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BREAKING AWAY FROM THE "PRAYER POLICE": WHY THE FIRST AMENDMENT PERMITS SECTARIAN LEGISLATIVE PRAYER AND DEMANDS A "PRACTICE FOCUSED" ANALYSIS

Robert Luther III* & David B. Caddell**

Historically, the "ineluctable tension"¹ within the First Amendment has concerned the relationship between the Free Exercise Clause and the Establishment Clause when the cause of such tension was an issue that involved a question of religion and its role in the public square.² However, in a post-

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¹ See Jesse H. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. PITT. L. REV. 673, 673 (1980) ("In this chapter I wish to confront the ineluctable tension that exists between the two provisions-a conflict that the Court has conceded . . . ."). Such "ineluctable tension" between the religion clauses was not intended by the Framers. John Baker, Amendments: Establishment of Religion, in THE HERITAGE GUIDE TO THE CONSTITUTION 302 (Edwin Meese III, Matthew Spalding & David F. Forte eds., 2005) ("In recent years the Supreme Court has placed the Establishment Clause and the Free Exercise Clause of Religion clauses in mutual tension, but it was not so for the Framers.").

² See generally James J. Knicely, "First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?, 52 DRAKE L. REV. 171 (2004). Needless to say, if the Establishment Clause were not incorporated against the states, it is unlikely that any of the cases discussed in this paper
Employment Division v. Smith world, it is not uncommon to find advocates who raise Establishment Clause claims confronted with the defense of the Free Speech Clause. Thus, "religious speech in the public square" cases that range from high school valedictorians who wish to speak about the role of a particular religion in their life at graduation, to cases where legislators, city council persons, school board members, or invited clergy wish to open legislative gatherings in the name of the deity most personal to them are often met with intense condemnation and scrutiny.

would entail "Establishment Clause concerns."


4. In cases involving religious speech in the public square, advocates are left with little choice but to raise Free Speech arguments in view of the fact that federal courts have closed the door to traditional Free Exercise claims in the years that have followed Smith. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 n.1 (2006) ("As originally enacted, RFRA applied to States as well as the Federal Government. In City of Boerne v. Flores, 521 U.S. 507 (1997), we held the application to States to be beyond Congress' legislative authority under § 5 of the 14th Amendment.").

5. Cole v. Oroville Union High Sch., 228 F.3d 1092, 1105 (9th Cir. 2000); Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979, 985 (9th Cir. 2003) (holding that a student selected on objective criteria to present a valedictory address may not disclaim sectarian, proselytizing religious speech at a graduation ceremony).


There had been virtually no litigation or legal authority concerning the constitutionality of sectarian legislative prayer until the last six years. As a general observation, the first federal courts to confront the issue tended to over-read the U.S. Supreme Court's seminal opinion on legislative prayer, *Marsh v. Chambers,* by restricting all sectarian content from prayers, although some courts have recently cut back on this initial over-reading. While it is clear that "if *Marsh* means anything, it is that the Establishment Clause does not scrutinize legislative invocations with the same rigor that it appraises other religious activities," it is equally evident that lower federal courts have failed to adopt a consistent framework for answering the question of whether the Constitution permits political bodies to control the content of a speaker's religious speech during legislative prayer.

In anticipation of the Supreme Court's final word, and with the hope of providing clarity to this dialogue in the meantime, we will discuss the reasons why *Marsh* permits the use of sectarian references despite the confusion within lower federal courts generated by reliance on dicta contained in *County of Allegheny v. American Civil Liberties Union*—a case that dealt with religious symbols and not religious speech. This article urges courts to favor the historical and constitutional policy of permitting individuals to choose their own words when engaging in speech, including religious speech, within the public square. Legislative bodies that refuse to allow those who are permitted to pray the right to mention specific deities of their choosing — Jesus, Allah, Jehovah, or others — in their prayers undermines diversity and the free speech rights of these individuals, and, in turn,
renders these traditionally solemn occasions meaningless.

As a result of these seemingly ambiguous and disparate road signs, conflict exists amongst the federal circuits in these legislative prayer cases.\textsuperscript{14} An attempt at reconciliation has created a myriad of confusing paths before courts addressing the issue.\textsuperscript{15} United States District Court Judge David Hamilton articulated a number of these diverging philosophies when he stated:

There are three solutions to the problem the Speaker has raised in terms of the inherently sectarian content of any prayer. The first would be to find that all religious prayer in this context (official speech as part of the formal legislative proceedings) violates the Establishment Clause. That was the approach of Justices Brennan and Marshall in dissent in \textit{Marsh}. The second is to find that the problem is not really a problem, so that legislative prayers based on inclusion and common traditions are permissible under the Establishment Clause. That was the approach of the Court majority in \textit{Marsh} . . . . The third would be to find that courts should not try to distinguish between permissible and impermissible prayer in this context, and so should permit any legislative prayer, no matter how sectarian, divisive, exclusive, or even hostile to other faiths it might be.\textsuperscript{16}

There is also a fourth approach Judge Hamilton fails to mention and which is discussed in detail in this article. Instead of following some grand, new judicially promulgated design, it makes more sense to adhere to the words of the Supreme Court precedent in \textit{Marsh} by refusing to “parse”\textsuperscript{17} particular prayers to the extent that a prayer does not “proselytize or disparage the particular tenets or beliefs of individual faiths.”\textsuperscript{18} This approach is not only faithful to

\begin{itemize}
  \item \textsuperscript{15} \textit{See Bosma}, 400 F. Supp. 2d at 1128.
  \item \textsuperscript{16} \textit{Id}.
  \item \textsuperscript{17} \textit{Marsh} \textit{v.} Chambers, 463 U.S. 783, 795 (1983).
  \item \textsuperscript{18} Snyder \textit{v.} Murray City Corp., 159 F.3d 1227, 1234 (10th Cir. 1998) (en banc) (refusing to permit prayer that proselytizes or disparages the tenets or beliefs of individual faiths because “[a] principal effect of [such] prayer, as practiced by Snyder and others, will be the symbolic association of government power with religious—and antireligious—intolerance and bigotry”).
\end{itemize}
precedent, it strikes the appropriate balance between permissible legislative prayer under Marsh and the hyperbolic fear of those who contend that unchecked legislative prayers could cause city council meetings to turn into spiritual revival sessions. Courts must recognize that "non-sectarian only prayer policies fail to allow individuals to pray according to their consciences and serve only to 'tame, cheapen, and secularize' what little religion remains in American public life today."19

I. UNDER MARSH, SECTARIAN REFERENCES INVOKED DURING LEGISLATIVE PRAYERS ARE CONSTITUTIONAL

While there is little doubt that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country,"20 the Supreme Court's "curious[ly] ambigu[ous]"21 decision in Marsh set the stage for the contemporary questions surrounding the constitutionality of sectarian references invoked during legislative prayer.22 In Marsh, Ernie Chambers, a maverick member of the Nebraska state legislature23, brought a civil rights action against Marsh, the Nebraska state Treasurer, seeking an injunction to halt the employment of Robert E. Palmer as legislative chaplain,24 on the theory that both the practice of legislative prayer and the

24. At the time the litigation commenced, Robert E. Palmer, a Presbyterian minister, had served as chaplain for the Nebraska Legislature for sixteen years (since 1965). Marsh, 463 U.S. at 785.
state funding of a chaplain to provide legislative prayer established religion in violation of the Establishment Clause.\textsuperscript{25} The District Court concluded that the practice was constitutional, but, the state was forbidden to fund the chaplain.\textsuperscript{26} The Eighth Circuit Court of Appeals reversed the District Court's findings and concluded the practice of legislative prayer was unconstitutional because it failed all three prongs of the \textit{Lemon} test.\textsuperscript{27} Nevertheless, the state was permitted to fund the chaplain under the power granted to the state via the Tenth Amendment.\textsuperscript{28} On appeal, the Supreme Court reversed the district and appellate court decisions, holding that both the practice and its funding were constitutional.\textsuperscript{29} The Supreme Court's opinion in \textit{Marsh} avoided much discussion about the constitutionality of legislative prayer and focused, instead, on the historical facts surrounding the Founders' decision to sanction to such prayer.\textsuperscript{30} The Court noted that within days after a final agreement was reached on the language of the Bill of Rights, the First Congress adopted a policy whereby a chaplain paid from Congressional funds would open each session with prayer.\textsuperscript{31} In view of these facts, the Court observed, "[c]learly the men who wrote the First Amendment Religion Clauses did not view . . . opening prayers as a violation of that Amendment . . . ."\textsuperscript{32}

The measured opinion of \textit{Marsh} attempted to balance two competing interests. First, the Court recognized the need for an outlet to display "tolerable acknowledgment of beliefs

\begin{itemize}
\item \textsuperscript{25} \textit{Marsh}, 504 F. Supp. at 586.
\item \textsuperscript{26} \textit{Id.} at 592.
\item \textsuperscript{27} \textit{Marsh}, 675 F.2d at 233-35. The government's action must have a "legitimate secular purpose"; the government's action must not have "the primary effect of advancing or inhibiting religion"; and the government's action must not result in any "excessive entanglement" with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
\item \textsuperscript{28} Marsh v. Chambers, 675 F.2d 228, 232-33 (8th Cir. 1982), \textit{rev'd}, 463 U.S. 783 (1983). "We recognize that a paid chaplain might be assigned functions other than offering official prayers, functions that could be deemed proper in some contexts." \textit{Id.} at 235.
\item \textsuperscript{29} \textit{Marsh}, 463 U.S. at 793-95.
\item \textsuperscript{30} See \textit{id.} at 786-92. The Court's opinion in \textit{Marsh} also marked the first time the Court failed to apply (or avoided applying) the "\textit{Lemon test}" since its decision in that case twelve years earlier. \textit{Id.}
\item \textsuperscript{31} \textit{Id.} at 787-88.
\item \textsuperscript{32} \textit{Id.} at 788.
\end{itemize}
widely held among the people of this country." Historically, deliberative bodies had accomplished this task by "invoke[ing] Divine guidance" prior to the commencement of their deliberative session. Yet, the Court also recognized that the government can not endorse or entangle itself with religion.

The Court avoided a decision based on the content of the prayer. Instead, the Court acknowledged that it is not the role of the judiciary to "embark on a sensitive evaluation" of the content of an individual's prayer. Indeed, except for recognition of Chaplain's Palmer's affiliation with the Presbyterian Church, the only reference in the Marsh majority opinion to any sectarian/non-sectarian distinction came in a footnote, when the Court observed that Palmer described them as being "‘nonsectarian,’ ‘Judeo Christian,’ and with ‘elements of the American civil religion.’" The Court declared, however, that legislative prayer falls outside of this tolerable acknowledgment of religion when "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." Regardless of its language, or absence thereof, concerning sectarian references, Marsh's mandate to lower courts that they not embark on a sensitive evaluation of the prayer at issue unless the prayer opportunity is used to proselytize or disparage another faith cannot reasonably be disputed.

Just six years later, in Allegheny, the Supreme Court was confronted by a nativity scene located inside the county courthouse and a menorah located outside of the city-county building violated the Establishment Clause. Although Allegheny involved religious symbols, rather than spoken words, the plurality opinion launched into a retrospective discussion of Marsh. In dicta, the plurality declared, "not

33. Id. at 792 (emphasis omitted).
34. Marsh, 463 U.S. at 792.
38. Id. at 793 n.14.
39. Id. at 794-95.
40. Id. at 792.
42. Id. at 578.
43. Id. at 602-05.
even the ‘unique history’ of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.”

Ironically, by what was apparently an attempt to remain neutral, the effect was to strong-arm the state into endorsing a generic, deistic, “god,” forcing speakers to adopt a judicially-generated theological premise that contradicts the Court’s neutrality principle. Additionally the Allegheny plurality failed to recognize the otherwise seemingly obvious fact that the Marsh Court “rejected the claim that an Establishment Clause violation was presented because the prayers had once been offered in the Judeo-Christian tradition.” Retrospective analysis also diminishes the Allegheny plurality’s statement. As the late Chief Justice Rehnquist recounted twenty-two years later, “In Marsh, the prayers were often explicitly Christian…but.” Thus, in view of the confusion generated by these two seemingly conflicting opinions, it comes as little surprise that federal courts have failed to consistently apply Marsh.

II. FEDERAL COURTS HAVE FAILED TO CONSISTENTLY APPLY MARSH

The unfortunate reality for those who viewed the Supreme Court’s treatment of religion in public life prior to 1980 as particularly harsh is that the Court’s next twenty-years revealed only a marginally mixed improvement. Yet,

44. Id. at 603.
46. Id.
48. Although the Supreme Court recognized religious freedom in universities. See Widmar v. Vincent, 454 U.S. 263 (1981), and upheld the Equal Access Act permitting religious clubs in high schools in Board of Education of
despite the handful of peripheral cases regarding legislative prayer in the twenty-years after *Marsh,* no case that questioned the specific religious content of legislative prayer reached the federal appellate level until *Wynne v. Town of Great Falls* in 2004. Initially, in *Wynne,* and most recently, in *Doe v. Tangipahoa Parish School Board,* a number of federal courts have failed to consistently apply *Marsh.* The inconsistent application of *Marsh* has resulted from the application of the U.S. Supreme Court's decision in *Allegheny,* a case addressing religious symbols in the public square.

A. *Wynne v. Town of Great Falls: The Unlikely Marriage of Marsh and the "Coercion Test"* For Analyzing Sectarian


49. See *Mellen v. Bunting,* 327 F.3d 355 (4th Cir. 2003) (prayer before meals violated Establishment Clause because of unique coercive environment); *Coles v. Cleveland Bd. of Ed.,* 171 F.3d 369 (6th Cir. 1999) (finding that a school board's practice of opening its meetings with a moment of silence or prayer violated the Establishment Clause); *Snyder v. Murray City Corp.,* 159 F.3d 1227 (finding that a city council did not violate the Establishment Clause when it denied a citizen permission to recite his proposed prayer because the citizen was proselytizing when he sought to convert the audience to his belief in the sacrilegious nature of government prayer).

50. *Wynne v. Town of Great Falls,* 376 F.3d 292 (4th Cir. 2004). *Wynne* was the first federal appellate decision to ignore the mandate of *Marsh* and make an evaluation of the religious content of the speech. Here, the Fourth Circuit concluded that "repeated sectarian references" spoken throughout a legislative prayer establish religion in violation of the Establishment Clause. *Wynne,* 376 F.3d at 301-02.

51. "While the coercion test developed in the public-school prayer context, the Fourth Circuit's extension into an adult-prayer scenario highlighted a precedential gap between a body of law focused on minor children and a lone Supreme Court case addressing adult prayer in a legislative situation." Elizabeth B. Halligan, Comment, *Coercing Adults?: The Fourth Circuit and the Acceptability of Religious Expression in Government Settings,* 57 S.C. L. REV. 923 (2006) (arguing that the Fourth Circuit may have pushed the boundaries of its authority by applying a test developed for children to adults in *Wynne* and *Simpson*).
Legislative Prayer Cases

Wynne pioneered a series of Fourth Circuit cases that attempted to define the scope of Marsh's holding. In Wynne, a practitioner of Wicca sued the town council to enjoin it from praying in the name of "Jesus Christ" at the conclusion of the invocation. Earlier, Ms. Wynne had contacted the council and informed them that she was uncomfortable with the atmosphere and she even "proposed that the prayer's references be limited to 'God' or, instead, 'that many members of different religions be invited to give prayers.'" Although the council adopted a non-sectarian policy a few weeks prior to trial, anecdotal commentary suggested that members of the council expressed both official and unofficial animosity towards Ms. Wynne.

The trial court permanently enjoined the council from making any sectarian references at future meetings. On appeal, the Fourth Circuit condemned the council's conduct for failing to adhere to the mandate of Marsh that they not engage in legislative prayer that proselytizes or disparages other faiths. However, in condemning the council for not

52. See, e.g., Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005); Turner v. City Council of Fredericksburg, 2006 U.S. Dist. LEXIS 56786 (E.D. Va. Aug. 14, 2006). Furthermore, the Fourth Circuit has been particularly fertile ground for "government speech" litigation. See, e.g., Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004); Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610 (4th Cir. 2002), reh'g denied, 305 F.3d 241, 245 (4th Cir. 2002).

53. Wynne, 376 F.3d at 294.
54. Id. at 295.
55. Id. at 296 n.2 ("On June 23, 2003, a few weeks before the trial, the Town Council adopted a resolution setting forth a policy governing prayers at Council meetings. The resolution provided that '[t]he invocation shall not contain or address any specific beliefs . . . of any specific religion.' But, after adoption of the Resolution, Council Member Stevenson told Wynne that things 'would stay the same' . . . and Mayor Starnes testified at trial that the Resolution 'would not prohibit any Town Council member from making specific references to Christ, Jesus Christ, or Christ in any prayer opening the Town Council meeting.'").
56. Id. at 295 ("Wynne continued to attend Town Council meetings, but she testified 'it began to get hard.' When she refused to stand during the Christian invocation, she heard a voice, which she believed was Councilman Broom's, state, 'Well I guess some people aren't going to participate.' Her fellow citizens then told Wynne she 'wasn't wanted,' and that she 'should leave town'; they accused her of being a 'Satanist,' and threatened that she 'could possibly be burned out.'").
57. Id. at 296.
58. Id. at 301-02 ("Great Falls engaged, as part of public business and for
adhering to *Marsh*, the court failed to articulate its understanding of the framework of *Marsh* before determining that an Establishment Clause violation had occurred.\(^{59}\) Thus, the sweeping scope of the *Wynne* court’s ruling only seems appropriate when viewed as a remedial punishment for the town’s public denigration of a religious minority. Additionally, the court’s inquiry also failed to consider whether the same standard should apply when the invocation at issue was not consistently provided by the same speaker.\(^{60}\) For example, would an invited clergyperson still be subject to the same prayer restrictions as a councilmember or school board member?

**B. Simpson v. Chesterfield County: The “Invocation” of the “Government Speech” Doctrine Simultaneously Trumps Both *Marsh* and the Free Speech Clause**

A year later, this question arose in a similar case that also concerned both Wiccans and the content of legislative prayer within the Fourth Circuit. At issue in *Simpson v. Chesterfield County*,\(^ {61}\) was the Chesterfield County Board of Supervisors’s policy that allowed leaders of religious congregations to give an invocation prior to meetings.\(^ {62}\) Simpson, a Wiccan Priestess, wished to give an invocation with other leaders at county meetings.\(^ {63}\) The Board of Supervisors rejected her request because its policy required that each “invocation must be non-sectarian with elements of the American civil religion . . . .”\(^ {64}\)

In *Simpson*, Chief Judge Wilkinson remarked that the decision in *Wynne* “found a Town Council’s practice explicitly advancing exclusively Christian themes to be unconstitutional.”\(^ {65}\) Particularly, “*Wynne* was concerned that

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59. See generally *Wynne*, 376 F.3d 292.
60. See generally *id*.
62. *Id.* at 278-79.
63. *Id.* at 279.
64. *Id.* at 278.
65. *Id.* at 282.
repeated invocation of the tenets of a single faith undermined our commitment to participation by persons of all faiths in public life." Wilkinson attributed the Wynne court's decision to the fact that the town was advancing "exclusively" Christian themes that were offered by the same person. Additionally, Chief Judge Wilkinson took note of the "repeated" religious references made by the speakers.

In his summary of Wynne, however, Chief Judge Wilkinson spoke the loudest where he spoke the least. By concluding almost summarily that the "government speech doctrine" permitted the board to control the content of the speech, Chief Judge Wilkinson avoided the need to address the question of whether all invocations of a single faith rise to the level of an Establishment Clause violation. However, despite dismissing the Free Speech claim on "government speech" grounds, he did acknowledge the "spacious boundaries set forth in Marsh." Indeed, by emphasizing the "repeated" sectarian references and generally hostile atmosphere in Wynne, it seems unlikely Chief Judge Wilkinson would conclude that isolated sectarian references violate the Establishment Clause.

C. Hinrichs v. Bosma: A U.S. District Court Outside of the Fourth Circuit Continues to Overstep Marsh's "Spacious Boundaries"

Shortly after the Fourth Circuit's decision in Simpson, the United States District Court for the Southern District of Indiana addressed the significant questions that lingered after Simpson in Hinrichs v. Bosma. The issue presented was whether isolated sectarian references, offered by a multitude of faiths during the course of the year-long Indiana House of Representatives legislative session, violated the Establishment Clause.

66. Id. at 283.
67. Simpson, 404 F.3d at 283 (emphasis added).
68. Id.
69. Id. at 284.
70. Simpson, 404 F.3d at 283-84.
72. Id. at 1106 ("Transcripts are available for forty-five prayers. Of these,
Unlike both the Wynne and Simpson cases, a non-sectarian prayer policy did not exist in the Indiana House. Hinrichs v. Bosma arose when Indiana State Speaker of the House Brian Bosma refused to adopt a policy requiring that only non-sectarian prayer be given at the beginning of Indiana State House proceedings.\footnote{Bosma, 400 F. Supp. 2d at 1129.} Unlike the aforementioned Fourth Circuit cases, in addition to arguing free speech and free exercise claims,\footnote{Id. at 1125.} Bosma had an additional weapon in his arsenal. Unlike Marsh or Wynne, there were no allegations in Bosma that one speaker continuously provided the invocation.\footnote{See id. at 1108-09.} Generally, Bosma is distinguishable from the previously decided legislative prayer cases because by inviting a broad variety of religious denominations to present invocations, the legislature avoids violating the Establishment Clause by institutionally preferring one faith over another. The fifty-three prayers offered during the 2005 session included prayers by a Jewish rabbi and a Muslim imam.\footnote{Id. at 1115.} Unfortunately, even the inclusion of these additional facts was not enough to persuade the District Court of “the Speaker’s view, [that] Marsh v. Chambers imposes no limits on legislative prayer, apart perhaps from intentional discrimination in the selection of volunteer clergy from different religious faiths.”\footnote{Id. at 1125.} In later denying the stay on the permanent injunction, Judge Hamilton followed Bosma’s concession that the opening prayer was “government speech”\footnote{Id. at 1125.} with the comment that “[Bosma] has not attempted to create a public forum in which all are welcome to express their faiths.”\footnote{Hinrichs v. Bosma, 410 F. Supp. 2d 745, 750 (S.D. Ind. 2006).} This false dichotomy is not wholly inclusive of the determinative factors. If, as Hamilton claims, a prayer forum where “all are welcome to twenty-nine were offered in the name of Jesus, Jesus Christ, the Savior, and/or the Son. In the majority of these invocations, the officiant did not indicate that he or she was personally praying in the name of Jesus or Christ. Some officiants explicitly stated that the prayer was offered for all those assembled or for persons other than the legislative body. The substantial majority of prayers offered during the 2005 session were explicitly Christian in content.”).
express their faiths" would be permissible, the quantity of speakers certainly does not change the fact that the speaking opportunity is still provided by the government. Rather, the appropriate questions to ask are: 1) whether the constitutional concern arises because the opportunity is birthed in the shroud of state authority; 2) whether the constitutional concern arises from the lack of "prayer diversity" when that opportunity is presented, and 3) whether the venue and means make clear that any sectarian prayer that may be offered is not endorsed by the state. While connected, these issues are worth considering separately. The ultimate question is which of these values controls.

Bosma immediately appealed the District Court's refusal to grant a stay on the injunction. In a divided panel opinion, the Seventh Circuit denied Bosma's request for a stay on the injunction. In dissent, Circuit Judge Kanne candidly summed up the sentiments of both individuals who wished to pray according to their conscience and their legal advocates:

The only time the Supreme Court considered the constitutionality of legislative prayer it approved of the practice. A key dispute in this case, as it appears now, is whether Marsh rests on a line drawn between sectarian and nonsectarian legislative prayer. While there is case

80. Id.


82. When courts focus only on the prayer and fail to focus on the prayer opportunity, which is the relevant inquiry under Marsh, they leave the constitutionality of any prayer at the mercy of the "prayer diversity" attributable not simply to the community, but attributable to the members of the community who take the initiative to provide prayers at legislative sessions. This is exactly what happened in Doe where the court observed that "even if another type of prayer had been given, which the Board failed to show, that would not cure the unconstitutionality of the prayers . . . ." Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188, 205 n.6 (5th Cir. 2006). By failing to focus on the prayer opportunity, the court found four sectarian prayers unconstitutional—not because someone had suffered a legitimate constitutional injury by being denied the opportunity to pray—but simply because all the prayers were Christian.

83. Bosma, 440 F.3d at 394.

84. Id. at 403.
law supporting the proposition that Marsh approves of only nonsectarian legislative prayer, there still remain powerful arguments to the contrary, not the least of which is the Marsh majority's curious ambiguity on the point. Moreover, other factual differences may drive the ultimate ruling in this case. The nuanced nature of Establishment Clause jurisprudence in general and the recognized status of legislative prayer as holding its own unique place in our nation's history make it difficult, if not impossible, to say that the Speaker lacks a significant probability of success on the merits. The legal uncertainty caused by the special place legislative prayer holds in our nation's heritage and our Establishment Clause jurisprudence, the absence of irreparable harm, and the deference due to another sovereign's internal spiritual practices require that we stay the district court's injunction at least until we can determine for ourselves whether a constitutional violation has occurred.\(^5\)

The Seventh Circuit's refusal to stay the injunction was not met with much enthusiasm inside the Indiana House. In February of 2007, "Rep. Mike Sodrel, R-Ind., responded by introducing a bill that would remove the content of speech at legislative sessions from judicial review. The bill was referred to the House Judiciary Committee."\(^6\)

During the Bosma oral argument before the Seventh Circuit on September 7, 2006, one judge asked Bosma's attorney how he would respond to the adoption of a policy by the Indiana House that would only permit Christian invocations.\(^7\) This question brings to light the essence of the debate over legislative prayer policies. Clearly, the hypothetical policy proposed violates the Establishment Clause under the current jurisprudence. The main concern from a religious liberty perspective, however, may not be that the Establishment Clause precedent dictates this result. While individuals on both sides of the fence would be aghast at the adoption of such a policy, the most egregious violation

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85. Id. at 403 (Kanne, J., dissenting) (citations omitted).
of the Establishment Clause here is where the policy instructs individuals on how they must pray—that is what the heart of the Establishment Clause prohibits. As such, it is unclear how the principle behind the hypothetical policy is any different from the “non-sectarian” prayer policy that currently stands.

On October 30, 2007, the United States Court of Appeals for the Seventh Circuit released its opinion in Bosma. The Court in Bosma refused to address the constitutionality of the sectarian prayers at issue and held that the plaintiffs-taxpayers lacked the requisite standing to bring suit on the basis of two recent U.S. Supreme Court opinions decided while the case was pending.

In her dissenting opinion, Judge Wood recounts that “[t]he Establishment Clause uniquely involves [a] sort of psychic, aesthetic, or intangible injury.” Yet, in support of this proposition, she cited three cases that each concerned religious symbols on public property—similar to the manner that other federal courts have cited the religious symbols case of Allegheny in tandem with Marsh when engaging in sectarian legislative prayer analysis. This trio of cases failed to include any case law support for the proposition that a “psychic, aesthetic, or intangible injury” may accrue and be used to challenge the sectarian content of a defendant’s religious speech in the form of legislative prayer.

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89. See DaimlerChrysler v. Cuno, 126 S. Ct. 1854, 1864 (2006) (“We hold that state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers.”); Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2559 (2007) (holding that federal taxpayers lack standing to bring Establishment Clause challenge unless Congress had expressly authorized the expenditures for religious purposes).
92. Id.
93. Just as the First Amendment fails to rise to a “constitutional injury” in the form of an Establishment Clause claim when an individual becomes offended at a public display of religious symbols, the First Amendment fails to
Additionally, Judge Wood apparently failed to consider the recent Fifth Circuit opinion that dismissed a plaintiff's suit that had been filed in objection to a legislative body's repeatedly sectarian legislative prayers on the grounds that the plaintiff lacked sufficient standing—the legal trajectory echoed by the majority's opinion in *Bosma*. Nevertheless, by reversing the opinion of the district court and dissolving the injunction it issued earlier, the question of the constitutionality of sectarian legislative prayer currently remains “an open one.”

III. “NON-SECTARIAN” PRAYER POLICIES VIOLATE THE ESTABLISHMENT CLAUSE

While the U.S. Supreme Court in *Marsh* ruled that legislative prayers do not violate the Establishment Clause of the First Amendment, it did not give government entities a license to censor prayer at will. Thus, a judicial approach that requires “non-sectarian prayer” is also flawed because it promotes deism and establishes a civic religion. In *Lee v.*
Weisman, the U.S. Supreme Court observed, "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.' 98 The Court in Lee prudently recognized, "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."99

In Lee, the Court struck down a middle school prayer policy,100 much like the ones at issue in Bosma, Turner v. City Council of Fredericksburg, and Klingenschmitt v. Winter,101 which directed all prayers to be non-sectarian.102 The Court pointed out that such a policy unconstitutionally "direct[s] and control[s] the content of the prayers" in violation of the Establishment Clause. The Court made clear that:

The central meaning of the Religion Clauses of the First

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99. Id. at 592.
100. Id. at 588.
101. Klingenschmitt v. Winter, No. 06-01832 (D.D.C. Oct. 2006), dismissed, No. 07-5034 (D.D.C. Sept. 21, 2007). "The Navy favors the 'non-sectarian' civic religion over the Trinitarian Christian religion." Id. at 8. "The Navy promotes Unitarianism over all other religions." Id. at 9. "The Navy permits its 'non-sectarian' and Unitarian Chaplains to express themselves fully and does not place limits on how they pray." Id. "The Navy places limits on how their Christian Chaplains can publicly pray and forbids them from saying 'in Jesus' name." Id. Although this case was recently dismissed on standing grounds, the facts have a high likelihood of repetition so this controversy should still be considered active. However, although we recognize the importance of Klingenschmitt's Free Exercise and Free Speech rights, we also realize that Rev. Klingenschmitt's case, even if decided on the merits, would have an additional obstacle to overcome. Federal courts are highly "deferential . . . in the area of military affairs." Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 58 (2006); see also Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (Jewish Air Force officer forbidden from wearing yarmulke indoors). Nevertheless, Rev. Klingenschmitt was fortunate to have been able to "invoke" the protection of RFRA since the U.S. Navy was a federal defendant.
Amendment... is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.103

While the U.S. Supreme Court, in Lee, has said that the government may not comprise an official prayer, it follows that individually promulgated and expressed invocations containing some sectarian references, including a deity, does not “proselytize” or “disparage,” in violation of Marsh, but is simply a tolerable accommodation of the religious diversity in this country.

IV. COURTS SHOULD CONTINUE FOCUS ON THE “PRAYER OPPORTUNITY” AND NOT THE “CONTENT OF THE PRAYER” WHEN ANALYZING LEGISLATIVE PRAYER CASES

After the District Court decision in Bosma, but before the United States Court of Appeals for the Seventh Circuit spoke on the injunction, the United States District Court for the Northern District of Georgia issued a decision in Pelphrey v. Cobb County104 that took a significantly different approach for evaluating sectarian references in legislative prayer. Only three months later, after the district court’s decision on the merits in Pelphrey, a similar legislative prayer case was decided by the United States Court of Appeals for the Fifth Circuit. This decision was later reversed on different grounds before the en banc panel. However, the decision of the initial three-judge panel is noteworthy because Judge Clement, in dissent, adopted a significant portion of the “practice-focused” analysis first suggested by the Court in Pelphrey. This approach contends that courts should evaluate cases that arise out of sectarian legislative prayer controversies by focusing their initial judicial inquiry on the facts that culminate in the prayer opportunity, and not the content of the speaker’s prayer—unless the prayer clearly “proselytizes or disparages.” Only then may the Court, as acknowledged in Marsh, “parse” the content of the sectarian prayer. This approach should be followed because it provides the widest latitude for toleration and accommodation of individual

103. Id. at 590.
expression, consistent with the Establishment Clause, and is consistent with the language and analysis set forth by the U.S. Supreme Court in Marsh.

A. Pelphrey v. Cobb County: A Step Away from an Evaluation of the Sectarian Content of Prayer and a Step Toward the “Practice Focused Analysis”

In Pelphrey, the United States District Court for the Northern District of Georgia refused to grant a preliminary injunction to citizens who brought suit against the county planning commission for permitting isolated sectarian references during legislative prayers. This decision marked the first time that a lower federal court explicitly acknowledged that a sectarian reference did not inherently offend the Establishment Clause. The decision was crucial because this was the first decision to distance itself from the content of the prayer and focus more on opportunity for prayer—a trend that has attracted attention in subsequent cases.

In Cobb County, taxpayers sued to enjoin invited speakers who serve as “leaders at local religious institutions” from making sectarian references. Even though the Board's clergy selection policy mirrored the policy in Simpson, the court determined that not all sectarian verbiage must be removed from invocations at the beginning of legislative sessions so long as the mandate of Marsh to not exploit or proselytize a particular faith is met. As such, “isolated sectarian references without more [are] insufficient to find prayer violated prohibitions of Marsh.”

105. Id.
106. Id. at 1325.
107. Id. at 1345-46 ("[T]he Court does not believe the Supreme Court's precedent in the arena of legislative prayer can be reduced to a requirement that all sectarian verbiage be excised from invocations. Rather, what it perceives as proscribed by the Supreme Court is an impermissible motive in the selection of clergy to provide legislative invocations; an exploitation of the allowance of an invocational opportunity by the legislature to promote the beliefs of one religious sect, or to disparage those of any other; or the maintenance of a practice that conveys the impression that the government has purposely elected to prefer one religious view to the exclusion of those of other faiths. The focus of each proscription, in all events, is not on a 'particular prayer,' but on the invocational practice as a whole.")
108. Id. at 1334 n.10 (citing Newdow v. Bush, 355 F. Supp. 2d 265, 289 (D.C.
The court’s decision in *Cobb County* raises the question of whether there is a substantive constitutional difference between an elected government official invoking a sectarian reference from a state-sponsored forum and an invited guest speaker invoking a sectarian reference from a state-sponsored forum. Because any attempt by a legislative body to coerce council-members or invited guests to pray in particular ways raises significant and substantial Establishment Clause concerns, the court noted a novel and insightful approach to legislative prayer analysis when it suggested that “the focus of the court’s inquiry should be on a legislature’s practice, rather than on a particular prayer, the selection and identity of speakers should be analyzed separately from the content of the prayer.”

B. Doe v. Tangipahoa Parish School Board: Judge Clement’s Dissent and the Continued Development of the “Practice Focused Analysis”

A well-balanced framework for interpreting *Marsh* may be found in Judge Clement’s dissent in *Doe v. Tangipahoa Parish School Board*, which recently expanded on the standard of focusing “not on the content of the prayer but on the practices and motivations behind the prayer opportunity.” Although the case was later dismissed en banc on standing grounds, the lawsuit has been refiled and Judge Clement’s views may be expected to be advanced once again. However, even if they are not, her approach and analysis is worthy of serious consideration.

In *Doe*, the Fifth Circuit considered a series of stipulated prayers given at the invocation preceding Tangipahoa School Board meetings. Three of the four prayers in question invoked the name of “Jesus” while one of the aforementioned three prayers named “Jesus” twice. The court applied

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110. Id. at 1368 n.12.
112. Id.
113. Id. at 192-93 (majority opinion).
114. Id.
Marsh instead of Lemon to strike down the stipulated prayers as a violation of the Establishment Clause. The majority in Doe claimed to have applied a “practice focus” analysis just as the Pelphrey v. Cobb County court had done, because both the Pelphrey and Doe courts went out of their way to say that it was not the invocation of the sectarian references that caused the prayers to be stricken—but the factual absence of other non-Christian prayers during legislative sessions that caused the Christian prayers at issue to tumble over the edge of the Establishment Clause.

Judge Clement’s dissent in Doe applies the approach first articulated in Pelphrey v. Cobb County. Initiating her inquiry by recalling first principles, Judge Clement reminds us that, as Cobb County suggested, “t[he Marsh Court’s focus was—as ours should be—not on the content of the prayer but on the practices and motivations behind the prayer opportunity.” She reminds the majority that the burden in an Establishment Clause case is on the plaintiff to prove that the speaking party is committing a constitutional violation. Judge Clement contends that the “fact-intensive” practice approach suggested in Cobb County and by the majority

115. Id. at 191.
116. Id. at 204-05. The court in Pelphrey acknowledged that “the sectarian references cited by Plaintiffs appear rather austere and innocuous when measured against those found objectionable in cases such as Hinrichs and, indeed, with respect to prayers offered before 1980 . . . .” Pelphrey v. Cobb County, 448 F. Supp. 2d 1357, 1369 (N.D. Ga. 2006) (holding that the county violated the Establishment Clause, not by permitting sectarian invocations in legislative prayer, but when it failed to solicit clergy from a variety of faiths within the county and clergy from a variety of faiths were reasonably solicitable within the county). Additionally, the court in Doe acknowledged that “[i]t is the Board’s stipulated prayer practice, not one particular prayer, that is at issue.” Doe, 473 F.3d at 203 n.2. Furthermore, as to eradicate any suggestion that this opinion controls all future cases involving sectarian prayer within the circuit, the court goes on to state that “this opinion does not ‘render all sectarian prayer necessarily unconstitutional.’ Nor . . . does it ‘reduce[e] Marsh to a sectarian/non-sectarian litmus test.’” Id. at 205 n.6.
118. Doe, 473 F.3d at 212 (Clement, J., dissenting).
119. Id. at 215.
120. Cobb County, 410 F. Supp. 2d at 1343-44. The court in Cobb County and the majority opinion in Doe adopt a “fact-intensive practice approach” to sectarian prayer analysis that is reminiscent of the path Justice Breyer adopted in the Ten Commandments case of Van Orden v. Perry, 545 U.S. 677, 698-700 (2005) (Breyer, J., concurring). We argue that this approach yields excessive power to federal judges and encourages the unnecessary involvement of federal
opinion in *Doe*, shifts the burden to the defendant to justify their conduct when, in fact, the defendant-speaker should not be forced to bear any burden. Judge Clement's "burden" analysis is also relevant to a speaker's Free Speech argument.

Under this approach, a constitutional concern never arises from the *content* of the prayer, just as no constitutional concern arises from the *practice* of legislative prayer. Instead, the constitutional concern arises when another party is denied an opportunity to *offer* his or her prayer—as was the case in *Wynne* and *Simpson*. However, the facts here were completely unlike *Wynne* and *Simpson* because "Doe has made no showing that he or anyone was ever denied the opportunity to have an invocation led by someone of a more personally acceptable denomination (or non-denomination)."

Therefore, "even if... historically, the Board's prayers have been uniformly Christian... is true, there is simply no record evidence that the Board *advances* Christianity to the *exclusion* of another sect or creed." Without evidence that a legislative body excludes an individual from leading a prayer, no constitutional body excludes an individual from leading a prayer, no constitutional violation can be said to have occurred.

courts in affairs that should be resolved locally. Under the aforementioned analyses, an Establishment Clause violation could arise when the population of a town simply can not produce members of minority faith's who wish to pray at legislative sessions. This quantity-intensive approach is flawed because it fails to articulate a judiciably manageable standard for appropriate legislative prayer and because a legislative body could approach an Establishment Clause violation on the basis of coercion simply because no minority faiths wish to send their clergy to pray. We do not believe that this scenario should give rise to an Establishment Clause violation.

122. See id. at 212.
123. *Id.* at 215.
124. *Id.*
125. This theory, which has come to be known as "non-preferentialism," was advocated by former Chief Justice Rehnquist and suggests that government may favor religion over non-religion, but government may not favor certain religions over others. See Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting). Non-preferentialism was most recently advocated at length by Justice Scalia in *Van Orden*, 545 U.S. at 692 (Scalia, J., dissenting) ("[T]here is nothing unconstitutional in a State's favoring religion generally... .") and in McCreary County v. ACLU, 545 U.S. 844, 885-903 (2005) (Scalia, J., dissenting) (citing examples of religion in the public square throughout U.S. history). But see Thomas B. Colby, "A Constitutional Hierarchy of Religions? Justice Scalia, The Ten Commandments, and the Future of the Establishment Clause," 100 NW. U.L. REV 1097 (2006) (tracing the development of "non-preferentialism" as an approach to Establishment Clause analysis but ultimately disagreeing with the merits of the theory). "Non-preferentialism"
Thus, under Judge Clement's analysis, the plaintiff in Wynne would only succeed in an Establishment Clause claim against the Board if she were denied a prayer opportunity. Following this logic, no speaker will ever face a constitutional reprimand for praying as his or her conscience dictates. If the member of a religious minority is denied the opportunity to offer an invocation, liability will not fall on an individual, but on the legislative body as a whole.

This approach provides the solution because it recognizes that sectarian religious speech that does not "proselytize or disparage" is permissible under Marsh. Yet, it also takes into consideration the fears of individuals who worry that legislative prayer opportunities can turn into spiritual revival sessions. By focusing on the practice of the prayer opportunity, and not the content of the prayer, unless the prayer "proselytizes or disparages," courts can act consistently with the precedent in Marsh and the First Amendment religious liberty interests of those permitted to open deliberative sessions with prayer.

Although the Doe opinion was ultimately vacated en banc, and while Cobb County has yet to reach the Eleventh suggests that government may favor religion over non-religion, but government may not favor certain religions over others. See generally Rob Natelson, 10 Commandments, "Under God," OK by Founders, THE BILLINGS OUTPOST, Apr. 28, 2005, http://www.newbillingsoutpost.com/news/index.php?option=com_content&task=view&id=16137&Itemid=5 (agreeing that the government is precluded from asserting a preference for one religious denomination or sect over others but not necessarily implying that the government may not favor religion over non-religion). As an original matter, the implementation of legislative prayer at the Founding implies that the many of the Framers were non-preferentialists. Prof. Natelson's comprehensive study of the Establishment Clause concludes that the Constitution's religion clauses were designed to further non-preferentialism; as such, the government could support belief in God, so long as government did not play favorites among religions. See Robert G. Natelson, The Original Meaning of the Establishment Clause, 14 WM. & MARY BILL RTS. J. 73, 112 (2005). It may be argued that the "non-preferential" approach has resulted in the "deist" approach some courts have taken to legislative prayer cases thus far. We would reject that approach for the reasons articulated in this paper. By enacting legislative prayer in the first place and by affirming that the practice satisfies constitutional muster, both the government and the U.S. Supreme Court have already recognized that religion holds a special place in this society. Therefore, these same bodies should not forbid a duly selected speaker from praying according to his or her conscience simply because the entire body and/or audience may not endorse the speaker's particular religious views.

126. Doe, 473 F.3d at 212 (Clement, J., dissenting).
127. Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494, 499 (5th Cir. 2007) (en
Circuit Court of Appeals, if either opinion were controlling, under Judge Clement's analysis, neither case would prohibit an isolated sectarian reference like the speech held impermissible by the District Courts in *Bosma* or *Turner* because the nature of the prayer opportunity permitted—and resulted in—prayer from a variety of religious traditions.

V. COURTS MUST LIMIT THE "GOVERNMENT SPEECH" DOCTRINE BECAUSE IT IS NOT COMPATIBLE WITH A "PRACTICE FOCUS" ANALYSIS

Unfortunately, the fact that no lower court has adopted the aforementioned theory for approaching sectarian legislative prayer cases reveals the symptoms of a much greater illness. The elephant in the room of these manifestations of judicial confusion is known as the "government speech" doctrine.  


With respect to government speech, my understanding of neutrality is as rigorous as that of the most orthodox secularist. In my view, the establishment clause absolutely disables the government from taking a position for or against religion. The government must treat every religious view with equal respect. "Agnostic" is the label that comes closest to describing the attitude required of the government, but that label is also misleading in an important way. An agnostic has no opinion on whether God exists, and neither should the government. But an agnostic also believes that humans are incapable of knowing whether God exists. If the government believed that, it would prefer agnostics over theists and atheists. Agnostics have no opinion for epistemological reasons; the government must have no opinion for constitutional reasons. The government must have no opinion because it is not the government's role to have an opinion.

Douglas Laycock, *Equal Access and Moments of Silence: The Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 7-8 (1986). Laycock appeared to hold the crystal ball and his article proved to be influential on at least one
While the "government speech" doctrine is a relatively new phenomenon in constitutional jurisprudence, in the context of sectarian legislative prayer analysis, the doctrine has been said to stand for the proposition that when actors and events are cloaked with government authority, the speech reflects the views of the government and therefore the government can generally control the content of the speech.  

A. Turner v. City of Fredericksburg: the "Government Speech" Doctrine Revisited

Turner involved the adoption of a non-sectarian prayer policy by the Fredericksburg, Virginia city council. However, unlike the city councils in Simpson and Cobb County, which invited religious leaders from the community, Fredericksburg's policy permitted members of Supreme Court member. Within three years of the publication of Laycock's article, that the phrase "government speech" made its first appearance into a U.S. Supreme Court opinion. In his partial dissent in Allegheny, Justice Kennedy explained his dissatisfaction with the Court's discussion and treatment of religious symbols on government property. "I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is per se suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part and dissenting in part) (citations omitted). "Passersby who disagree with the message conveyed by [religious symbols on government property] are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." Id. at 664. We think that it is worth noting that both County of Allegheny and Board of Education v. Mergens, 496 U.S. 226 (1990) only dealt with "government speech" in the context of religious symbols on government property. Needless to say, religious symbols on government property are not legislative prayers.

129. Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 288 (4th Cir. 2005) ("The context, and to a degree, the content of the invocation segment is governed by established guidelines by which the Board may regulate the content of what is or is not expressed when it 'enlists private entities to convey its own message.'" (citing Simpson, 292 F.Supp.2d at 819 (internal citations omitted) (quoting Rosenberger v. Rector, 515 U.S. 819, 833 (1995)))).


131. Simpson, 404 F.3d at 279; Pelphrey v. Cobb County, 410 F. Supp. 2d
the council to sign up and deliver the invocation on a rotating basis.\textsuperscript{132} From the year of his initial election in 2002, until the council's decision to adopt a nonsectarian prayer policy pursuant to the ACLU's demand letter in 2005, elected Councilman Rev. Hashmel Turner, Jr. ended his prayers with "in Jesus' name."\textsuperscript{133} Because of the rotating nature of the prayer roster, \emph{Turner} drew arguments from \emph{Marsh} and \emph{Lee} to the effect that government should not be parsing prayers and when it does, it risks establishing a civic religion.\textsuperscript{134} Additionally, \emph{Turner} recalled the language from \emph{Cobb County} that "isolated sectarian references, without more, [are] insufficient to find prayer violated prohibitions of \emph{Marsh}."\textsuperscript{135} Nevertheless, without even attempting to distinguish the speaker from the content of the speech, or note that \emph{Cobb County} involved invited clergy, whereas Turner was an actual member of the board, the District Court concluded that "Councilor Turner's opening prayer is government speech, and thus, the First Amendment guarantees are not implicated."\textsuperscript{136}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{132} 1324, 1325-26 (2006).
\item \textsuperscript{133} 132. \emph{Turner}, 2006 U.S. Dist. LEXIS 56786, at *2.
\item \textsuperscript{134} 133. \emph{Id.} at *2-3. For a time, Reverend Turner stopped praying to evaluate the ACLU's challenge, but felt, in good conscience, that he had to start up again.
\item \textsuperscript{135} 134. The argument in \emph{Lee} stated:
\begin{quote}
It is a cornerstone principle of our Establishment Clause jurisprudence that it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government and that is what the school officials attempted to do. Petitioners argue . . . that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony . . . . But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself . . . . And these same precedents caution us to measure the idea of a civic religion . . . . The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.
\end{quote}
\item \textsuperscript{136} \emph{Lee v. Weisman}, 505 U.S. 577, 588-90 (1992) (citation omitted) (quotations omitted).
\item \textsuperscript{135} 135. \emph{Cobb County}, 410 F. Supp. 2d at 1334 n.10 (citing Newdow v. Bush, 355 F. Supp. 2d 265, 289 (D.D.C. 2005)).
\item \textsuperscript{136} 136. \emph{Turner}, 2006 U.S. Dist. LEXIS 56786, at *9.
\end{enumerate}
\end{footnotesize}
B. The “Government Speech” Doctrine Poses a Significant Danger to Religious Speech that is Protected Under the First Amendment

Despite Chief Judge Wilkinson’s recognition in *Simpson* that neither *Marsh* nor *Allegheny* held that the identity of the speaker “would ‘affiliate the government with any one specific faith or belief,’”[137] both the Circuit Court in *Simpson*, and the District Court in *Turner*, nevertheless concluded that whenever sectarian religious speech was being directed from a government podium it constituted “government speech”—regardless of whether the words were spoken by an invited guest or a board member.[138] While Turner’s attorneys properly contested the argument that Rev. Turner’s speech was “government speech,” the direction of the District Court’s decision in *Bosma* may be traced to Representative Bosma’s ill-advised stipulation that official prayers are government speech.[139] The issue, however, is more nuanced than the question of whether Bosma’s sectarian reference is government speech. While the government provided the prayer opportunity,[140] the prayer itself was, is, and, unless expressly endorsed, always should be viewed as private speech protected by the Free Exercise and Free Speech Clauses.[141] It is a cardinal principle that “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”[142]

Therefore, because of the sweeping scope of the “government speech” doctrine and the threat that it raises to Free Speech concerns across the board, this doctrine must be reconsidered or else other manifestations of speech, including but not limited to religious speech, are likely to become

137. *Simpson*, 404 F.3d at 286.
139. See 400 F. Supp. 2d 1103, 1129 (S.D. Ind. 2005), stay denied, 440 F.3d 393 (7th Cir. 2006), rev’d, 506 F.3d 584 (7th Cir. 2007).
140. See id. at 1104-08.
141. U.S. CONST., amend. I.
strangers to the public square.

VI. "Proselytizing" or "Disparaging" Remarks Made in Regards to the Tenets of Other Faiths During Legislative Prayer Find No Shelter in the First Amendment

The numerous legal theories in judicial opinions across the country have caused confusion within communities and deliberative bodies that wish to avoid threats and costly lawsuits but also wish to continue solemnizing their meetings. Courts must reach a consensus on the proper analysis to provide citizens and government officials some predictability in the law on this issue. But as the previous discussion of relevant cases reveals, federal courts have failed to follow the path laid forth by the Supreme Court. Fortunately, the horizon reveals that when Marsh is coupled with a solid and basic understanding of the history of First Amendment jurisprudence, a remarkably principled, clear, and pragmatic approach emerges.

A. Marsh Plainly States that the Content of Speech May Not be Examined by Court's Unless the Prayer Opportunity in Question First "Proselytizes or Disparages . . ."

Indeed, the basic principle at the heart of Marsh correctly identifies the proper relationship between deliberative bodies, religion, and citizens, with speech and religious liberties.\(^{143}\)

That basic principle, in the Court's words, is:

The content of the prayer is not of concern to judges, where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.\(^{144}\)

Ironically, as content-based concerns continue to occupy much of the debate among judges and lawyers regarding what may be said throughout the course of a legislative prayer, a proper application of the aforementioned standard is the key to a remarkably consistent jurisprudence fully respectful of the free speech rights of the person delivering the prayer and


\(^{144}\) Id. at 794-95.
establishment limits on the government meant to ensure that political participants do not feel left out of the political process as a result of legislative prayers. Careful scrutiny of the existing case law shows that the content-based approach is a shallow and misguided application of the standard enunciated in Marsh.

A plain reading of Marsh illuminates a three-tier analysis. First, Marsh properly established legislative prayer as a constitutionally tolerable expression of faith. Second, the Court in Marsh properly recognized that, with rare exception, courts should not be in the business of parsing prayers. Under the third tier of analysis, the Court reasoned that when the legislative prayer opportunity is being used to proselytize or disparage, only then may a federal court “embark on a sensitive evaluation or . . . parse the content of a particular prayer.”

It is due to the failure of federal courts to consider each of these steps that has caused courts to stray into a number of different jurisprudential directions. The common tendency has been for courts to consider Marsh’s first tier and then skip directly to tier three. However, this is not an accurate application of the standard set forth by the Supreme Court in Marsh. It seems plausible that courts have avoided inquiring into the proselytization prong of the test due to the fact that the U.S. Supreme Court has “never defined the term ‘proselytize,’ much less provide[] any workable legal test for

145. See id. at 790-95.
146. Id. at 795 (“The Court today . . . holds that officially sponsored legislative prayer . . . is generally exempted from the First Amendment’s prohibition against ‘an establishment of religion.’”) (Brennan, J., dissenting).
147. Id.
148. Id.
149. For example, in Wynne, the Court concluded that the routine use of sectarian references in the legislative prayers of the Town Council violated the Establishment Clause. Wynne v. Town of Great Falls, 376 F.3d 292, 298-99 (4th Cir. 2004). Although the Court did go through the effort of defining the terms “proselytize” and “advance,” and even went to such lengths as to distinguish the two terms, the Court ultimately failed to critically consider whether the use of sectarian references during legislative prayer inherently “proselytize[s] or advance[s]” any one, or “disparage[s] any other, faith or belief,” as described in the Marsh framework. Id. at 300 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 30, 1821 (3d ed. 1993)). Here, the Court failed to see that merely referencing a specific deity does not necessarily “forward, further, [or] promote” any particular religion, but in fact may serve only as a tolerable acknowledgment of religion. Id.
determining precisely what qualifies as prohibited proselytizing.”

As such, it comes as little surprise that to date, many courts have considered the sectarian language of the prayer, but very few courts have applied *Marsh* in a way that focuses on whether the prayer “proselytize[s] and disparage[s].”

B. Snyder v. Murray City Corp.: The Tenth Circuit Conducts a Proper Application of the Marsh Framework

One such case that has considered the latter standard is *Snyder v. Murray City Corp.* In *Snyder*, the Tenth Circuit Court of Appeals analyzed whether a legislative body violates the Establishment Clause when it forbids an individual from delivering a prayer that would mock the practice of legislative prayer. The court concluded that the city’s refusal to offer

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152. *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (en banc).

153. The proposed prayer at issue stated:

OUR MOTHER, who art in heaven (if, indeed there is a heaven and if there is a god that takes a woman’s form) hallowed be thy name, we ask for thy blessing for and guidance of those that will participate in this meeting and for those mortals that govern the state of Utah;

We fervently ask that you guide the leaders of this city, Salt Lake County and the state of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions;

We pray that you prevent self-righteous politicians from misusing the name of God in conducting government meetings; and, that you lead them away from the hypocritical and blasphemous deception of the public, attempting to make the people believe that bureaucrats’ decisions and actions have thy stamp of approval if prayers are offered at the beginning of government meetings;

We ask that you grant Utah’s leaders and politicians enough courage and discernment to understand that religion is a private matter between every individual and his or her deity; we beseech thee to educate government leaders that religious beliefs should not be broadcast and revealed for the purpose of impressing others; we pray that you strike down those that mis-use your name and those that cheapen the institution of prayer by using it for their own selfish political gains;

We ask that the people of the state of Utah will some day learn the wisdom of the separation of church and state; we ask that you will teach the people of Utah that government should not
Snyder an invitation to present his prayer was not a violation of the Establishment Clause under *Marsh.*\(^{154}\) The court drew this conclusion because Snyder's prayer was "proselytizing"\(^{155}\) and "disparaging."\(^{156}\) Unlike the *Wynne* and *Turner* Courts, which simply asserted that sectarian invocations ran afoul of the principles of *Marsh,* the court in *Snyder* actually evaluated the definitions of the words "proselytizing" and "disparaging" in the context of *Marsh.*\(^{157}\)

The court did not arrive at their conclusion in *Snyder* because the plaintiff invoked the names of specific deities. On the contrary, the "Establishment Clause does not prohibit all prayer that can be identified with a particular sect."\(^{158}\) "Rather, what is prohibited by the clause is a more aggressive form of advancement, i.e., proselytization."\(^{159}\) In reaching a proper understanding of the Supreme Court's declaration in *Marsh,* the Tenth Circuit noted, "the kind of legislative prayer that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine."\(^{160}\) Here, the court used the term "proselytize," in context to demonstrate participate in religion; we pray that you smite those government officials that would attempt to censor or control prayers made by anyone to you or to any other of our gods;

We ask that you deliver us from the evil of forced religious worship now sought to be imposed upon the people of the state of Utah by the actions of mis-guided, weak and stupid politicians, who abuse power in their own self-righteousness;

All of this we ask in thy name and in the name of thy son (if in fact you had a son that visited Earth) for the eternal betterment of all of us who populate the great state of Utah.

Amen.

\emph{Id.} at 1229 n.3.

154. \emph{Id.} at 1234.

155. \emph{Id.} at 1235 ("Because Snyder's prayer seeks to convert his audience to his belief in the sacrilegious nature of governmental prayer, his prayer is itself proselytizing.").

156. \emph{Id.} at 1236 ("Snyder's proselytizing and disparaging prayer falls well outside the scope of invocational legislative prayers found to be constitutional in *Marsh,* and thus there was nothing improper about excluding it from the time properly set aside for legislative prayer.").

157. See \emph{id.} at 1232-34.

158. Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188, 213 (5th Cir. 2006) (Clement, J., dissenting) (citing *Snyder,* 159 F.3d at 1234 n.10).

159. *Snyder,* 159 F.3d at 1234 n.10 (citing *Marsh* v. *Chambers,* 463 U.S. 783, 793 n.14, 794-95 (1983)).

160. *Snyder,* 159 F.3d at 1234.
that danger in this scenario may only arise when the government attempts "to convert citizens to particular sectarian views."\footnote{161}

Under this application, the government would only be permitted to prohibit prayers that place the government in a position of effectively converting citizens to a particular religion.\footnote{162} Applying this analysis to the facts, the Snyder court concluded that the government had properly denied an invitation to give the invocation because the proposed prayer would proselytize and disparage.\footnote{163} The proposed prayer disparaged other faiths because it referred to politicians who believe in the use of legislative prayer as "'self-righteous,' 'hypocritical,' 'selfish,' 'mis-guided, weak, and stupid[.]'\footnote{164} Moreover, Snyder's prayer "proselytized" by asking for "the wisdom of separating church and state" and to "never again perform demeaning religious ceremonies as part of official government functions."\footnote{165} It is of particular importance to note that while the Court listed several aspects of Snyder's that constituted "proselytizing," the Court did find Snyder's use of a deity at the end of his prayer to be constitutionally prohibited.\footnote{166}

The distinction to be made between Snyder and Turner is as follows: While Snyder's prayer crossed the line, legislative prayers that merely invoke the name of a deity such as "Jesus" do not. A thin, but clear, line exists between the invocation of a single sectarian reference and orthodoxy or coercion. Snyder abused the prayer opportunity by attempting to force his view that deliberative bodies should endorse a "strict separation of church and state" onto others.\footnote{167} By simply mentioning a deity, whom clearly and

\footnotesize{161. Id. at 1234 n.10 (emphasis added) (defining "proselytize" as "to convert from one religion, belief, opinion, or party to another") (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 1826 (1986)).

162. Marsh's refusal to examine prayer content was conditioned on there being "no indication that the prayer opportunity has been exploited to proselytize or advance any one [faith or belief]." Marsh, 463 U.S. at 794. This condition often requires the examination of content. Doe, 473 F.3d at 203 n.3.

163. Snyder, 159 F.3d at 1242.

164. Id. at 1235. However, the court did not raise concerns regarding the following: "All of this we ask in thy name and in the name of thy son . . . ." Id. at 1228 n.3.

165. Id. at 1229 n.3.

166. Id, at 1235.

167. See id. at 1235 ("Because Snyder's prayer seeks to convert his audience}
reasonably relates to the person delivering the prayer, the
government in no way attempts to "convert" a listener's
religious beliefs. To the contrary, it is merely a tolerable
acknowledgment of that person's religious beliefs. As the
Snyder court observed, "all prayers 'advance' a particular
faith or belief in one way or another." This observation
"underscores the conclusion that the mere fact a prayer
evokes a particular concept of God is not enough to run afoul
of the Establishment Clause."

VII. OUR CONSTITUTIONAL TRADITION BENEFITS FROM
EXPOSURE TO A VARIETY OF RELIGIOUS SPEECH IN THE PUBLIC
SQUARE

Under the U.S. Supreme Court's decision in Marsh, three
propositions of law are irrefutably clear: courts must recognize: 1) the practice of legislative prayer is
constitutional; 2) it is not the business of courts to embark on
a sensitive evaluation of any legislative prayer at issue, unless; 3) it is shown that the prayer opportunity is used to
proselytize or disparage another faith. Yet, in the 25 years
since Marsh concluded that the practice of legislative prayer
does not offend the Establishment Clause of the First
Amendment, many lower courts have struggled to analyze
Marsh correctly. A number of lower courts have mistakenly
understood the Court's holding in Marsh to stand for the
proposition that legislative prayers must omit sectarian
references to be safe from Establishment concerns. Ironically,
by attempting to avoid Establishment concerns, these
approaches have placed governments in the position of
reviewing and editing such prayers, which has resulted in
excessive entanglement between the government and
religion. Consequently, these approaches have stifled the
Free Speech rights of those persons permitted to deliver
prayers. As the U.S. Supreme Court declared some years
before Marsh, "[i]t is a cornerstone principle of our
Establishment Clause jurisprudence that 'it is no part of the

\[\text{to his belief in the sacrilegious nature of governmental prayer, his prayer is itself proselytizing.}\]

168. Id. at 1234 n.10.
169. Snyder, 159 F.3d at 1234 n.10.
business of government to compose official prayers for any
group of the American people to recite as a part of a religious
program carried on by government." While the U.S.
Supreme Court, in Lee, has said that the government may not
comprise an official prayer, lower courts must breathe life
into this statement by recognizing that the invocation of some
sectarian references, including a deity, does not "proselytize"
or "disparage," in violation of Marsh. The correct approach,
which focuses judicial inquiry on the facts that culminate in
the prayer opportunity, and not the content of the speaker's
prayer, is consistent with the language and analysis set forth
by the U.S. Supreme Court in Marsh. Until this "practice-
focused" approach is uniformly adopted, confusion will
continue to abound within the federal circuits concerning
what may be said, and who may be referenced, throughout
the duration of a legislative prayer.

While courts should consider this "practice-focused"
approach in the future, much may still be learned through
reflection on the past. Over forty years ago, in one of the most
controversial Religion Clause cases that ever addressed
Establishment concerns, Justice Goldberg wrote that: "[I]t is
of course true that great consequences can grow from small
beginnings, but the measure of constitutional adjudication is
the ability and willingness to distinguish between real threat
and mere shadow." Taken by itself, Justice Goldberg's
comment seems incomplete without considering the context of
the adjudication at issue. Perhaps some context can be added
by considering the sage words of the late Chief Justice
Rehnquist, who reminds us that: "At this point in the
twentieth century we are quite far removed from the dangers
that prompted the Framers to include the Establishment
Clause in the Bill of Rights."

When considered together, these quotes recognize that
there is both risk and justification for permitting individuals
to invoke sectarian language in their legislative prayers. As

U.S. 421, 425 (1962)).
(Goldberg, J., concurring).
the late Justice Goldberg indicates, the real risk at stake by permitting sectarian prayer is ultimately no more than "mere shadow." As such, legislative bodies must take a stand to preserve the free speech rights of those they have permitted to speak and offer prayer. In doing so, these bodies must pursue an environment that is neutral to each religion; however, they may not create an environment that is hostile toward any specific religion. To satisfy this aim, any policy a board or council adopts must sincerely affirm the right of all individuals in the community to choose their own words of faith freely when presented the opportunity to pray. A pluralistic nation like the United States must account for and recognize that not everyone who prays does so in the same way or to the same deity and "openness to . . . ecumenism is consonant with our character both as a nation of faith and as a country of free religious exercise and broad religious tolerance." Thus, by asserting the fundamental right to pray according to one's conscience, whether at home or in front of a council, courts promote religious liberty and pay homage to the religious pluralism that is as much a part of America's past and present as the practice of legislative prayer itself.

173. Schempp, 374 U.S. at 308 (Goldberg, J., concurring).
174. Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 284 (4th Cir. 2005).