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# Constraining Moses: Rethinking Thanksgiving Day Proclamations

*Paul Baumgardner\**

## INTRODUCTION

Modern American presidents enjoy an extensive reserve of formal and informal powers, which have developed in accordance with the historical, institutional, and ideological changes across the federal government. In recent months, many Americans have felt the reach and impact of one particular power—the president’s rhetorical power. Long before Donald Trump told the American people that “there is blame on both sides” in Charlottesville, Virginia, political scientists had begun researching the outsized capital that presidential discourse can marshal.<sup>1</sup> A president’s words possess an unparalleled institutional power to arrange and rearrange the populace—to motivate action, encourage restraint, to assuage strife, and also to send peasants scrambling for pitchforks.

Our political knowledge of a president’s rhetorical power ought to inform and complicate how we analyze the constitutionality of certain presidential practices. In this article, I focus on one such presidential practice: Thanksgiving Day Proclamations. The presidential tradition of offering Thanksgiving Proclamations began with our first president, George Washington, and it has remained a common—but not constant—oratorical practice of American presidents up to the present. However, Thanksgiving Proclamations have sustained a fair degree of legal and political scrutiny, even during the founding generation.

In this article, I examine the core criticisms of Thanksgiving Proclamations that have connected certain Founders, such as Thomas Jefferson and James Madison, with contemporary Supreme Court Justices. Jeffersonian and Madisonian concerns about religious entanglement and endorsement align with recent

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<sup>1</sup> Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames ‘Both Sides,’* N.Y. TIMES (Aug. 15, 2017), [https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html?mcubz=1&\\_r=0](https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html?mcubz=1&_r=0).

Supreme Court cases and constitutional standards concerning the Establishment Clause of the First Amendment. As currently understood by some members of the Court, the First Amendment's prohibition on government actions respecting an establishment of religion brings the content of Thanksgiving Proclamations under sharp scrutiny.

Although the Supreme Court has not yet deemed presidential Thanksgiving Proclamations to be unconstitutional, it has criticized and, in some cases, struck down similar calls to prayer. In this article, I unpack the political, legal, and historical arguments against presidential Thanksgiving Proclamations and outline some of the advantages of "constraining Moses."

The reasons for selecting this particular presidential rhetorical practice are manifold, but one of the most intriguing certainly is the political preparatory work/worries that already have been accomplished—prematurely—in anticipation of this very article.<sup>2</sup> To be clear: I do not advocate for the end of presidential Thanksgiving Proclamations. However, it is important to uncover the best variations of these arguments, including the sort of resources that they should draw on.<sup>3</sup> In the final analysis, these arguments may not supply the best moral or constitutional course for future Establishment Clause jurisprudence.<sup>4</sup> Rather, this thesis-less article is designed to highlight the pieces that seem best ordered for justifying this constitutional direction, even if such a direction proves unlikely or unwarranted in the current political climate.

So let us jump in. First, an introduction to a spectrum of presidential Thanksgiving Proclamations. In Section II, a brief

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<sup>2</sup> *We built this moated fortress and have had it manned for years, because we knew your horde would eventually come!* See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 100–03, 113 (1985) (Rehnquist, J., dissenting); *Cty. of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 670–71 (1989) (Kennedy, J., concurring in part and dissenting in part); *Lee v. Weisman*, 505 U.S. 577, 633–35, 645 (1992) (Scalia, J., dissenting); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting); *Wes Barrett, God Returns to Presidential Thanksgiving Proclamation*, FOX NEWS (Nov. 25, 2010), <http://www.foxnews.com/politics/2010/11/25/god-returns-to-presidential-thanksgiving-proclamation.html> [<http://perma.cc/GER5-5HXC>]; *Chuck Norris, Obama vs. George Washington on Thanksgiving*, WORDNETDAILY (Nov. 23, 2014, 4:13 PM), <http://www.wnd.com/2014/11/obama-vs-george-washington-on-thanksgiving/#6Ofv9G2XPslDYBAK.99> [<http://perma.cc/8HAB-DVAE>]; *Joel Siegel, Obama Leaves God out of Thanksgiving Speech, Riles Critics*, A.B.C. NEWS (Nov. 25, 2011), <http://abcnews.go.com/Politics/obama-omits-god-thanksgiving-address-riles-critics/story?id=15028644> [<http://perma.cc/5W5D-RBZN>]; *Carson Holloway, Thanksgiving and the Constitution*, PUBLIC DISCLOSURE (Nov. 26, 2013), <http://www.thepublicdiscourse.com/2013/11/11618/> [<http://perma.cc/9KPV-QKJM>]; DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* 2–3, 18–20 (2010).

<sup>3</sup> *But why is this "uncovering" so important if you're not advocating for the abolition of presidential Thanksgiving Proclamations? What do you have against Thanksgiving!?*

<sup>4</sup> *Moral or constitutional? Oh dear! What would Dworkin have said to this distinction?*

political science interlude on presidential rhetoric. In Section III, linkages to Establishment Clause cases and considerations, old and new. In Section IV, cameo appearances by some unimpeachable Founding presidents/precedents. In Section V, select reservations, resignations, and Bible readings.

#### I. SO WHAT ARE WE DEALING WITH HERE? SOME EXAMPLES OF PRESIDENTIAL THANKSGIVING PROCLAMATIONS

Many American presidents have issued Thanksgiving Proclamations. A central constitutional worry with this practice is that it exploits the station of the presidency for the purposes of evangelism. As directives from the country's highest executive office, which generally are designed to (1) situate the country's eyes on a certain god, a specific religious tradition, and/or a particular set of beliefs, and (2) encourage participation in discrete spiritual actions, these proclamations could approach the line of religious establishment.

So what are we dealing with here? These executive actions have taken on a variety of forms over the years. Quite a few proclamations have served as calls to worship God—wielding religious symbols and Judeo-Christian rhetoric to reaffirm a preference for a particular belief system and a governmental push to embrace that belief system *now*—while others have sounded more like general statements of appreciation for the successes and strengths of our nation. Compare, for example, President Barack Obama's 2011 Thanksgiving Day Proclamation to President George W. Bush's 2008 Thanksgiving Day Proclamation.

The first sentence of President Obama's Proclamation 8755 reads: "One of our Nation's oldest and most cherished traditions, Thanksgiving Day brings us closer to our loved ones and invites us to reflect on the blessings that enrich our lives."<sup>5</sup> This opening line was indicative of the general tone and thesis of Obama's Thanksgiving Proclamation. The President focused on the origins and history of the holiday. He also emphasized the cooperation between Native Americans and Pilgrims, the valuable contributions of Native Americans, and the importance of diversity, family, and friendship in the good times and bad.<sup>6</sup>

President Obama also mentioned that Americans "give thanks to each other and to God for the kindness and comforts

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<sup>5</sup> President Barack Obama, Thanksgiving Day Proclamation 8755 (Nov. 16, 2011), <http://www.presidency.ucsb.edu/ws/?pid=97063> [<http://perma.cc/R5T3-9QKD>].

<sup>6</sup> *Id.*

that grace our lives.”<sup>7</sup> With the exception of one reference to George Washington’s praise of God in the first presidential Thanksgiving Proclamation, this was the only time the word “God” appeared in President Obama’s Proclamation.<sup>8</sup> Instead of invoking a certain god or a specific religious tradition, President Obama exhorted:

[T]he people of the United States to come together—whether in our homes, places of worship, community centers, or any place of fellowship for friends and neighbors—to give thanks for all we have received in the past year, to express appreciation to those whose lives enrich our own, and to share our bounty with others.<sup>9</sup>

Three years before President Obama’s Proclamation, President George W. Bush gave his final Thanksgiving Proclamation.<sup>10</sup> In his opening paragraph, President Bush declared: “We recognize that all of these blessings, and life itself, come not from the hand of man but from Almighty God.”<sup>11</sup> Unlike President Obama’s Proclamation, President Bush’s address centered on religion, thankfulness to God, and pronouncements of faith that the Christian God (that many of our Founding Fathers turned to) would continue to help the United States.<sup>12</sup> He also counseled Americans to “let us all give thanks to God who blessed our Nation’s first days and who blesses us today. May He continue to guide and watch over our families and our country always.”<sup>13</sup>

President Bush’s 2008 Thanksgiving Proclamation is not an outlier in terms of religious rhetoric and instruction. Just look at President Dwight D. Eisenhower’s Proclamation more than five decades earlier.<sup>14</sup> In Proclamation 3036, President Eisenhower supplied a very short, priestly admonishment for citizens to genuflect.<sup>15</sup> Wasting no time or ink, the Proclamation’s introduction dove right into a direct call to prayer:

As a Nation much blessed, we feel impelled at harvest time to follow the tradition handed down by our Pilgrim fathers of pausing from our labors for one day to render thanks to Almighty God for His bounties. Now that the year is drawing to a close, once again it is fitting that we

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> President George W. Bush, Thanksgiving Day Proclamation 8322 (Nov. 21, 2008), <http://www.presidency.ucsb.edu/ws/?pid=84954> [<http://perma.cc/PAR7-BB2B>].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> President Dwight D. Eisenhower, Thanksgiving Day Proclamation 3036 (Nov. 7, 1953), <http://www.presidency.ucsb.edu/ws/?pid=72469> [<http://perma.cc/W7BN-25G8>].

<sup>15</sup> *Id.*

incline our thoughts to His mercies and offer to Him our special prayers of gratitude.<sup>16</sup>

Eisenhower's proclamation from 1953 designated the American population to be "a religious people," faithful to the presumably Christian God but still in need of some good, old-fashioned kneeling.<sup>17</sup> On Thanksgiving, he told the country to "bow before God in contrition for our sins, in supplication for wisdom in our striving for a better world, and in gratitude for the manifold blessings He has bestowed upon us and upon our fellow men."<sup>18</sup>

## II. PRESIDENTIAL RHETORIC

Although there has been remarkably little scholarly analysis of Thanksgiving Proclamations, recent American political scientific research does illuminate some of the cardinal political worries surrounding this governmental practice.<sup>19</sup> For example, presidential Thanksgiving Proclamations have a breadth, directness, and authoritativeness that other controversial forms of government benediction do not possess. In fact, the president has unrivaled rhetorical powers in American politics.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See James W. Ceaser et al., *The Rise of the Rhetorical Presidency*, 11 PRESIDENTIAL STUD. Q. 158, 159–61 (1981); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 44–46 (1993); KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, PRESIDENTS CREATING THE PRESIDENCY: DEEDS DONE IN WORDS 6–9 (2008); Jeffrey E. Cohen, *Presidential Rhetoric and the Public Agenda*, 39 AM. J. POL. SCI. 87, 87–89 (1995); Todd Garvey, *The Obama Administration's Evolving Approach to the Signing Statement*, 41 PRESIDENTIAL STUD. Q. 393, 394–95, 406 (2011); Vanessa B. Beasley, *Speaking at Selma: Presidential Commemoration and Bill Clinton's Problem of Invention*, 44 PRESIDENTIAL STUD. Q. 267, 268–69, 286–87 (2014); Jeffrey Friedman, *A "Weapon in the Hands of the People": The Rhetorical Presidency in Historical and Conceptual Context*, 19 CRITICAL REV. 197, 199–200 (2007); ANDREW B. WHITFORD & JEFF YATES, PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS 2–6 (2009); JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 3–4 (1987); Jeffrey K. Tulis, *Revisiting the Rhetorical Presidency*, in BEYOND THE RHETORICAL PRESIDENCY 3–4, 13–14 (1996); Christopher S. Kelley et al., *Assessing the Rhetorical Side of Presidential Signing Statements*, 43 PRESIDENTIAL STUD. Q. 274, 274–76 (2013); Michael J. Berry, *Controversially Executing the Law: George W. Bush and the Constitutional Signing Statement*, 36 CONGRESS & THE PRESIDENCY 244, 244–45, 266–68 (2009); Christopher S. Kelley & Bryan W. Marshall, *The Last Word: Presidential Power and the Role of Signing Statements*, 38 PRESIDENTIAL STUD. Q. 248, 248–67 (2008); Martin J. Medhurst, *A Tale of Two Constructs: The Rhetorical Presidency versus Presidential Rhetoric*, in BEYOND THE RHETORICAL PRESIDENCY xi–xxv (1996); WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 176–77 (2003); BRANDICE CANES-WRONE, WHO LEADS WHOM? PRESIDENTS, POLICY, AND THE PUBLIC 3–5 (2006); SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP 1–2 (3d ed. 2007).

According to political scientist Keith Whittington, presidential rhetoric has a disparate and more pronounced role in modern times than in the early years of American political history.<sup>20</sup> Since the twentieth century, Americans have witnessed a different brand of president—an institutional actor more willing to engage with the public, by giving more speeches, making more proclamations, and attempting to connect directly with citizens.<sup>21</sup> This rhetorical shift in the modern presidency is aimed at exerting political power over the citizenry—influencing public sentiment by rallying support or disdain, pushing certain policy agendas, and inculcating particular civic values and practices. Whittington writes, “[p]residential rhetoric not only persuades but also constructs a political world within which various political actors operate.”<sup>22</sup>

Presidency scholars take note of the disproportionate amount of public attention that is paid to presidential discourse and how this coverage creates a greater number of political opportunities for the chief executive.<sup>23</sup> Presidential rhetoric can significantly impact public opinion and influence policy.<sup>24</sup> When a president speaks to the public, his words have the power to increase the salience of certain issues and civic practices.<sup>25</sup> Modern presidents rely on rhetorical performances such as directives, public speeches, and proclamations to set agendas and communicate to the American people how they prioritize different people, cultures, and values.

### III. ESTABLISHMENT CLAUSE JURISPRUDENCE: CASES, PRECEDENTS, AND OTHER CONSTITUTIONAL CONSIDERATIONS

The historical scrutiny that has been leveled against a constellation of related governmental institutions, persons, and practices seriously informs the legal and normative considerations about presidential Thanksgiving Proclamations. These adjacent religious figures and observances include prayers issued at the start of municipal meetings and state appointments and uses of chaplains and benedictions at public school graduations and athletic events. Now, although there are important distinctions between Thanksgiving Proclamations and

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<sup>20</sup> KEITH E. WHITTINGTON, *The Rhetorical Presidency, Presidential Authority, and President Clinton*, 26 PERSP. POL. SCI. 199, 199–201 (1997).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 205.

<sup>23</sup> See generally Cohen, *supra* note 19; CANES-WRONE, *supra* note 19; KERNELL, *supra* note 19.

<sup>24</sup> See Cohen, *supra* note 19, at 87–88, 101, 103.

<sup>25</sup> See CANES-WRONE, *supra* note 19, at 19–23; see also KERNELL, *supra* note 19, at 1–9.



this constellation (with many of these distinctions casting *additional* doubt on the constitutionality of presidential proclamations), it would be wise to first highlight the significant number of similarities and legal precedents involved.

The most relevant constitutional provision to these matters is the Establishment Clause, which reads: “Congress shall make no law respecting an establishment of religion.”<sup>26</sup> Located within the First Amendment of the U.S. Constitution, this clause initially prohibited only the federal government from respecting an establishment of religion.

In *Everson v. Board of Education*, the Supreme Court incorporated the Establishment Clause, thus extending the prohibition to states.<sup>27</sup> The divided Court provided important clarification to this short constitutional clause.<sup>28</sup> *Everson*, one of the foundational twentieth century Establishment Clause cases, highlighted the guiding principles within the Clause, principles which—to this day—serve as a controversial set of standards for Establishment Clause analysis. In direct and forceful language, Justice Hugo Black articulated the strict separation enshrined by the Clause:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”<sup>29</sup>

Although the Justices were divided about how to apply the Establishment Clause to the case before them, the Court was unified about the strict separation principles undergirding the Clause: the Government must be neutral between religions and

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<sup>26</sup> U.S. CONST. amend. I.

<sup>27</sup> See *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 18 (1947).

<sup>28</sup> See *id.* (finding “[t]hat [the First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary”).

<sup>29</sup> *Id.* at 15–16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

also between religion and non-religion; state and national governmental actions cannot show religious favoritism, either by favoring religion generally or favoring a specific religion; the government also would violate the Establishment Clause by demonstrating religious disfavor through a national or state law that actively harms a religion or its institutions, practices, and adherents.<sup>30</sup>

But, in practice, how strict must the separation be between church and state? How do we know when the government has not been neutral towards religion? Must a citizen prove that the government coerced her into participating in an alien religious practice in order for the courts to be sure that a breach of the Establishment Clause has occurred? In a series of cases following *Everson*, many of which explicitly dealt with the topic of governmentally-sanctioned prayer, the Court provided greater definition to the strict separation principles within the Establishment Clause.

#### A. Prayer and Public Schools

In *Engel v. Vitale*, the Supreme Court ruled that a governmentally approved prayer said daily in New York public schools represented an impermissible establishment of religion.<sup>31</sup> In a 6-to-1 ruling, the Court outlined the manifold problems with this sort of religious entanglement and promotion. Using sweeping language, the Justices in the majority argued that it is problematic for the government to encourage prayer—and not just because of the age of the admonished audience, but because of the state-sanctioned nature of the religious act.<sup>32</sup> Justice Black turned to James Madison’s writings for historical support. He asserted: “The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”<sup>33</sup>

The majority and concurring opinions in *Engel* also were clear that a governmental policy may violate the Establishment Clause even when no one is legally compelled to participate in a religious practice. Distinguishing the Establishment Clause from the Free Exercise Clause that follows in the First Amendment, the majority claimed the Establishment Clause “does not depend

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<sup>30</sup> See generally *Everson*, 330 U.S. 1.

<sup>31</sup> *Engel v. Vitale*, 370 U.S. 421, 424–25 (1962).

<sup>32</sup> See *id.* at 424–25, 432–33.

<sup>33</sup> *Id.* at 431–32 (quoting James Madison, Memorial and Remonstrance against Religious Assessments (June 20, 1785), in 2 THE WRITINGS OF JAMES MADISON, 1783–1787, at 187 (Gaillard Hunt ed., 1901)).

upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”<sup>34</sup> A year later, in *School District of Abington Township, Pennsylvania v. Schempp*, the high court again struck down governmentally-approved prayers and Bible readings, reiterating that “a violation of the Free Exercise Clause is predicated on coercion, while the Establishment Clause violation need not be so attended.”<sup>35</sup>

Two additional Supreme Court cases offer insight into the constitutionality of presidential Thanksgiving Proclamations. In *Lee v. Weisman*, the Court determined whether the Establishment Clause forbids clergy from offering non-denominational prayers at middle school and high school graduation ceremonies.<sup>36</sup> Writing for the majority, Justice Anthony Kennedy dedicated a good deal of ink showcasing the “subtle coercive pressure,” “indirect coercion,” and “peer pressure” involved in these benedictions.<sup>37</sup> Those individuals who would not willingly participate in such prayers are placed in an uncomfortable situation in which religious activity is either required or is costly to avoid (because of the incredible social pressure that comes along with abstaining from participation). It was clear to the majority that although a governmental practice does not have to be coercive to contravene Americans’ religious liberty, coerced participation in prayer certainly is unconstitutional: “[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”<sup>38</sup>

As in *Engel* (and numerous other Establishment cases) the writings, speeches, and actions of Thomas Jefferson and James Madison were used authoritatively by both the majority and

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<sup>34</sup> *Id.* at 430; *see also id.* at 438 (Douglas, J., concurring) (“[T]here is no element of compulsion or coercion in New York’s regulation requiring that public schools be opened each day with the following prayer . . . a child is free to stand or not stand, to recite or not recite, without fear of reprisal or even comment by the teacher or any other school official.”).

<sup>35</sup> *Sch. Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 223 (1963); *see also Wallace v. Jaffree*, 472 U.S. 38, 59–61 (1985) (holding an Alabama law that required public schools to set aside a short period of class time for silence, meditation, or prayer violated the First Amendment).

<sup>36</sup> *Lee v. Weisman*, 505 U.S. 577, 586–87 (1992).

<sup>37</sup> *Id.* at 588, 592–93.

<sup>38</sup> *Id.* at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

dissenting Justices in *Lee*.<sup>39</sup> In fact, Justice David Souter's concurrence, which was joined by Justices Stevens and O'Connor, relied on Thomas Jefferson's well-documented objection to presidential Thanksgiving Proclamations to support the view that the Establishment Clause entails no state endorsement of religion.<sup>40</sup>

In *Santa Fe Independent School District v. Doe*, the Court analyzed the constitutionality of a prayer offered by a high school student and broadcast before high school football games in Santa Fe, Texas.<sup>41</sup> Following *Lee*, the Court stressed the heightened coercion and social pressure involved in this practice of praying "on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer."<sup>42</sup> Writing for the six-member majority, Justice John Paul Stevens found the school district improperly "invite[d] and encourage[d] religious messages."<sup>43</sup> The Establishment Clause cannot brook this sort of "perceived and actual endorsement of religion."<sup>44</sup>

As in earlier Establishment cases, the presidential practice of making Thanksgiving Proclamations hovered in the background of *Santa Fe*. Whereas the majority of the Court claimed that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer,"<sup>45</sup> the dissenting Justices—led by Chief Justice William Rehnquist—rejoined:

Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God."<sup>46</sup>

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<sup>39</sup> See *id.* at 634 (Scalia, J., dissenting) (noting that Jefferson, in his second inaugural address, specifically "acknowledged his need for divine guidance and invited his audience to join his prayer"); see also *Engel v. Vitale*, 370 U.S. 421, 431–32 (1962).

<sup>40</sup> *Id.* at 623 (Souter, J., concurring).

<sup>41</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315–17 (2000).

<sup>42</sup> *Id.* at 290.

<sup>43</sup> *Id.* at 306.

<sup>44</sup> *Id.* at 305.

<sup>45</sup> *Id.* at 313.

<sup>46</sup> *Id.* at 318 (Rehnquist, C.J., dissenting) (quoting George Washington, Presidential Proclamation (Oct. 3, 1789), in 1 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 64 (J. Richardson ed., 1897)).

Prayer cases such as these should bear heavily on our evaluation of the constitutionality of Thanksgiving Proclamations. For if a high school student cannot give a “nonsectarian, nonproselytizing” prayer before an audience of a few hundred people,<sup>47</sup> it is difficult to imagine how the President of the United States can give a (sometimes highly sectarian) prayer and encourage hundreds of millions of Americans to continue with more (sometimes highly sectarian) praying. If “the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration,” is it not reasonable to assume that the American people also perceive the president’s Thanksgiving Proclamation as an expression of the public’s view, endorsed by the United States federal government?<sup>48</sup>

## B. Legislative Prayer

Two Supreme Court cases addressed aspects of legislative prayer that are informative of constitutional questions and the specific modes of analysis that may be involved in reconsidering presidential Thanksgiving Proclamations.

The first of these cases concerns state appointments and uses of chaplains. In *Marsh v. Chambers*, the Court considered whether the Nebraska state government violated the Establishment Clause by authorizing a chaplain to conduct prayers before legislative sessions.<sup>49</sup> Of added legal concern was the fact that “a clergyman of only one denomination has been selected by the Nebraska Legislature for 16 years, that the chaplain is paid at public expense, and that the prayers are in the Judeo-Christian tradition[.]”<sup>50</sup>

The Court ruled 6-to-3 that the chaplaincy position and legislative prayers did not constitute an establishment of religion. Chief Justice Warren Earl Burger penned the majority opinion, which gave special weight to this practice of “unique history” and tradition, and argued that the chaplain’s duties served as “a tolerable acknowledgment of beliefs widely held.”<sup>51</sup>

In a blistering dissent, Justice William Brennan rejoined that these government-sanctioned prayers are at odds with the Constitution and inconsistent with the Court’s previous

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<sup>47</sup> *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294.

<sup>48</sup> *Id.* at 308.

<sup>49</sup> See *Marsh v. Chambers*, 463 U.S. 783, 784 (1983).

<sup>50</sup> *Id.* at 783–84.

<sup>51</sup> *Id.* at 791–92.

decisions.<sup>52</sup> The simple fact that Nebraska’s legislature—as well as the U.S. House of Representatives, the U.S. Senate, and many state legislatures—has a rich history of praying before sessions does not erase the Establishment transgression. In pointed response to the majority opinion, Justice Brennan noted: “Prayer is serious business—serious theological business—and it is not a mere ‘acknowledgment of beliefs widely held among the people of this country’ for the State to immerse itself in that business.”<sup>53</sup>

The fact that a large number of Americans share a particular faith or participate in a similar religious practice only increases the need for a robust Establishment Clause and a “wall between church and state” that is “kept high and impregnable.”<sup>54</sup> Government-sanctioned prayer, including prayer from a legislative chaplain, undercuts the fundamental purposes of the Establishment Clause and instead “forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues.”<sup>55</sup>

More than thirty years after *Marsh* was decided, the Court returned to the matter in *Town of Greece v. Galloway*. In *Greece*, the Court evaluated the constitutionality of prayers offered at the start of municipal meetings.<sup>56</sup> In the town of Greece, New York, the municipal council regularly invited local clergymen to deliver an invocation before meetings began and government business was conducted. Many of the prayers were Christian in nature and were given by Christian clergymen, for “nearly all of the congregations in town were Christian.”<sup>57</sup>

In one of the most anticipated Establishment Clause rulings handed down by the U.S. Supreme Court this decade, the *Greece* Court, divided 5-to-4, found the town council prayers to be a constitutional exercise.<sup>58</sup> Writing for the majority, Justice Anthony Kennedy worked hard to elaborate the critically non-religious aspects of the pre-meeting invocations. According to the majority, the prayers were redeemable because they

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<sup>52</sup> See *id.* at 795–96 (Brennan, J., dissenting).

<sup>53</sup> *Id.* at 819.

<sup>54</sup> *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 18 (1947).

<sup>55</sup> *Marsh v. Chambers*, 463 U.S. 783, 808 (1983) (Brennan, J., dissenting).

<sup>56</sup> See *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1815 (2014).

<sup>57</sup> *Id.* at 1816. During the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians. These four prayers occurred in 2008, shortly after the plaintiffs began complaining about the town’s Christian prayer practice and nearly a decade after that practice had commenced. *Id.* at 1839 (Breyer, J., dissenting).

<sup>58</sup> *Id.* at 1813.

furnished a number of secular benefits.<sup>59</sup> For instance, the clergyman's invocation "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society."<sup>60</sup> Justice Kennedy stressed the purely ceremonial and somehow innocuous nature of this form of government prayer, arguing it is a benign part of our heritage and "intended to place town board members in a solemn and deliberative frame of mind."<sup>61</sup>

Offsetting his language about the ceremonial and significantly secular nature of the town council prayers, Justice Kennedy explored the setting and audience for the prayers to ascertain the extent to which people were being coerced into religious participation.<sup>62</sup> Fortunately for Kennedy & Co., the critically non-religious religious oration was determined to be non-coercive and principally directed at lawmakers. Justice Kennedy was clear to point out that "[t]he analysis would be different if town board members directed the public to participate in the prayers . . . . Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public."<sup>63</sup> The majority's logic clearly hinged on the limited number of citizens that attended town council meetings, citizens were not the intended audience for the prayers, and attendants' ability to opt out of listening and participating.

The brightest parts of Justice Elena Kagan's dissenting opinion, which was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor, sharply disagreed over this very evaluation of the setting and audience for town council prayers. According to the four dissenters, many members of the audience during these council meetings were members of the general public.<sup>64</sup> Moreover, "the prayers there [were] directed squarely at the citizens."<sup>65</sup>

An especially damning characteristic of the prayers was their association with a single religion—Christianity. Justice

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<sup>59</sup> *Id.* at 1818.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1816.

<sup>62</sup> *See id.* at 1825 ("It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.' . . . The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.") (quoting *Cty. of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 659 (1989)).

<sup>63</sup> *Town of Greece, N.Y.*, 134 S. Ct. at 1826.

<sup>64</sup> *Id.* at 1842 (Kagan, J., dissenting).

<sup>65</sup> *Id.* at 1848.

Kagan was especially troubled by the establishment risks that attend to this level of sectarianism. In her dissent, Kagan walked through several examples of governmental actors—a judge, an election official, an official at a naturalization ceremony—engaging in public religious invocations to show how “prayer repeatedly invoking a single religion’s beliefs in these settings—crossed a constitutional line.”<sup>66</sup> This clashes with the principle of full and equal citizenship guaranteed by the Establishment Clause. A government-sponsored prayer aligned with a single faith can offer the impression that they are less than full citizens and their equal rights and equal ownership over democratic government is predicated on an established religious orthodoxy.<sup>67</sup> In the closing paragraph of her opinion, Justice Kagan reinforced this point, writing: “When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another . . . they should not confront government-sponsored worship that divides them along religious lines.”<sup>68</sup>

### C. Grounds for Reconsidering Thanksgiving Proclamations

Not coincidentally, almost every court case discussed so far included some judicial reference to, or sustained commentary on, American presidents’ practice of issuing Thanksgiving Proclamations. Although the U.S. Supreme Court has never evaluated this particular practice, it certainly has given citizens the resources to do so. The arguments best equipped to cast doubt on the constitutionality of Thanksgiving Proclamations certainly include materials from the aforementioned constellation of governmental institutions, persons, and practices. Many of the precedents and modes of judicial reasoning generated by the Supreme Court’s Establishment Clause jurisprudence, spanning at least from *Everson* to *Greece*, complicate our historical embrace of presidential prayers and executive calls to thank and praise God.

For decades now, courts have turned to *Everson v. Board of Education* when explicating the strict separation principles undergirding the Establishment Clause. Based on these

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<sup>66</sup> *Id.* at 1843.

<sup>67</sup> *Id.* at 1841 (“I think the Town of Greece’s prayer practices violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. . . . In my view, that practice does not square with the First Amendment’s promise that every citizen, irrespective of her religion, owns an equal share in her government.”).

<sup>68</sup> *Id.* at 1854.



principles, it seems that presidential Thanksgiving Proclamations must be neutral between religions and also between religion and non-religion for them to pass constitutional muster. These official governmental actions cannot show religious favoritism, either by favoring religion generally or favoring a specific religion. After examining the various Thanksgiving Proclamations of the past, it should be clear that many of these executive statements have favored religion generally and also favored a specific religion.

Those who may claim that Thanksgiving Day Proclamations are vindicated by the fact that such Proclamations do not force citizens into religious observance should return to the U.S. Supreme Court's decisions in *Engel* and *Abington*. In these cases, the Court communicated the State's constitutional duty to avoid this exact sort of religious entanglement and promotion.<sup>69</sup> State-sanctioned calls for prayer are constitutionally suspect, even when no one is legally compelled to participate in the religious practice. This is because a government practice does not have to be coercive to violate the Establishment Clause.

Following the holdings in *Lee* and *Santa Fe*, we might wonder about the "subtle coercive pressure," "indirect coercion," and "peer pressure" involved in these benedictions, which flow from an individual who is regularly interpreted as the leader of the free world and the most powerful person on Earth.<sup>70</sup> A strong claim could be made that the president's words disseminate as a "perceived and actual endorsement of religion."<sup>71</sup>

Although the outcomes of *Marsh* and *Greece* appear to justify Thanksgiving Proclamations, this is not necessarily the case. The United States does not have a unique and unbroken history of presidential Thanksgiving Proclamations. Not every president has delivered this sort of religious message, and several who have issued Proclamations were troubled by their actions and/or used brief, muted, and/or secular declarations.

Justice Kennedy's majority opinion and Justice Kagan's dissenting opinion in *Greece* both illustrated the added constitutional obstacles facing presidential Thanksgiving addresses. Thanksgiving Proclamations are not purely ceremonial and innocuous words, issued by a local minister to a small crowd. Many of these Proclamations include religious exhortations, deeply theistic messages, and explicitly Judeo-Christian language and references. If four Justices of the

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<sup>69</sup> See *supra* Section III(A).

<sup>70</sup> *Lee v. Weisman*, 505 U.S. 588, 592–93 (1992).

<sup>71</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000).

Court were made queasy by the town council of Greece's strong association with a single clerical background, they must surely shudder by the language of Thanksgiving Proclamations and their common religious affiliation.

Even the majority opinion in *Greece* was adamant that “[t]he analysis would be different if town board members directed the public to participate in the prayers.”<sup>72</sup> The setting and audience for presidential Thanksgiving Proclamations is the public at large—political recipients of executive orders and messages. These Proclamations represent official governmental statements and are widely reported in the media. Moreover, many of these Proclamations clearly direct the public to participate in prayers.

#### IV. “THOU SHALT NOT MAKE RELIGIOUS PROCLAMATIONS” – JAMES MADISON AND THOMAS JEFFERSON

In addition to the conventional political scientific wisdom on presidential rhetoric and the relevant First Amendment jurisprudence on government-sanctioned prayer, several frank opinions from the founding generation may prove valuable to the evaluation of presidential Thanksgiving Proclamations. Some may consider this line of inquiry to be a fool's errand, especially because the first two presidents—George Washington and John Adams—both felt comfortable in offering Thanksgiving Proclamations.<sup>73</sup> Several influential leaders (and presidents) in the early years of our nation, however, expressed serious concerns over these exact practices.

An unmistakable characteristic of the Establishment Clause case law is the repeated struggles between competing historian-Justices over how best to appropriate (and pay homage to) James Madison and Thomas Jefferson. Madison and Jefferson wrote

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<sup>72</sup> *Id.* at 1826.

<sup>73</sup> After he left office, however, John Adams seemed less comfortable with these decisions. See *From John Adams to Benjamin Rush, 12 June 1812*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Adams/99-02-02-5807> [<http://perma.cc/DWH2-B2FE>] (last modified June 29, 2017).

The National Fast, recommended by me turned me out of Office. It was connected with, the general Assembly of the Presbyterian Church, which I had no concern in. . . . A general Suspicion prevailed that the Presbyterian Church was ambitious and aimed at an Establishment as a National Church. I was represented as a Presbyterian and at the head of this political and ecclesiastical Project. The Secret Whisper ran through them all the Sects ‘Let Us have Jefferson, Madison, Burr, any body, whether they be Philosophers, Deist or even Atheists, rather than a Presbyterian President.’ This Principle is at the Bottom of the Unpopularity of national Fasts and Thanksgivings, Nothing is more dreaded than the National Government meddling with Religion.

*Id.*

and spoke extensively on the topic of religious liberty, and both men were active in securing a strong separation of church and state while they served in governmental positions.

On the religion clauses of the First Amendment, these Founders' words have been "accepted almost as an authoritative declaration of the scope and effect of the amendment."<sup>74</sup> For example, the majority and dissenting opinions in *Everson* brim with dozens of references to these two men.<sup>75</sup> The Court turned to Madison and Jefferson throughout, as Establishment Clause exponents, experts, and historical beacons.<sup>76</sup> So if the actions and views of Madison and Jefferson are believed to offer "irrefutable confirmation of the Amendment's sweeping content,"<sup>77</sup> what can the lives of these two statesmen tell us about presidential Thanksgiving Proclamations?

For at least the past 140 years, Supreme Court Justices have trusted Thomas Jefferson's *Letter to the Danbury Baptists* as a reliable companion text to the Free Exercise Clause and Establishment Clause of the First Amendment.<sup>78</sup> Believing this letter helps to explicate the purposes and principles lying within our constitutionally guaranteed religious liberty protections, constitutional commentators have fought over the true meaning and history of Jefferson's missive.<sup>79</sup> Interestingly enough, a primary purpose behind President Jefferson's letter pertains to Thanksgiving Day Proclamations.

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<sup>74</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>75</sup> *See Everson v. Bd. of Educ.*, 330 U.S. 1, 34 (1947) (Rutledge, J., dissenting).

<sup>76</sup> *See generally id.*

<sup>77</sup> *Id.* at 34.

<sup>78</sup> *See Reynolds*, 98 U.S. at 164.

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions,—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 and State. Adhering 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.

*Id.* (quoting Thomas Jefferson).

<sup>79</sup> *See generally* DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT (2010); DANIEL L. DREIBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (First Harvard Univ. Press ed. 2002); VINCENT PHILLIP MUNOZ, GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON (2009); JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2d ed. 2000).

During his eight years as President, Jefferson never made such a Proclamation. Understanding the controversy surrounding this political decision, Jefferson relied on his *Letter to the Danbury Baptists* “to explain his reasons for refusing to issue presidential proclamations of days for public fasting and thanksgiving.”<sup>80</sup> On the same day that Jefferson sent the letter, he explained to then-attorney general Levi Lincoln these very intentions: “[T]he Baptist address now inclosed [sic] admits of a condemnation of the alliance between church and state, under the authority of the Constitution. [I]t furnishes an occasion too, which I have long wished to find, of saying why I do not proclaim fastings & thanksgivings.”<sup>81</sup>

Although Jefferson had issued a Thanksgiving Proclamation more than twenty years earlier, as governor of Virginia, he did not believe the president was constitutionally authorized to engage in this sort of religious practice.<sup>82</sup> During his final term in office, Jefferson reiterated his constitutional view on the matter:

I consider the government of the U.S. as interdicted by the constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. [T]his results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the U.S. certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government . . . but it is only proposed that I should *recommend*, not prescribe a day of fasting & prayer. [T]hat is that I should *indirectly* assume to the U.S. an authority over religious exercises which the constitution has directly precluded them from. [I]t must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it: not indeed of fine & imprisonment but of some degree of proscription perhaps in public opinion. [A]nd does the change in the nature of the penalty make the recommendation the less a *law* of conduct for those to whom it is directed?<sup>83</sup>

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<sup>80</sup> DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 2, 27–30 (2002).

<sup>81</sup> Thomas Jefferson, *To Levi Lincoln, 1 Jan. 1802*, in 36 THE PAPERS OF THOMAS JEFFERSON: DECEMBER 1, 1801 TO MARCH 3, 1802, at 256–57 (Barbara B. Obery ed., 2009), available at <https://jeffersonpapers.princeton.edu/selected-documents/levi-lincoln-0> [<http://perma.cc/CK8A-7BLQ>].

<sup>82</sup> President Thomas Jefferson, Proclamation Appointing a Day of Thanksgiving and Prayer (Nov. 11, 1779), <http://founders.archives.gov/documents/Jefferson/01-03-02-0187> [<http://perma.cc/2CWW-5WCN>].

<sup>83</sup> *From Thomas Jefferson to Samuel Miller, 23 January 1808*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/99-01-02-7257> [<http://perma.cc/VVU8-WSJH>] (last modified June 29, 2017).

Jefferson steadfastly believed it was not the responsibility of the president to direct a religious activity. Even if no legal compulsion accompanies the president's rhetoric, these official Thanksgiving Proclamations have the power to produce social pressure, inequality, and religious division among the American people.

James Madison, who played an instrumental role in the construction and congressional passage of the religion clauses of the First Amendment, shared Jefferson's constitutional worries and spent decades expressing his disapprobation with Thanksgiving Proclamations and similar practices. In his *Memorial and Remonstrance against Religious Assessments*, Madison expounded his belief in a meaningful separation of church and state.<sup>84</sup> Madison's petition argued a government could only secure religious equality for its citizens if it abstained from establishing a single faith or using public resources to support religion.<sup>85</sup> Religious life would thrive best, Madison reasoned, when it was divorced from government aid and our political institutions would operate most effectively when they did not depend on religious alliances.<sup>86</sup>

Madison's commitment to a mutually beneficial divorce between church and state elucidates his discomfort with presidential Thanksgiving Day Proclamations. Unlike Jefferson, Madison did make such Proclamations while President. He was, however, cognizant of the public concern over the constitutionality and propriety of "religious Proclamations" coming from the presidency, and he wrote quite a bit about these religious exercises (even to President James Monroe).<sup>87</sup>

In his *Detached Memoranda*, Madison deemed the appointment and use of legislative chaplains to be

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<sup>84</sup> *Memorial and Remonstrance against Religious Assessments*, [ca. 20 June] 1785, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/01-08-02-0163> [<http://perma.cc/2ZEU-W4Q9>] (last modified June 29, 2017).

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* ("If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an 'equal title to the free exercise of Religion according to the dictates of Conscience.' Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.").

<sup>87</sup> *See From James Madison to James Monroe, 11 December 1818*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/04-01-02-0339> [<http://perma.cc/4QTD-XTCF>] (last modified June 29, 2017).

unconstitutional.<sup>88</sup> Immediately following this evaluation, he articulated why “[r]eligious proclamations by the Executive recommending thanksgivings & fasts are shoots from the same root with the legislative acts reviewed.”<sup>89</sup> Madison went into detail on this point, recounting his legal, political, and historical “objections” to these Proclamations. These objections include the national government’s lack of legal authority to instruct religious activities such as prayer, the Proclamation’s offering the impression of an established national religion, and the possibility that politicians and political parties would use these prayers to serve political ends.<sup>90</sup>

In an 1822 letter to Edward Livingston, Madison again identified Thanksgiving Proclamations as a practice that compromised “a perfect separation between ecclesiastical & Civil matters” in the United States.<sup>91</sup> Madison complained: “There has been another deviation from the strict principle, in the Executive Proclamations of fasts and festivals; so far at least as they have spoken the language of *injunction*, or have lost sight of the equality of *all* Religious Sects in the eye of the Constitution.”<sup>92</sup> Madison remained hopeful, though, about the future of religious liberty, telling Livingston: “I have no doubt that every new example will succeed, as every past one has done, in shewing that Religion & Govt. will both exist in greater purity, the less they are mixed together.”<sup>93</sup>

Madison’s optimism was not entirely misplaced. The presidents immediately succeeding Madison stopped the practice. It was not until the 1860s, more than forty years after the last presidential Thanksgiving Proclamation was made, that Moses spoke again.

#### V. ON NON-CONCLUSIONS AND THERMIDOR

The political power of presidential rhetoric, the development of Establishment Clause jurisprudence, and the opinions of a few, long-dead Founding Fathers—where does all this leave us? Some may think it leads to a robust constitutional claim against presidential Thanksgiving Proclamations. Others may *pray* that

<sup>88</sup> *Detached Memoranda, CA. 31 January 1820*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/04-01-02-0549> [<http://perma.cc/64V2-WW3R>] (last modified June 29, 2017).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *From James Madison to Edward Livingston, 10 July 1822*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/04-02-02-0471> [<http://perma.cc/WU5T-CSLA>] (last modified June 29, 2017).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

it leads nowhere—drowned out by at least an equal number of political, scientific, legal, and historical materials and counterclaims. Let's leave that necessary dialectic for a different day and another law review article. Until then, remaining puzzles (or excursus):

Some Thanksgiving Proclamations have been neither as separationist as President Obama's nor as catechismal as President Bush's or President Eisenhower's. The subject of President Jimmy Carter's 1979 Thanksgiving Day Proclamation was hope and determination.<sup>94</sup> President Carter highlighted the countless obstacles through which the American people have persevered: Pilgrims struggling on a new continent, a later generation maintaining faith during the Revolutionary War, and subsequent Americans remaining confident in the nation's future even as the Civil War raged.<sup>95</sup> This Thanksgiving Proclamation was dedicated to a people who always made it through, who were virtuous, successful, and capable of finding their way out of trials.

Near the end of his Proclamation, President Carter did "ask all Americans to give thanks on that day for the blessings Almighty God has bestowed upon us, and seek to be good stewards of what we have received."<sup>96</sup> But the President's broader message to the United States seems to have been one of collective praise and unity, encouraging citizens to "be thankful in proportion to that which we have received, trusting not in our wealth and comforts, but in the strength of our purpose."<sup>97</sup>

. . .

"I have seen these people," the Lord said to Moses, "and they are a stiff-necked people. Now leave me alone so that my anger may burn against them and that I may destroy them. Then I will make you into a great nation."

But Moses sought the favor of the Lord his God. "Lord," he said, "why should your anger burn against your people, whom you brought out of Egypt with great power and a mighty hand? Why should the Egyptians say, 'It was with evil intent that he brought them out, to kill them in the mountains and to wipe them off the face of the earth'? Turn from your fierce anger; relent and do not bring disaster on your people. Remember your servants Abraham, Isaac and Israel, to whom you swore by your own self: 'I will make your descendants as numerous as the stars in the sky and I will give your descendants all

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<sup>94</sup> President Jimmy Carter, Thanksgiving Day Proclamation 4693 (Sept. 28, 1979), <http://www.presidency.ucsb.edu/ws/?pid=31444> [<http://perma.cc/BMJ2-YCTY>].

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

this land I promised them, and it will be their inheritance forever.” Then the Lord relented and did not bring on his people the disaster he had threatened.

Moses turned and went down the mountain with the two tablets of the covenant law in his hands. They were inscribed on both sides, front and back. The tablets were the work of God; the writing was the writing of God, engraved on the tablets.

When Joshua heard the noise of the people shouting, he said to Moses, “There is the sound of war in the camp.”

Moses replied: “It is not the sound of victory, it is not the sound of defeat; it is the sound of singing that I hear.”

When Moses approached the camp and saw the calf and the dancing, his anger burned and he threw the tablets out of his hands, breaking them to pieces at the foot of the mountain. And he took the calf the people had made and burned it in the fire; then he ground it to powder, scattered it on the water and made the Israelites drink it.<sup>98</sup>

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<sup>98</sup> *Exodus* 32: 9-20.