidence is probative to the outcome of the case. **If the history is dispositive, or even probative, it must be as fully vetted as any other evidence.** And when history is raised only at the appellate level, it should be treated by the court as an inappropriate attempt to supplement the record in violation of the Federal Rules of Appellate Procedure and thrown out.

State bars might consider addressing this as an issue of

334 *See, e.g.*, Warren Throckmorton, *Despite Erroneous Material, Family Research Council Features David Barton at Event for Pastors*, WARREN THROCKMORTON (Apr. 25, 2017), https://www.wthrockmorton.com/2017/04/25/family-research-council-features-david-bartons-capitol-tour/ (mentioning that FRC promoted David Barton's "tours" of the Capitol in D.C.).

335 This is outside the scope of this article and, in any event, probably deserves its own treatment.

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candor to the tribunal. The FRC brief is so deficient that it is difficult to believe it is simply shoddy, rather than deliberately dishonest. The judges on the Fifth Circuit, which heard both *McCarty* and the *Tangipahoa* case that gave rise to the FRC amicus brief, might consider this avenue as well.

Finally, the entire idea of using history to interpret the Constitution should be revisited by the academy and judiciary, and treated with extreme skepticism. As long as *Marsh* remains good law, it will stand as a testament to the error of this method. This reexamination and the need to define the limits of history is all the more pressing in light of the recent Bladensburg cross opinion, which interprets 230-year-old history with absolute certainty but 90-year-old history as something "[w]e can never know for certain."[336] Some history in the law is inevitable, but when decisions are based on history instead of legal principles, their foundations are shaky. When other lawyers or judges expose the history, or when scholars discover new history or fill in historical gaps, we are stuck with decisions that do not hold up but upon which bodies of case law have been built. Instead of granite and marble structures like the courthouses in which judges reign, the body of law is a house of cards.

No court should permit school board prayers to continue. There is no history of school board prayer and, even if there were, it should not matter. *Marsh* and its offspring should be overturned. History should not triumph over principle.

336 *Am. Legion*, 139 S. Ct. at 2090.

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