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Legislative Prayer and the Secret Costs of Religious Endorsements

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Article

Legislative Prayer and the Secret Costs of Religious Endorsements

Christopher C. Lund†

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† Assistant Professor, Wayne State University Law School. I would like to thank James Beattie, Gregory Bowman, Timothy Floyd, Paul Horwitz, Kerry Kornblatt, Douglas Laycock, Rob Luther, Michael McCann, Mark Modak-Truran, Andy Olree, Eric Segall, and Nelson Tebbe for helpful comments on earlier drafts of this piece. For the sake of disclosure, I should add that I worked on a number of these cases, including *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005), and *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004). Copyright © 2010 by Christopher C. Lund.

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INTRODUCTION

The Establishment Clause cannot be reduced to a single principle. But if it could—if there is a single premise that has animated the Supreme Court’s approach over the past fifty years—it would be the neutrality principle. Government must be neutral toward religion, and cannot endorse it over potential alternatives. To this rule, there is but one official exception—legislative prayer. This exception came in 1983, in the Supreme Court’s decision in *Marsh v. Chambers*, where the Court upheld the chaplaincy of Nebraska’s state legislature.¹ In *Marsh*, for the first and only time, government was given unambiguous judicial sanction to speak religiously.²

Both before and after *Marsh*, and probably in part because of it, there has been a steady push on the Court either to create more exceptions to the neutrality principle or to simply abandon it altogether. The Court’s recent struggles with “under God” in the Pledge of Allegiance and with government-sponsored Ten Commandments displays are but the most recent examples.³ A reoccurring argument in these cases—and one that runs through *Marsh* itself—is that modest deviations from the neutrality principle make a great deal of political sense.⁴ Better to let mild religious endorsements stand, so the argument goes, especially in light of the backlash that would follow from striking them down. This sort of argument has been advanced in various places by the most thoughtful and distinguished voices in constitutional scholarship, including Judge Richard Posner,⁵ Steven Smith,⁶ Noah Feldman,⁷ Richard

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

2. See *infra* notes 52–63 and accompanying text (defending the claim that *Marsh* is, in this way, unique).

3. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

4. See *infra* notes 60–62.

5. See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

6. See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995).

7. See NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005).

Schrager,⁸ Eugene Volokh,⁹ Rick Garnett,¹⁰ and perhaps most surprisingly, Justice Breyer.¹¹ And their argument has undeniable force. After all, where exactly *is* the real harm in allowing the government to speak religiously? How can things like a town holiday display or a public school graduation prayer ever be a genuine threat to religious liberty?

To these questions, a partial answer may be emerging in the remarkable story of legislative prayer. For it is now twenty-five years since *Marsh* was decided. And with a generation's worth of hindsight, we can begin to see clearly what can happen when government is authorized to speak religiously. In a strange way, *Marsh* has presented us with a unique opportunity. We now have a small window through which we can see what religious liberty would look like if the neutrality principle were to fade and mild religious endorsements like legislative prayer were to proliferate.

What can be seen through that window, however, does not look good. In the last twenty-five years, legislative prayer controversies have become a part of American culture. With *Marsh's* approval, legislative prayer has grown into a fissure that now divides county boards, state legislatures, and city councils across the country.¹² Some of these disputes have

8. See Richard C. Schrager, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004).

9. See Posting of Eugene Volokh, volokh@law.ucla.edu, to religion-law@lists.ucla.edu (July 25, 2008, 11:16:14 PDT), available at <http://lists.ucla.edu/pipermail/religionlaw/2008-July/023483.html>.

10. See Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 CONST. COMMENT. 273 (2008).

11. See *Van Orden v. Perry*, 545 U.S. 677, 698–706 (2005) (Breyer, J., concurring) (providing the fifth vote).

12. See, e.g., Rebecca Bakken, *Opening With Prayer: Area Municipalities Vary in Their Decisions About Invocations*, KALAMAZOO GAZETTE, Dec. 14, 2008, <http://www.mlive/news/kzgazette/index.ssf?/base/news-31/122923201628600.xml&coll=7>, available at 2008 WLNR 23966116; *City Council Prayer Should Seek to Include*, VA.-PILOT & LEDGER STAR, Aug. 8, 2009, at 6, available at 2009 WLNR 15366990; Justin Faulconer, *Praying in Virginia: Legal Debate Intensifies*, NEWS & ADVANCE (Lynchburg, Va.), Feb. 8, 2009, available at 2009 WLNR 2548554; Mary Giunca, *Prayer Lawsuit May Be Coming to End*, WINSTON-SALEM J., Mar. 25, 2009, <http://www2.journalnow.com/content/2009/mar/25/prayer-lawsuit-may-be-coming-to-end/>, available at 2009 WLNR 5576861; Rob Johnson & Mason Adams, *Prayer at Roanoke City Council: Once Again in Jesus' Name: Roanoke's First City Council Meeting of 2009 Begins with Another Overtly Christian Prayer*, ROANOKE TIMES & WORLD NEWS, Jan. 6, 2009, available at 2009 WLNR 252619; Nick G. Maheras, *Prayer Fight May Head for Round 2*, HIGH POINT ENTERPRISE (N.C.), Oct. 19, 2008, available at 2008 WLNR 19896932; Anita Miller, *ACLU Allegations About Council Prayers*

changed the course of elections;¹³ others have led to violence.¹⁴ Litigation has, unsurprisingly, become an omnipresent threat and a frequent reality.¹⁵ Legislative prayer is, obviously, a

Bring Sharp Responses, SAN MARCOS DAILY RECORD, July 12, 2009, http://www.sanmarcosrecord.com/archivesearch/local_story_193111710.html, available at 2009 WLNR 13277669; Roger Phillips, *Lodi Prayer Battle Draws in Others*, REC. (Stockton, Cal.), Aug. 4, 2009, http://www.recordnet.com/apps/pbcs.dll/article?AID=/20090804/A_News/908040313, available at 2009 WLNR 15043536; Elizabeth Stull, *Prayer's Day In Court: Town of Greece Will Defend Prayer Policy in Federal Court*, DAILY REC. (Rochester, N.Y.), Aug. 13, 2009, available at 2009 WLNR 15905924; Amy Flowers Umble, *Public Prayer Still Raises Issues*, FREE LANCE-STAR (Fredericksburg), Jan. 24, 2009, <http://www.Fredericksburg.com/News/FLS/2009/012009/01242009/440915>, available at 2009 WLNR 1422683; Pam Zubeck & Perry Swanson, *Springs City Council: We'll Keep Praying*, THE GAZETTE (Co. Springs, Co.), July 21, 2008, <http://www.gazette.com/articles/meetings-384538council-prayers.html>, available at 2008 WLNR 13570724; Laura Ingraham, *Controversy Over Mayor's Decision to Cancel Prayer at City Council Meetings*, FOX NEWS, Aug. 20, 2008, http://www.foxnews.com/printer_friendly_story/0,3566,408045,00.html, available at 2008 WLNR 15747503.

13. See Nick G. Maheras, *Prayer Issue Revisited*, HIGH POINT ENTERPRISE (N.C.), Oct. 30, 2008, available at 2008 WLNR 20700493 ("Area Christian ministers met Monday to discuss the High Point City Council prayer issue and Tuesday's upcoming election."); Tom Steadman, *Council Votes on Prayer*, GREENSBORO NEWS & REC., July 17, 2007, at A1, available at 2007 WLNR 13681870 (explaining that after a nine to one vote to allow only nonsectarian prayers, one minister "critical of the council vote, ended his comments with a political threat . . . 'We're going to remember in 2008,'" which was followed by a "loud standing ovation"); Sherry Youngquist, *Issues Led to Defeat of Yadkin Officials*, WINSTON-SALEM J., May 11, 2008, <http://www2.journalnow.com/content/2008/may/11/issues-led-to-defeat-of-yadkin-officials/>, available at 2008 WLNR 8869993 ("Yadkin voters booted out incumbent commissioners Kim Clark Phillips and Joel Cornelius in the Republican primary last week as part of a backlash over the board's decision to drop sectarian prayer from meetings, residents said.").

14. See Denyse Clark, *High Priestess Took Chester County Town to Court*, HERALD (Rock Hill, S.C.), Aug. 16, 2005, at 1B, available at 2005 WLNR 12874908 (describing how one legislative prayer plaintiff returned home to find her house broken into, her parrot beheaded, its heart cut out, and a note left behind that read, "You're next!"); Robert Patrick & Laura Green, *Rosenauers' Home, Truck Vandalized: The Jewish Family Suing the Manatee County School Board Over a Prayer Issue Calls Friday's Attack a Hate Crime*, SARA-SOTA HERALD-TRIB., Apr. 13, 2004, at A1, available at 2004 WLNR 2979228.

15. See *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008); *Turner v. City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008); *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005); *Wynne v. Great Falls*, 376 F.3d 292, 298–99 (4th Cir. 2004); *Bacus v. Palo Verde Unified Sch. Dist.*, 52 F. App'x 355 (9th Cir. 2002); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (en banc); *Joyner v. Forsyth County*, No. 1:07CV243, 2009 WL 3787754 (M.D.N.C. Nov. 9, 2009); *Dobrich v. Walls*, 380 F. Supp. 2d 366 (D. Del. 2005); *Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867, 868 (Ct. App. 2002); see also Complaint at 1, Gal-

quite narrow field of law. But in the last decade, perhaps no other Establishment Clause topic has seen as much litigation.

Consider some of the recent battles, which illustrate well the issues involved. In South Carolina, the town council of the city of Great Falls regularly opens its sessions with identifiably Christian prayer.¹⁶ A woman tries to avoid the prayer by showing up late to the meetings, is harassed for doing so by council members, and brings suit to end the council's prayer practice.¹⁷ In Virginia, the Fredericksburg City Council adopts a policy where all legislative prayers must be nondenominational, and is sued by one of its own council members who feels religiously committed to referring to Jesus Christ in his prayers.¹⁸ Elsewhere in Virginia, a resident tries to get on the list to offer prayers before the Chesterfield County Board of Commissioners, but receives a letter in the mail denying her the opportunity because she is a Wiccan.¹⁹ In Indiana, pandemonium ensues when, on the floor of the state legislature, a member of the clergy who was invited to give a prayer breaks out into the song, "Just a Little Walk with Jesus."²⁰ In Utah, outcries erupt when, at a Murray City Council meeting, a citizen seeks to offer a prayer that begins, "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."²¹ These disputes offer something to offend people of all political ideologies and all religious denominations; there is enough here to gore everyone's ox.

Lower courts have struggled with these cases. The Supreme Court in *Marsh* focused principally on the first-order question—whether or not legislative prayer was intrinsically

loway v. Town of Greece, No. 6:08cv06088 (W.D.N.Y. Feb. 28, 2008); Joint Motion for Entry of Order Approving Settlement & Entering Consent Decree, in *Rosenauer v. Sch. Bd. of Manatee County*, No. 8:04cv0018 (M.D. Fla. May 20, 2004).

One public interest group that litigates these issues reports that they have resolved, without litigation, numerous such disputes brought to their attention in the last five years. See AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE, NONLITIGATION ADVOCACY SUMMARY (2010), <http://www.au.org/internal/legal/non-litigation-report.html>.

16. See *Wynne*, 376 F.3d at 294.

17. See *id.* at 295.

18. See *Turner*, 534 F.3d at 353–54.

19. See *Simpson*, 404 F.3d at 279–80.

20. See *Hinrichs*, 440 F.3d at 395.

21. See *Snyder v. Murray City Corp.*, 159 F.3d 1227, 228 & n.3 (10th Cir. 1998).

constitutional.²² The Court said little about the second-order questions—that is, whether and to what extent constitutional principles would still constrain the actual operation of legislative prayer. Left largely to developing their own jurisprudence, lower courts have deeply split on these questions, and eventually the Supreme Court will have to step in to address them.

This Article addresses this second generation of legislative prayer cases. It has two purposes, one doctrinal and one theoretical. On the doctrinal side, it examines the constitutional limitations that lower courts have placed on legislative prayer. These usually come in two types. First, courts have imposed limitations on the content of legislative prayers—sometimes requiring, for example, that legislative prayers be thoroughly nondenominational or “nonsectarian.”²³ Second, courts have imposed limitations on the selection of prayergivers—sometimes prohibiting, for example, the government from picking and choosing prayergivers based on their religious affiliations.²⁴ Both requirements make some sense. They each flow naturally from the Supreme Court’s iron prohibition on denominational discrimination, and at first glance seem sensible protections for religious liberty within the sphere of legislative prayer.

Yet they both also have serious and intractable downsides. There are admittedly some problems with things like line drawing. But more troubling are the costs imposed on religious liberty. For what these restrictions give to religious freedom with one hand, they take from religious freedom with the other. Insisting that prayer be nondenominational, for example, protects listeners from denominationally exclusive speech. But it concomitantly requires discrimination against speakers who insist on praying in denominational terms. Protecting one group by necessity requires leaving the other defenseless. Religious liberty, within the sphere of legislative prayer, thus becomes a perverse sort of zero-sum game—no matter how it is done, someone’s religious liberty will inevitably be lost as a consequence. The only way to really protect religious liberty, it seems, is by not having legislative prayer at all.

And this realization brings us to the larger and more theoretical ambition of this Article. These legislative prayer dis-

22. See *Marsh v. Chambers*, 463 U.S. 783, 783–92 (1983) (discussing whether the practice of legislative prayer was generally constitutional).

23. See *infra* Part II.

24. See *infra* Part III.

putes do not just say something about legislative prayer. Instead, they provide a unique insight into the inherent dangers of religious endorsements, and a general warning about the future of the Establishment Clause. For fifty years, the Court has generally barred government from endorsing religion. But recently that principle has come under serious attack. Even more liberal Justices, like Justice Breyer, now seem inclined to accept minor religious endorsements as mostly harmless accommodations of majoritarianism,²⁵ even as justly prominent scholars, liberal and conservative alike, encourage the Court down this path.²⁶

The overarching lesson of these legislative prayer cases is that these ostensibly harmless endorsements have a way of becoming not so harmless at all. When the government speaks religiously, it becomes committed to making a continual set of discretionary religious choices. This invites conflict; in the context of legislative prayer, it means battles over who will have the right to pray and what they will get to say. Government now must decide fundamental issues of religious truth—it must decide the proper type of religious message and the proper type of person to deliver it. Different communities will decide these issues differently. Diverse ones will tend to embrace religious ecumenism and reject religious exclusivity; homogenous ones will tend to do the opposite. But in both cases someone will have to be rejected. Everyone intuitively understands the costs legislative prayer puts on atheists and agnostics.²⁷ But the surprising thing has been the costs of legislative prayer on religious believers, on both the left and the right, who are suddenly

25. Justice Breyer surprised many recently when he voted to uphold a Ten Commandments display. The display might be divisive but the more divisive thing, Breyer suggested, would have been for the Court to strike it down. See *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) (providing the fifth vote and arguing that striking down the Ten Commandments display in question would “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid”).

26. See *supra* notes 5–10 and accompanying text.

27. See, e.g., Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 730 (2009) (explaining how legislative prayer “tells atheists that their beliefs don’t count and aren’t worthy of being expressed at government occasions”); cf. *County of Allegheny v. ACLU*, 492 U.S. 573, 673–74 (1989) (Kennedy, J., concurring in part and dissenting in part) (“It seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step with the political norm.”).

surprised to find that their religion is not what the government wants.

Putting constitutional restrictions on legislative prayer may reduce these harms by narrowing the scope of the government's religious choices. But it cannot eliminate them. As long as legislative prayer is constitutionally permissible—as long as *Marsh* lives—these fights over legislative prayer will continue, as will the distress that gives rise to them. Of course, had *Marsh* been decided the other way, both the disputes and the distress would not be happening. There would have been other problems, to be sure. Many people would have been angered at the Supreme Court; perhaps that anger would have spilled out to create other types of religious conflict. Ultimately, of course, no one can really say with certainty which route would have best minimized religious division. But what one can say with certainty is that the Supreme Court's approval of legislative prayer has turned out to be more threatening to religious liberty than was apparent at the time. *Marsh* chose the route that seemed most expedient—the route that offered the least potential for immediate controversy. Yet twenty-five years later, as the battles over legislative prayer still rage, that route seems more and more a misadventure. For those who think that mild religious endorsements are harmless, the history of legislative prayer offers a somewhat sobering response.

In the coming years, the Roberts Court will have to consider whether to allow the government more latitude to send religious messages and put up religious symbols.²⁸ There will be hard decisions as to whether to adhere to the neutrality principle, and if not, how far to depart from it. These legislative prayer cases offer the best glimpse of where such decisions might lead. Should the Roberts Court wish to know where a rejection of the neutrality principle now could lead to in a generation, it need look no further than the status of legislative prayer today. Twenty-five years worth of hindsight suggest that giving government latitude to speak religiously comes with extensive social costs that are initially difficult to foresee—costs that will be borne by people of all political and religious persuasions.

This Article proceeds in five parts. Part I addresses *Marsh v. Chambers*, and explains how it has led to the current disputes over legislative prayer. Parts II, III, and IV turn to the

28. See, e.g., *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), cert. granted *sub nom.* *Salazar v. Buono*, 129 S. Ct. 1313 (2009).

second generation of legislative prayer cases. These Parts explain the constitutional issues that *Marsh* has left open and the virtues and vices of the alternative positions, ultimately concluding that it is impossible to provide for religious liberty within the world of legislative prayer. Part V connects legislative prayer to the larger debate about the Establishment Clause, using legislative prayer as a case study to examine the hidden perils of apparently benign religious endorsements.

I. THE ESTABLISHMENT CLAUSE AND LEGISLATIVE PRAYER

A. *MARSH* AND ITS HISTORY

It was in 1983, in *Marsh v. Chambers*, that the issue of legislative prayer finally reached the Supreme Court.²⁹ The precise issue was the constitutionality of Nebraska's practice of having a hired chaplain offer prayers at the beginning of legislative sessions. But understanding the constitutional issue in *Marsh* requires some context.

At the time of *Marsh*, the Supreme Court had, in word and deed, long adhered to the neutrality principle—the idea that the government could not prefer religion over its alternatives. This theory was more far-reaching than its modern competitors, such as noncoercionism and nonpreferentialism.³⁰ Under

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

30. See Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U. L. REV. 37, 39 (1991). As for noncoercionism and nonpreferentialism, their names somewhat suggest their meanings. Under noncoercionism, government cannot coerce or punish religious belief, but it can try to persuade its citizens on religious matters. Under nonpreferentialism, government cannot favor one religion over another, but it can favor religion generally over nonbelief. These two theories overlap, but have different centers. Requiring citizens to attend worship at a religious institution of their choice, for example, would be consistent with nonpreferentialism but not noncoercionism. Allowing the government to put up crèches at Christmas, as another example, would be consistent with noncoercionism but not nonpreferentialism. For more discussion of these two theories, see *id.* at 39–41.

There is also a restrictive hybrid of noncoercionism and nonpreferentialism, known as nonsectarianism. Under nonsectarianism, government can only encourage religious belief; it can never coerce or punish. And the government cannot encourage religion of a particular stripe; it can only encourage religion generally over nonbelief. Nonsectarianism also now acts as a label given to government speech (which is by its nature usually noncoercive) that is nonpreferential. See *id.* at 39–41 (discussing noncoercionism and nonpreferentialism in more detail); see also *infra* notes 88–98 (discussing nonsectarianism in more detail).

it, government could not show the slightest favoritism for religion. The Court first laid out the neutrality principle in *Everson v. Board of Education*,³¹ where the Court explained it like 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.³²

Over the subsequent decades, the Court repeatedly reaffirmed this statement. The Court's opinions were littered with various rephrasings of the general principle. The government had to be neutral "between religion and nonreligion."³³ It could not "persuade or force" opinion on religious matters,³⁴ as the First Amendment was designed "to take every form of propagation of religion out of the realm of . . . public business."³⁵ The government had to "be neutral in its relations with groups of religious believers and nonbelievers,"³⁶ and therefore could not "aid all religions as against nonbelievers."³⁷ The Court perhaps put the point most elaborately in *Epperson v. Arkansas*:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.³⁸

Virtually every Justice agreed with these broad statements of neutrality, even as they differed in applying that principle to particular cases. By the time of *Marsh*, every member of the Court had agreed to some rephrasing of the neutrality principle, with the sole exception of Justice Rehnquist.³⁹ And the Supreme Court's commitment to this principle was not merely in words. The Court had repeatedly applied it, constitutionally

31. 330 U.S. 1 (1947).

32. *Id.* at 15 (emphasis added).

33. *Gillette v. United States*, 401 U.S. 437, 469 (1971) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968)).

34. *Zorach v. Clauson*, 343 U.S. 306, 311 (1952).

35. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216 (1963) (quoting *Everson*, 330 U.S. at 18).

36. *Everson*, 330 U.S. at 18.

37. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

38. *Epperson*, 393 U.S. at 103-04.

39. *See Laycock, supra* note 30, at 61 (listing the Justices who agreed with this neutrality principle).

barring the government from doing such things as offering prayers,⁴⁰ claiming that certain religious views were true,⁴¹ putting up religious displays,⁴² or conditioning political benefits on religious belief.⁴³

From the perspective of the neutrality principle, the legislative chaplaincy at issue in *Marsh* seemed clearly unconstitutional. Legislative chaplaincies involved the sort of favoritism for religion that the neutrality principle had always condemned—the chaplaincies were “official, institutional, clerical, paid, statutorily authorized, continuously operating, longstanding, and undeniably religious.”⁴⁴ On this issue no one really disagreed; applying the neutrality principle forthrightly meant striking down the chaplaincies.

But there was, of course, another side to the story. Legislative chaplaincies, in both the states and in the federal government, were long-established institutions. The history behind legislative prayer extended back to even before the Constitution.⁴⁵ Of course, there had always been some doubts about the constitutionality of legislative prayer⁴⁶—and an occasional

40. See *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding that it violated the Establishment Clause for a state school to encourage students to participate in a daily classroom invocation).

41. See *Epperson*, 393 U.S. at 107 (striking down an Arkansas statute prohibiting the teaching of evolution in the public schools); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (holding that it violated the Establishment Clause for state schools to read students passages from the Bible).

42. See *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (striking down a Kentucky statute that required the posting of the Ten Commandments in public school classrooms).

43. See *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (striking down a Maryland oath that required notaries to declare a belief in God).

44. See Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1172–73 (2009).

45. *Id.* at 1177–82 (discussing the origins of legislative prayer in the Continental Congress in 1774).

46. In his *Detached Memoranda*, James Madison argued against the constitutionality of the chaplaincies. See Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 558–59 (1946); see also Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NW. U. L. REV. 145, 159–60 (2008). Congress also considered the constitutional issue several times in the 1850s in various reports, although each report concluded that the chaplaincies were constitutional. See H.R. REP. NO. 33-124, at 6, 8 (1854); S. REP. NO. 32-376, at 1–4 (1853); H.R. REP. NO. 31-171, at 3 (1850). For more on Madison's and Congress's objections, see Lund, *supra* note 44, at 1186–87, 1196–1202.

challenge to it⁴⁷—but after two centuries, it seemed as if such doubts had dried up. Indeed, the Court had itself repeatedly intimated that the chaplaincies were constitutional. In 1952, in the early case of *Zorach v. Clauson*,⁴⁸ the Court referred to “[p]rayers in our legislative halls” as the sort of nominal support for religion that would be constitutionally acceptable.⁴⁹ Justice Brennan himself indicated the same a decade later, when he claimed that “invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause.”⁵⁰ There was thus undeniable dissonance between the Court’s stated principles and the practices that it had long condoned.⁵¹

And who knows how long the Supreme Court would have been able to postpone dealing with the contrast between principle and practice, had it not been for the Eighth Circuit’s decision to strike down Nebraska’s legislative chaplaincy.⁵² The Court now found itself unavoidably thrust into the debate, and with a difficult choice to make. It could strike down the chaplaincies, which would generate tremendous religious and political controversy. Or it could uphold them, thus officially backtracking on the neutrality principle. This was, in all relevant respects, the same dilemma that the Court would face a generation later, when the Ninth Circuit ordered “under God” out of

47. See, e.g., *Elliott v. White*, 23 F.2d 997, 998 (D.C. Cir. 1928) (dismissing, on standing grounds, an Establishment Clause challenge to the congressional chaplaincies).

48. See *Zorach v. Clauson*, 343 U.S. 306, 308 (1952).

49. *Id.* at 312–13. The first case to mention the tradition of legislative prayer was *Church of Holy Trinity v. United States*, 143 U.S. 457, 471 (1892), where the Court referred to “the custom of opening sessions of all deliberative bodies and most conventions with prayer.” *Id.*

50. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring).

51. At this point, the Court had not yet considered other similar issues, such as the proclamation “God save the United States and this Honorable Court” opening the business of the federal courts, or the religious Thanksgiving proclamations issued by Presidents in office, or the phrase “under God” added to the Pledge of Allegiance in 1954, see Act of June 14, 1954, Pub. L. No. 83-396, ch. 297, 68 Stat. 249 (codified as amended at 4 U.S.C. § 4 (2006)), or the phrase “in God we Trust” put on the coin in 1864, see 3 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 602 (1950).

52. See *Chambers v. Marsh*, 675 F.2d 228 (8th Cir. 1982), *rev’d*, 463 U.S. 783 (1983).

the Pledge of Allegiance.⁵³ In *Marsh*, as was later the case in *Newdow*, constitutional principle was squarely opposed to political reality. In *Marsh*, as in *Newdow*, it was “politically impossible to affirm and legally impossible to reverse.”⁵⁴ In *Marsh*, as in *Newdow*, the immovable object had met the irresistible force.

Ultimately, the Supreme Court chose to uphold the chaplaincies, writing the opinion as a straightforward application of what it considered to be undisputed history.⁵⁵ Given the long history of legislative prayer, and given that the First Congress had explicitly authorized it within a few days of approving the Establishment Clause, Chief Justice Burger concluded that “the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment.”⁵⁶ That was essentially the end of the opinion.⁵⁷ The majority opinion did not cite *Engel v. Vitale*, the only other case the Court had ever decided that dealt with government-sponsored prayer.⁵⁸ Nor did it mention the then-dominant three-part doctrinal test of *Lemon v. Kurtzman*.⁵⁹ *Marsh*’s particular historical approach made all these cases, and the neutrality principle itself, utterly irrelevant.

Deciding *Marsh* this way, of course, avoided all the political and religious controversy that might well have followed from a decision striking the chaplaincies down. The Court surely understood this point. When the Court called the chaplaincies “simply a tolerable acknowledgment of beliefs widely held

53. See *Newdow v. U.S. Cong.*, 328 F.3d 466 (9th Cir. 2003), *rev'd on other grounds sub. nom.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

54. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 224 (2004) (referring to *Newdow*).

55. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (describing the history as “unambiguous and unbroken”). *But see* Lund, *supra* note 44, at 1207–13 (arguing that *Marsh*’s historical analysis was somewhat oversimplified).

56. *Marsh*, 463 U.S. at 788.

57. See, e.g., Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988) (“The interesting thing about the opinion is that it is based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause.”).

58. See *Engel v. Vitale*, 370 U.S. 421, 423 (1962).

59. Justice Brennan pointed this out in his dissent. See *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)) (“The Court makes no pretense of subjecting Nebraska’s practice of legislative prayer to any of the formal ‘tests’ that have traditionally structured our inquiry under the Establishment Clause.”).

among the people of this country,"⁶⁰ it left an unmistakable impression—namely that part of what was making the chaplaincies so tolerable to the Court was precisely the fact that the support for them was widely held.⁶¹ This also accords with what we know of the author of the opinion in *Marsh*, Chief Justice Burger. A decade earlier, Burger wrote *Lemon v. Kurtzman*, where the Court first conceptualized the avoidance of disagreement as a primary Establishment Clause value.⁶² "[P]olitical division along religious lines," Burger said, "was one of the principal evils against which the First Amendment was intended to protect."⁶³ Sentiments of that sort surely prodded the Court toward accepting the chaplaincies, though it is no doubt impossible to calculate their true influence.

There were, of course, criticisms of *Marsh* both on and off the Court. The two dissents focused on different points. Justice Brennan argued that the chaplaincies were intrinsically unconstitutional, while Justice Stevens argued that the chaplaincies would inevitably disadvantage religious minorities, and thus were unconstitutional in their operation.⁶⁴ Other commentators added their critiques.⁶⁵ But the continuing problem with the chaplaincies, however, has been their deep incompatibility with constitutional principle. The history behind legislative

60. *Id.* at 792 (majority opinion).

61. Justice Scalia understands *Marsh* this way as well. He once quoted the passage as evidence that the *Marsh* Court was considering potential political reaction in its decision to uphold the chaplaincies. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 900 n.8 (2005) (Scalia, J., dissenting) ("Nothing so clearly demonstrates the utter inconsistency of our Establishment Clause jurisprudence as Justice O'Connor's stirring concurrence in the present case. 'We do not,' she says, 'count heads before enforcing the First Amendment.' But Justice O'Connor joined the opinion of the Court in *Marsh v. Chambers*, 463 U.S. 783, (1983), which held legislative prayer to be 'a tolerable acknowledgment of beliefs widely held among the people of this country.'" (citations and quotations omitted)).

62. *Lemon*, 403 U.S. 602.

63. *Id.* For a thorough analysis of this claim, and how it has changed over time, see generally Richard Garnett, *Religion, Division, and the First Amendment*, 94 *GEO. L.J.* 1667 (2006).

64. Compare *Marsh*, 463 U.S. at 795–822 & nn. 1–54 (Brennan, J., dissenting) with *id.* at 822–24 & nn. 1–2 (Stevens, J., dissenting).

65. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 14–15, at 1288–89 (2d ed. 1988) (describing *Marsh* as a "seemingly anomalous" case); Leslie C. Griffin, *No Law Respecting the Practice of Religion*, 85 *U. DET. MERCY L. REV.* 475, 479 (2008) ("There should be no historical exception to the rule that government should not become involved in religious practice."); McConnell, *supra* note 57, at 362 ("I believe that *Marsh v. Chambers* represents original intent subverting the principle of the rule of law.").

prayer in this country certainly does not square with the neutrality principle, to be sure. But the real problem is that legislative prayer does not square with *any* principled conception of the Establishment Clause. Religious worship conducted by government-paid clergy bears important hallmarks of the old established churches; the two differ greatly in magnitude, of course, but not much in principle. So it is hard to find any theory of the Establishment Clause that is compatible with the history of legislative prayer in this country. A noncoercion theory cannot do it. After all, chaplains have been paid with money taken from taxpayers, and taxation is certainly coercive.⁶⁶ Nor can the history behind the chaplaincies be explained with a nonpreferentialist theory (such as the one that Justice Scalia has sometimes counseled).⁶⁷ For that would require legislative prayers to have had nondenominational language and legislative prayergivers to have been chosen on nondenominational grounds. Yet those requirements are modern creations—as a matter of history, neither Nebraska’s chaplaincy nor the federal congressional chaplaincies were nonpreferential in this sense.⁶⁸ Indeed, even rejecting incorporation would not solve the dilemma—the congressional chaplaincies were obviously established by Congress, not by the states. Perhaps the only

66. See Laycock, *supra* note 30, at 40 (“[I]t is common ground that taxation is coercive.”); see also Brief for the Respondent at 11, *Marsh*, 463 U.S. 783 (No. 82-83) (“[Nebraska’s practice of legislative prayer] violat[es] the irreducible core of the Establishment Clause—that no tax in any amount may be used to fund overtly religious activity.”). For more on the ways in which taxation was used to support the established churches at the time of the founding, see Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2146–59 (2003).

67. See *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J. dissenting) (“[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).”); see also *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 909 (2005) (Scalia, J., dissenting) (suggesting that government-sponsored endorsements of religion are unconstitutional when they “prefer[] one religious sect over another”).

68. See, e.g., Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2104 (1996) (“[W]ithin the last six years alone, over two hundred and fifty opening prayers delivered by congressional chaplains have included supplications to Jesus Christ.”). This is also a theme in Lund, *supra* note 44.

principled conception of the Establishment Clause that can legitimize the chaplaincies is Justice Thomas's view that the Establishment Clause creates no individual rights.⁶⁹ But that is just a backhanded illustration of how difficult it is to offer a principled conception of the Establishment Clause that would uphold the chaplaincies. Justice Thomas's theory would require a complete rewrite of Establishment Clause history; in his eyes, there has been no Establishment Clause case ever brought where the plaintiff should have won.⁷⁰ In this sense, the Framers' acceptance of legislative prayer seems deeply unprincipled—not in the pejorative sense of being illegitimate or dishonorable, but in the objective sense of rejecting any overarching philosophy.⁷¹ To borrow a phrase later used by Thomas Berg, the chaplaincies are perhaps the best example of Establishment Clause anti-theory.⁷²

A generation later, *Marsh* now stands as one of the most important Establishment Clause cases ever decided. In many different contexts, the Supreme Court has barred government from acting religiously and from favoring religion over its alternatives.⁷³ *Marsh* is the only exception—the only domain where the government has license to speak religiously. One can perhaps think of other examples, such as the Ten Commandments display approved in *Van Orden*, the Christmas tree and menorah approved in *Allegheny County*, and the crèche approved in *Lynch*.⁷⁴ But those cases all differ in a fundamental respect. The Supreme Court approved the displays in those

69. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) (“The Establishment Clause does not purport to protect individual rights.”).

70. See Laycock, *supra* note 54, at 240 (“[Justice Thomas] appears to believe that every decision in the Court’s history giving any content to the Establishment Clause was also wrongly decided.”).

71. That the historical practice of legislative prayer is unprincipled in this sense does not make it unjust or even unconstitutional. We could cobble together an Establishment Clause jurisprudence using bits of history, precedent, and common sense, without depending on any overarching principle. Of course, some object to such an approach, and indeed Michael McConnell criticized *Marsh* on this precise ground. McConnell, *supra* note 57, at 363 (“[U]nless I can be persuaded that there is some coherent understanding of the establishment clause, which can be applied consistently in the circumstances of today, I am forced to disagree with the holding in *Marsh*.”).

72. See Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693 (1997).

73. See *infra* notes 31–43 (providing examples).

74. See *Van Orden v. Perry*, 545 U.S. 677 (2005); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

cases on the theory that they were, at bottom, secular—or, speaking inelegantly, at least more secular than religious.⁷⁵ But the Supreme Court suggested no such thing in *Marsh*. The *Marsh* court did not conclude that legislative prayer was not religious—it concluded that legislative prayer, though religious, did not violate the Establishment Clause.

Now some, no doubt, will find this distinction thin, technical, and unpersuasive. But the Court certainly still maintains it; it still sees *Marsh* as fundamentally different from its other cases. A few years ago, for example, the Court offhandedly referred to legislative prayer as the sole “special instance [where it] found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious.”⁷⁶ Lower courts have picked up on this as well. They often refer to how “*Marsh* is one of a kind,”⁷⁷ and have also clearly understood that the usual “endorsement,” “coercion,” and “*Lemon*” tests—which apply to all other Establishment Clause litigation—are inapposite when it comes to legislative prayer.⁷⁸

75. See *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring)(providing the fifth vote and upholding the government’s display of the Ten Commandments, on the grounds that the display “communicates not simply a religious message, but a secular message as well” and that the “nonreligious aspects of the tablets’ message . . . predominate”); *County of Allegheny*, 492 U.S. at 619 (upholding the government’s display of a Christmas tree and a menorah, on the grounds that it was “not an endorsement of religious faith but simply a recognition of cultural diversity”); *Lynch*, 465 U.S. at 681 (upholding the government’s display of a crèche, on the grounds that there were “legitimate secular purposes” behind the government’s action).

76. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 859 n.10 (2005)(citing only *Marsh v. Chambers*, 463 U.S. 783 (1983)); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 40 (2004) (O’Connor, J., concurring) (“[O]nly in the most extraordinary circumstances could actual worship or prayer be defended [as constitutional]. . . . We have upheld only one such prayer against Establishment Clause challenge, and it was supported by an extremely long and unambiguous history.” (citing *Marsh*, 463 U.S. 783)).

77. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999); see also *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 211 (5th Cir. 2006); *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003); *Newman v. City of East Point*, 181 F. Supp. 2d 1374, 1378 (N.D. Ga. 2002).

78. See, e.g., *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1232 (10th Cir. 1998) (“[T]he evolution of Establishment Clause jurisprudence indicates that the constitutionality of legislative prayers is a *sui generis* legal question.”); *Kurtz v. Baker*, 829 F.2d 1133, 1147 (D.C. Cir. 1987) (Ginsburg, J., dissenting) (“[E]xisting legislative prayer practice, . . . fits into a special nook—a narrow space tightly sealed off from otherwise applicable first amendment doctrine.”). Justice Brennan foresaw this in his *Marsh* dissent. See *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) (“[T]he Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.”).

And regardless of this distinction's ultimate persuasiveness, it undoubtedly has had an impact on Establishment Clause litigation. With regard to holiday displays and Ten Commandments plaques, the government must vigilantly maintain the façade that its action is entirely secular. But with legislative prayer, government can (and does) let slip the mask, knowing that legislative prayer can be honestly and unambiguously religious while still falling within the safe harbor established by *Marsh*. As we shall see, this has made legislative prayer a unique domain where governments can openly develop things like "prayer policies" and freely make religious decisions and theological judgments. And, as we shall also see, this has led to some uniquely disturbing incidents and uniquely vexing problems.⁷⁹

B. *MARSH* AND ITS AMBIGUITIES

Marsh thus conclusively resolved the issue whether legislative prayer was intrinsically unconstitutional (what we will call the first-order question). But by answering that in the negative, the Court created for itself a variety of second-order questions. The Court then had to lay out whether there were circumstances under which legislative prayer, constitutional in theory, might turn unconstitutional in practice. The important point here is that *Marsh* did not simply wash its hands of legislative prayer. Instead of turning legislative prayer over entirely to the political process, *Marsh* approved legislative prayer with two limitations.⁸⁰ The first related to the content of legislative prayer. At some point, according to *Marsh*, legislative prayer could become so overly divisive and denominational that the

79. *Marsh* has also taken on unparalleled importance in one other respect. Its status as the only official exception to the neutrality rule means that the only salvation for clear endorsements of religion lies in *Marsh* itself. So whether one is talking about the daily supper prayer at a military college, a school board's practice of opening with a religious invocation, or prayer at the President's inauguration, the question is always whether the religious activity at issue is sufficiently like the legislative prayers approved in *Marsh*. See, e.g., *Mellen*, 327 F.3d at 369–70 (evaluating a daily supper prayer at Virginia Military Institute); *Coles*, 171 F.3d at 380–83 (evaluating a school board meeting prayer); *Newdow v. Bush*, 355 F. Supp. 2d 265, 283–86 (D.D.C. 2005) (evaluating a prayer at the presidential inauguration).

80. By permitting the political branches to engage in legislative prayer, while restricting them with various conditions on the exercise of that power, *Marsh* in an important way maximized (though unintentionally) the future role of the Court. Cf. Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in CONSTITUTIONAL LAW STORIES 13, 28–31 (Michael C. Dorf ed., 2004) (making the same point regarding *Marbury*).

prayer experience would be unconstitutional.⁸¹ The second related to the methods by which prayergivers were chosen. At some point, according to *Marsh*, government's ability to pick and choose prayergivers on the basis of their religious denominations would be limited.⁸²

Much more will be said about these two requirements. But one can see immediately that they provide somewhat complementary protections. One protects listeners, while the other protects speakers. And both restrictions are essentially safeguards against religious preferentialism. The first protects listeners from speech they find harassing because of its denominational overtones; the second protects speakers from being excluded because of their particular denominational affiliations. But although the two restrictions seem to be mutually reinforcing, the reality is not nearly so simple.

II. PROTECTING LISTENERS: THE NONSECTARIAN REQUIREMENT

The most persistent of the second generation *Marsh* controversies has been over the content of legislative prayers. The facts of the individual cases vary somewhat, although common themes abound. Certainly the most typical cases are the disputes that arise over identifiably Christian prayers. In *Pelphrey v. Cobb County*, for example, the Cobb County Board of Supervisors opened its sessions with prayers that typically used Christian theological language—prayers would routinely end, for example, “in Jesus’ name we pray.”⁸³ But there are other types of cases. Sometimes religious minorities take control of the prayer opportunity in a way that the majority finds offensive. In *Snyder v. Murray City Corp.*, a plaintiff sought to open the Murray City Council’s meeting with a prayer that began, “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.”⁸⁴

Now there is little dispute that *Marsh* imposes some sort of content-based limitation on the content of legislative prayers. *Marsh* itself said as much.⁸⁵ And for quite good reason—

81. See *Marsh*, 463 U.S. at 792–95; see also *infra* Part II.

82. See *Marsh*, 463 U.S. at 792–95; see also *infra* Part III.

83. *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008). For a detailed analysis critical of *Pelphrey*, see Segall, *supra* note 27, at 713.

84. *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1228 n.3 (10th Cir. 1998).

85. See *Marsh*, 463 U.S. at 783; see also *infra* notes 104–05.

virtually everyone believes that the Establishment Clause forbids government from deliberately favoring one religion over another. But while few doubt that overly denominational prayers cross a constitutional line at some point, people debate intensely over where that point is. Some courts have imposed a rigorous “nonsectarian” requirement, mandating that each individual legislative prayer be scrupulously nondenominational.⁸⁶ Other courts have been more deferential, requiring only that the legislative prayer process not be exploited in such a way as to proselytize for one faith or to disparage some other faith.⁸⁷

This section examines the various standards, chiefly by examining the virtues and vices of the stricter nonsectarian requirement. In some ways, a complete ban on denominational references makes perfect sense; it would be the natural and precise implementation of the Supreme Court’s longstanding ban on denominational discrimination. But it has its downsides, the largest being that it essentially discriminates against prayergivers who would use denominational references. People can reasonably disagree as to whether the benefits of a strict ban outweigh the costs. But one reality should be apparent. Neither option looks very good at all. And when all our potential paths forward are this unsatisfying—when we are forced to choose between one form of denominational discrimination or another—we naturally must wonder whether we are on wrong course altogether.

A. THE NONSECTARIAN REQUIREMENT GENERALLY

We begin with some general discussion of the particulars of nonsectarianism. As discussed earlier, nonsectarianism is the restrictive hybrid of two other Establishment Clause theories—noncoercionism and nonpreferentialism.⁸⁸ Under nonsectarianism, government can only encourage religious belief, rather than coerce it. And the only type of religion that government can encourage is a general nondenominational one.

While the nonsectarian standard has had a pivotal role in legislative prayer cases, it has also played a significant role in Establishment Clause litigation more generally. From the very beginning, nonsectarianism has been a competitor to the neu-

86. See *Wynne v. Great Falls*, 376 F.3d 292, 302 (4th Cir. 2004); *Bacus v. Palo Verde Unified Sch. Dist.*, 52 F. App’x 355, 357 (9th Cir. 2002).

87. See, e.g., *Pelphrey*, 547 F.3d at 1271; *Snyder*, 159 F.3d at 1236.

88. See *supra* note 30 and accompanying text.

trality principle. In one of the first school prayer cases, *Engel v. Vitale*, the issue was New York's policy of opening the school day with a prayer created by the New York Board of Regents.⁸⁹ One of the reasons why the prayer was constitutional, New York argued, was that it was nondenominational. It referred to God generally, and did not go into any theological details that might divide various monotheists.⁹⁰ And actually the idea of nonsectarianism actually goes further back than that—back into the nineteenth century, when states and local governments first addressed how the newly formed public schools would deal with issues of religion.⁹¹

In different times and in different contexts, the nonsectarian standard resurfaces. Part of the reason it keeps coming back is that it offers a somewhat attractive middle ground between having no government-sponsored religion at all, and giving the government complete discretion to say whatever it likes about religion. The nonsectarian standard offers a compromise, albeit of an unusual sort. The government can act religiously, but not *too* religiously.

The extremes in our political culture find the nonsectarian standard attractive mostly as a fallback. The left would rather get rid of government-sponsored religion altogether. The right would like government to be able to support either individual religions⁹² or narrow groups of religions,⁹³ without having to support religion in an entirely generic and general manner. Each side thus advances the nonsectarian standard when tactically appropriate, as a way of avoiding a more complete loss. Thus, in areas where the Supreme Court has prohibited gov-

89. *Engel v. Vitale*, 370 U.S. 421 (1962).

90. See Brief of Respondents at 8, *Engel*, 370 U.S. 421 (No. 468), 1962 WL 115798 (“[T]he challenged recitation was rightly upheld. It is not compulsory, is clearly nonsectarian in language, and neither directly nor indirectly even suggests belief in any form of organized or established religion.”).

91. Trying to smooth over the differences between groups of Protestants, school districts taught a generalized sort of Protestantism. This was eventually labeled the “nonsectarian” approach, because it was compatible with all the various sects of Protestantism. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 299–300 (2001) (describing this approach and how it eventually led to nineteenth-century conflicts between Protestants and Catholics).

92. See *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (involving a government display of a city-owned nativity scene).

93. See *County of Allegheny v. ACLU*, 492 U.S. 573, 579–87 (1989) (involving a government display of a nativity scene, menorah, and Christmas tree).

ernment-sponsored religion (as with, for example, government-sponsored prayer in the public schools), it is the conservative side that argues for the nonsectarian standard. But in areas where the Supreme Court has approved government-sponsored religion (as with, for example, legislative prayer), it is the liberal side that argues for the nonsectarian standard. Of course, this does mean that both sides end up being somewhat inconsistent about the nonsectarian standard when the need arises. Conservative groups praise the nonsectarian standard when the issue is prayer in schools or certain religious displays,⁹⁴ but then attack it in the context of legislative prayer.⁹⁵ Liberal groups do the opposite, advancing the nonsectarian standard in the context of legislative prayer,⁹⁶ but then trying to undermine it in other contexts.⁹⁷

The nonsectarian standard thus functions largely as a strategic device; neither side is committed to it as a matter of principle. Indeed, the only ones that directly benefit from a nonsectarian standard are those who both embrace government-sponsored religion and whose views of the divine are themselves nonsectarian. This is a very small crowd. Intense religious believers often reject the nonsectarian standard, as it sidelines those who would only pray in denominational terms. And nonbelievers often reject it as well, seeing prayers to God as being just as incompatible with atheism as prayers to Jesus or Allah.⁹⁸ This again reinforces the tactical nature of the non-

94. See Brief of Amicus Curiae American Center for Law & Justice in Support of Respondents at 2–3 & n.1, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500), 2005 WL 273648 (arguing that a Ten Commandments display should be upheld, in part, because it is “non-sectarian”).

95. See Brief Amicus Curiae of the American Center for Law & Justice in Support of Defendants-Appellants at 12–16, *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (No. 05-30294), 2007 WL 2735333 (“[T]he distinction between ‘sectarian’ and ‘nonsectarian’ [legislative prayer] is inherently in the eye of the beholder. . . . [P]ars[ing] the content of prayers to draw a line between ‘sectarian’ and ‘nonsectarian’ would pose serious First Amendment problems[, such as] ‘an impermissible degree of entanglement.’”).

96. See Brief Amicus Curiae of the Anti-Defamation League in Support of Appellee John Doe at 21–27, *Tangipahoa Parish*, 494 F.3d 494 (No. 05-30294), 2005 WL 5774135.

97. See Brief of Amici Curiae, Anti-Defamation League and Philip A. Cunningham, Ph.D., Executive Director, Center for Christian-Jewish Learning at Boston College, in Support of Petitioner in No. 03-1500 and in Support of Respondents in No. 03-1693 at 24, *Van Orden*, 545 U.S. 677 (No. 03-1500), *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (No. 03-1693), 2004 WL 2911167 [hereinafter Brief of Amici Curiae, Anti-Defamation League and Philip A. Cunningham, Ph.D.].

98. Indeed, by trying to include as many religious groups as possible, the

sectarian standard. The left hopes that its adoption will fracture the coalition supporting government-sponsored religion to the point where it becomes politically unsustainable; the right hopes that its adoption will act as a camel's nose in the tent for more particular forms of government-sponsored religion.

B. THE NONSECTARIAN REQUIREMENT AND LEGISLATIVE PRAYER

How the nonsectarian standard came to be associated with legislative prayer is a story that begins with *Marsh v. Chambers*.⁹⁹ *Marsh* focused primarily on whether legislative prayer was intrinsically constitutional.¹⁰⁰ But toward the end of the opinion, the Court addressed some fact-specific complaints the plaintiff raised against Nebraska's chaplaincy in particular.¹⁰¹ The plaintiff brought up how the prayers of the Nebraska chaplain were all based in "the Judeo-Christian tradition."¹⁰² This, to the plaintiff, made them overly denominational—not only were the prayers incompatible with atheism (as all legislative prayers must be), they were also incompatible with other well-established religious faiths, like Hinduism and Buddhism.¹⁰³

The Court in *Marsh* only briefly responded to this argument, saying that "[t]he 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."¹⁰⁴ And, in a footnote quite removed from this discussion, the Court added in a factual rejoinder. The Court noted that Nebraska's chaplain had indeed made significant attempts to keep his prayers non-denominational, having "removed all references to Christ after a 1980 complaint from a Jewish legislator."¹⁰⁵

nonsectarian standard may increase the disfavor placed on nonbelievers. See *Lee v. Weisman*, 505 U.S. 577, 594 (1992) ("That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.").

99. 463 U.S. 783 (1983).

100. *Id.* at 786, 792–95.

101. *Id.* at 793–95.

102. *Id.* at 793.

103. *See id.*

104. *Id.* at 794–95.

105. *Id.* at 793 n.14.

Marsh though was not the Supreme Court's final word on this issue. Six years later, in *County of Allegheny v. ACLU*, the Court addressed two holiday displays, ultimately upholding one while striking down the other.¹⁰⁶ In the course of its opinion, the Court revisited *Marsh* and the restrictions it imposed on the content of legislative prayers:

Indeed, in *Marsh* itself, the Court recognized that not 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. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'¹⁰⁷

This passage purports to be a summary of *Marsh*, but it is a revisionary sort of summary. In *Marsh*, the fact that the chaplain had removed all references to Christ seemed but a background fact. The majority in *Allegheny County* here remakes it into a central holding of the case. Now any legislative prayer that refers to Jesus Christ is apparently unconstitutional. Shifting majorities explain the change in tone. While *Marsh* was a triumph for the right, *Allegheny County* was a triumph for the left.¹⁰⁸ And part of the victory won by the liberals in *Allegheny County* was this small but fundamental change in *Marsh's* meaning.

From these two different sources, courts have pulled two different standards for evaluating the content of legislative prayers. The right advances *Marsh's* more deferential language, claiming that legislative prayer is unconstitutional only when "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."¹⁰⁹ The left advances *Allegheny County's* reinterpretation, claiming that each individual prayer must now be scrupulously nonsectarian, which at least means "remov[ing] all references to Christ."¹¹⁰ Some courts have adopted the former interpreta-

106. *County of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989).

107. *Id.* at 603 (quoting *Marsh*, 463 U.S. at 793 n.14).

108. Three of the five Justices in the *Allegheny County* majority—that is, a majority of the *Allegheny County* majority—actually dissented in *Marsh*. The *Allegheny County* majority consisted of Justices Brennan, Stevens, Marshall, O'Connor, and Blackmun. *Id.* at 577–78. The first three dissented in *Marsh*; the last two were in the *Marsh* majority. *Marsh*, 463 U.S. at 784, 795, 822.

109. *Marsh*, 463 U.S. at 794–95.

110. *Allegheny County*, 492 U.S. at 603 (citation and internal quotation marks omitted).

tion,¹¹¹ while others have adopted the latter.¹¹² And some judges have understandably called out for better guidance.¹¹³

Yet while some confusion is understandable, there does seem to be a fairly clear doctrinal answer. Being the more recent Supreme Court pronouncement on the subject, *Allegheny County* controls—and it is unambiguous in its deliberate modification of the *Marsh* standard. *Allegheny County* said that the prayers in *Marsh* were constitutionally acceptable “because the particular chaplain had removed *all* references to Christ.”¹¹⁴ The implication is unavoidable: prayers with *any* reference to Christ are unconstitutional. Some have called *Allegheny County*’s reinterpretation of *Marsh* dicta.¹¹⁵ And that is true.¹¹⁶ But it also is irrelevant; lower courts are bound by the Supreme Court’s considered dicta as well as its holdings.¹¹⁷

The more important question, however, is what the Supreme Court will do with the nonsectarian standard. The Supreme Court, of course, has no obligation to follow its own earlier precedent or that of anyone else.¹¹⁸ The next section therefore turns from the descriptive to the prescriptive—from what the rule currently is to what the rule should be.

111. See, e.g., *Pelphrey v. Cobb County*, 547 F.3d 1263, 1271–72 (11th Cir. 2008); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233–34 (10th Cir. 1998).

112. See *Wynne v. Town of Great Falls*, 376 F.3d 292, 298–99 (4th Cir. 2004); *Bacus v. Palo Verde Unified Sch. Dist.*, 52 Fed. App’x 355, 356–57 (9th Cir. 2002).

113. See *Hinrichs v. Bosma*, 440 F.3d 393, 403 (7th Cir. 2006) (Kanne, J., dissenting) (pointing out “the *Marsh* majority’s curious ambiguity on the point” of whether sectarian prayer is permitted).

114. *Allegheny County*, 492 U.S. at 603 (emphasis added) (internal quotation marks omitted).

115. See, e.g., Robert Luther III & David B. Caddell, *Breaking Away from the “Prayer Police”: Why the First Amendment Permits Sectarian Legislative Prayer and Demands a “Practice Focused” Analysis*, 48 SANTA CLARA L. REV. 569, 571, 575–76 (2008).

116. Being unnecessary to the decision, *Allegheny County*’s interpretation of *Marsh* must be classified as dicta. See *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) (explaining the differences between holding and dicta).

117. See, e.g., *Jones v. St. Paul Cos.*, 495 F.3d 888, 893 (8th Cir. 2007) (“[F]ederal courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings . . .” (citation and internal quotation marks omitted)); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975).

118. See *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (“The doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law.” (quotation and citation omitted)).

C. THE MERITS OF THE NONSECTARIAN REQUIREMENT

While the nonsectarian requirement has its share of problems, it serves some foundational constitutional values. There is a reason why all courts have acknowledged at least some constitutional limit on the content of legislative prayers. For while judges differ on whether endorsements of religion are unconstitutional, virtually everyone believes that endorsements of one particular religion over another are unconstitutional. The Supreme Court put it succinctly in *Larson v. Valente*¹¹⁹: “The clearest command of the Establishment Clause,” the Court said, “is that one religious denomination cannot be officially preferred over another.”¹²⁰ So settled is this proposition that Michael McConnell once wrote that “[t]his conclusion has voluminous support in the history of the First Amendment, and I know of no First Amendment theorist who disputes it.”¹²¹

Most importantly, this proposition has long been accepted even in the noncoercive context of government speech and even by Justices that entirely reject the neutrality principle. In *Wallace v. Jaffree*, a case dealing with moments of silence, Justice Rehnquist argued that “nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion.”¹²² But he still affirmed that government was prohibited from “asserting a preference for one religious denomination or sect over others.”¹²³ Justice Scalia took a similar tack in his dissent in *Lee v. Weisman*, where he said he would uphold public school graduation prayer—but only as long as it remained nondenominational.¹²⁴ And most recently, in a dissent

119. 456 U.S. 228 (1982).

120. *Id.* at 244; *see also* Bd. of Educ. v. Grumet, 512 U.S. 687, 703 (1994) (calling this “a principle at the heart of the Establishment Clause”).

121. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 146 n.143 (1992).

122. *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

123. *Id.*

124. *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (conceding that the Establishment Clause forbids a “government-sponsored endorsement of religion . . . where the endorsement is sectarian”).

That Justice Scalia would support the nonsectarian standard may be surprising to some. But it comports with his view that all monotheists are worshipping the same God, despite the differing labels they use. *See id.* at 646 (“The Founders of our Republic knew . . . that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek.” (emphasis added)); *see also* McCreary County v. ACLU of Ky., 545 U.S. 844, 893 n.3 (2005) (Scalia, J., dis-

that would have upheld a Ten Commandments display, the conservative side of the Court all joined in an opinion condemning denominational religious speech by government.¹²⁵ Of the nine Justices currently on the Court, the best guess is that eight of them support this ban on denominational religious speech—the only dissenter seems to be Justice Thomas.¹²⁶

From a general ban on denominational religious speech, the ban on sectarian prayers quickly and easily flows. Indeed, the nonsectarian requirement seems to be just a contextualized application of the general ban on denominational preferences. Justice Scalia, writing for the dissenters in *Lee v. Weisman*, said that graduation prayers were proper as long as prayergivers refrained from “specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ [such as] the divinity of Christ.”¹²⁷ The *McCreary County* dissenters said that Ten Commandments displays were permissible in part because they were consistent with the religious beliefs of “a broad and diverse range of the population” including “[t]he three most popular religions in the United States, Christianity, Judaism, and Islam.”¹²⁸ This gives a first inkling of what a nonsectarian standard looks like in the context of legislative prayer. Legislative prayers must be consistent at least with “Christianity, Judaism and Islam”¹²⁹ and cannot refer to disputed issues such as

senting) (“The Court thinks it surprising and truly . . . remarkable to believe that the deity the Framers had in mind . . . was the God of monotheism. This reaction would be more comprehensible if the Court could suggest what other God . . . there *is*, other than the God of monotheism.” (citation and internal quotation marks omitted)).

This claim, of course, carries with it some controversy; some Christians, Jews, and Muslims would dispute worshipping the same God. See, e.g., Rob Johnson & Mason Adams, *Prayer Debate Swirls in Roanoke*, ROANOKE TIMES, Jan. 11, 2009, at A1, available at 2009 WLNR 646416 (“If you’re going to offer a prayer and it’s not in the name of Jesus, who is it being offered to—what deity is on call that day?”) (statement attributed to Barney Arthur, a Baptist minister).

125. See *McCreary County*, 545 U.S. at 894 (Scalia J., dissenting, joined by Rehnquist, C.J., Thomas, J., and in part by Kennedy, J.) (conceding the unconstitutionality of a “government endorsement of a particular religious viewpoint”).

126. See *supra* note 69 and accompanying text (explaining Justice Thomas’s view, articulated in *Newdow*, that the Establishment Clause creates no judicially enforceable individual rights).

127. *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

128. See *McCreary County*, 545 U.S. at 894 (Scalia J., dissenting).

129. See *id.*

“the divinity of Christ.”¹³⁰ These formulations from the conservative end of the Court differ little from *Allegheny County’s* command that prayergivers “remove[] all references to Christ.”¹³¹ They all have the same core—legislative prayergivers must avoid discussing the theological details that might pit monotheists against each other.¹³²

Yet another reason exists for a nonsectarian limitation in the context of legislative prayer—one that is particular to the nature of legislative prayer and its acceptance by the Court. In *Marsh*, legislative prayer was held constitutional largely on grounds of historical tradition.¹³³ But the *Marsh* Court did not accept legislative prayer merely as some obsolete historical relic. Instead, the Court saw a legitimate purpose in legislative prayer—it was a way of encouraging unity and religious toleration. This is what Chief Justice Burger meant in *Marsh* when he called legislative prayer an “acknowledgment of beliefs widely held among the people of this country.”¹³⁴ It is what Justice Scalia later meant when he spoke of prayer as being an “important unifying mechanism” for our citizenry.¹³⁵ And Justice O’Connor once put it this way as well. Sitting by designation in a recent lower court case after her retirement from the Supreme Court, she said that legislative prayers that had been constitutionally accepted all “shared a common characteristic: they recognized the rich religious heritage of our country in a fashion that was designed to *include* members of the community.”¹³⁶ These Justices differ profoundly in their views of legislative prayer. Justice O’Connor conceives of legislative prayer as a political ritual with religious trappings;¹³⁷ Justice Scalia does

130. *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

131. *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (quoting *Marsh v. Chambers*, 463 U.S. 783, 793 n.14 (1983)).

132. More remains to be said about the actual content of the nonsectarian standard, but that will have to wait temporarily. See *infra* Parts II.D–E.

133. See *supra* notes 55–57 and accompanying text.

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

135. *Lee*, 505 U.S. at 646 (Scalia, J. dissenting).

136. See *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 356 (4th Cir. 2008) (O’Connor, J., retired, sitting by designation) (emphasis added), *cert. denied*, 129 S. Ct. 909 (2009).

137. Justice O’Connor, in a later case, put it this way:

The Court has permitted government, in some instances, to refer to or commemorate religion in public life. See, e.g., . . . *Marsh v. Chambers*, 463 U.S. 783 (1983). While the Court’s explicit rationales have varied, my own has been consistent; I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes.

not hesitate to emphasize the religious components of legislative prayer.¹³⁸ So it reflects something particularly important that they all emphasize unity as legislative prayer's organizing theme and its foundational purpose.

Perceptive lower courts have picked up on this theme. "The genre [of legislative prayer] approved in *Marsh*," the Tenth Circuit has said, "is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose."¹³⁹ "*Marsh* requires that a divine appeal be wide-ranging," the Fourth Circuit has said, "tying its legitimacy to common religious ground."¹⁴⁰ The value of legislative prayer thus lies in its capacity to bring legislators and citizens together—to help them recognize their common identity by stressing the religious beliefs they (or at least most of them) have in common.¹⁴¹ This is not just a theory of legislative prayer. It has been *the* theory of legislative prayer; it was the theory upon which legislative prayer was accepted in *Marsh*.

But the whole justification for allowing legislative prayers simply dries up when prayers begin to use denomination-specific language. Indeed, when prayers become denominational, they are not only outside of *Marsh*'s saving rationale, but anathema to it. When prayers begin to focus on the particulars of the speaker's theology, rather than on the common theological elements shared by the speaker and the audience, legislative prayer can no longer serve any unifying purpose. All this is to say that without a nonsectarian limitation, legislative prayer will operate counter to some very deep constitutional values.

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring).

138. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 892 (2005) (Scalia J., dissenting) (explaining *Marsh* as "approv[ing] . . . government-led prayer to God").

139. *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998).

140. *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 287 (4th Cir. 2005); see also *id.* at 283 (arguing that legislative prayer "recognize[s] the capacity of legislative invocations to bring the unifying aspects of our heritage to the difficult task of public deliberation").

141. People may reasonably question the extent to which these purposes have been fulfilled by legislative prayer. But, at least in some instances, legislative prayer has indeed been an agent of unity. See Robert J. Delahunty, "Varied Carols": *Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517, 547 n.109 (2006-07) (describing the experience of the first Muslim visiting chaplain before the House of Representatives); Lund, *supra* note 44, at 1204-05 (describing the invitations given by Congress to leaders of various minority religious groups for them to pray).

D. THE INCOHERENCE OBJECTION

We turn now to some frequent criticisms of the nonsectarian standard. First on our list is a global objection directed at the standard's coherence. Commentators have sometimes maintained that the distinction between nonsectarian and sectarian prayers is entirely illusory. They point out that every prayer is sectarian in some sense, because every prayer is theologically unacceptable to someone.¹⁴² Even the most generic prayers are premised on certain theological assumptions shared by some but not by others.¹⁴³ And one could also note that every prayer is also nonsectarian in some sense, because there is usually someone somewhere, beyond the individual praying, who would agree with it.¹⁴⁴

Yet, at least as it is presently framed, this incoherence objection should not prevail. It is true that there is no clear boundary between sectarian and nonsectarian prayers. But that does not make the nonsectarian standard incoherent or meaningless. It means only that we are dealing with a continuous variable rather than a dichotomous one. We are dealing with differences in degree rather than differences in kind. So instead

142. See, e.g., Brief for Theologians and Scholars of Religion as Amici Curiae Supporting Appellant at 8, *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) (Nos. 05-4604, 05-4781), 2006 WL 4820684 ("Every prayer, by its very nature, reflects and conveys particular beliefs about the nature of the divine and is thus 'sectarian.'"); Delahunty, *supra* note 141, at 539 ("Prayer is inherently 'sectarian' [because] [n]o prayer can escape making particular claims about the divine."); Martha McCarthy, *The Law in Providing Education: Religious Influences in Public Schools: The Winding Path Toward Accommodation*, 23 ST. LOUIS U. PUB. L. REV. 565, 577 n.86 (2004) ("Because prayer by its nature depicts a particular faith (those believing in prayer and God), 'nonsectarian prayer' appears to be an oxymoron."); cf. *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting) ("If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all."); *Snyder*, 159 F.3d at 1234 n.10 ("[A]ll prayers 'advance' a particular faith or belief in one way or another.").

143. See, e.g., Delahunty, *supra* note 141, at 539–40 & n.81 (explaining the theological presuppositions underlying "God Bless America"); Laycock, *supra* note 54, at 224–27 & nn.445–58 (explaining the theological presuppositions underlying "under God" in the Pledge of Allegiance); Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 829 & n.45 (1983) (explaining the theological presuppositions underlying the Regent's prayer in *Engel v. Vitale*, 370 U.S. 421 (1962)).

144. See, e.g., Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 267 (2008) (suggesting that because "[t]here are at least 31 types of Baptist," perhaps even identifiably Baptist prayers should still be considered nonsectarian).

of a dualistic model that asks whether a prayer is either sectarian or nonsectarian, we should consider a more refined account that asks *how* sectarian a prayer is. And we can get a fairly standardized measure of the degree to which a prayer is sectarian by looking at a ratio of two numbers—the number of people who would see the prayer as consistent with their religious beliefs, and the number of people who would see the prayer as inconsistent with their religious beliefs. This quotient offers an admittedly crude approximation of the denominational exclusivity of a particular prayer.

By looking at the factors that bear on this ratio, we can also get a sense of what makes a prayer more or less sectarian. Surely the most obvious is the prayer's theological content. The more the prayer specifies about God, the fewer the people that will agree with it, and the more sectarian it is. A Hail Mary is more sectarian than a prayer to Jesus, which in turn is more sectarian than a prayer to God. Another factor is the makeup of the community in which the prayer is given. Some have called the first congressional legislative prayer sectarian, in the sense that the chaplain of the Continental Congress, Jacob Duché, referred to Jesus Christ at the prayer's end.¹⁴⁵ But Jacob Duché was praying to a generally Protestant Continental Congress—a Continental Congress absolutely devoid of any Jews or Catholics—and he stayed quite clear of any theological debates that would have divided the attending Protestants.¹⁴⁶ This too should enter the calculus.

Were we to insist on a perfectly standardized measure, we would have to consider more, for how sectarian a prayer is depends on more than just its theological content and the religious demographics of the surrounding community. Prayers can be identifiably denominational without having any theological content particular to that denomination. Take, for example, the Lord's Prayer—a frequently given legislative prayer¹⁴⁷—and

145. See, e.g., Brief for Amicus Curiae the United States of America at 10 & n.2, *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) (Nos. 05-4604, 05-4781), 2006 WL 4820685; Brief of Amicus Curiae State of South Carolina at 14, *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004) (No. 03-2069), 2003 WL 25463480.

146. See Lund, *supra* note 44, at 1177–82.

147. See, e.g., Becky Johnson & Bibeka Shrestha, *The Great Divide: Christians Stick to One of Last Vestiges of Prayer in Public Life*, SMOKY MOUNTAIN NEWS (Waynesville, N.C.), Jan. 5, 2010, available at http://www.smoky-mountainnews.com/issues/01_10/01_06_10/fr_great_divide.html; Kris Kitto, *History's Witnesses*, THE HILL, Jan. 5, 2010, available at <http://thehill.com/capital-living/cover-stories/74459-historys-witnesses>. But see *Akron Council*

whether it is sectarian. Jews and Muslims may have no objections to the theology expressed in the Lord's Prayer.¹⁴⁸ But although they could perhaps say the prayer without crossing their fingers (theologically speaking), they never would. The prayer is simply outside of their tradition.¹⁴⁹

Take also the fact that the dominant religious majority is often not in a good place to even see the ways in which their prayers are sectarian. Most Protestants have no idea that Catholics do not say the last stanza of their Lord's Prayer, or that Presbyterians (and other Reformed Christians) substitute "debts" for "trespasses."¹⁵⁰ But Catholics and Presbyterians know it—and when the Lord's Prayer is prayed in public, they know from the subtle wording of the prayer that the prayer is not really theirs.

One of the arguments pressed during the Ten Commandments litigation was the claim that the Ten Commandments themselves were sectarian, because Jews and Christians had different versions and the government had chosen to go with a Christian version.¹⁵¹ The *McCreary County* dissenters dis-

Drops Lord's Prayer After AU Protest, CHURCH & STATE, Dec. 1, 2007, at 3, available at 2007 WLNR 26079155; Christopher Scott, *Council Drops Lord's Prayer*, THE SUN (Lowell, Mass.), Apr. 25, 2007, available at 2007 WLNR 7836202.

148. Much of the Lord's Prayer is derived from parts of various older Jewish texts. This makes sense, given Jesus' religious background, but it sometimes surprises people. See Ron Csillag, *The Radical Truth Behind the Lord's Prayer: The Best-Known Invocation in Christianity Has its Roots Firmly in Jewish Tradition*, TORONTO STAR, Feb. 23, 2008, at 7, available at <http://www.thestar.com/living/Religion/article/306187>.

149. Early courts suggested that the Lord's Prayer was nonsectarian precisely because it came from Jewish sources. See, e.g., *Doremus v. Bd. of Educ.*, 75 A.2d 880, 887–88 (N.J. 1950) (“[N]othing [in the Lord's Prayer] is called to our attention as not proper to come from the lips of any believer in God, His fatherhood, and His supreme power. Christ was a Jew and He was speaking to Jews; and it is said, on excellent Jewish authority that the prayer was based upon the ancient Jewish prayer called ‘the Kaddish.’ . . . We find nothing in the Lord's Prayer that is controversial, ritualistic or dogmatic.” (citation omitted)).

150. The “debts” version is found in the early Wycliffe translation of the Bible, used by Presbyterian and other Reformed Churches. *Matthew* 6:9–13 (Wycliffe). The “trespasses” version is used by the later Tyndale translation, *Matthew* 6:9–13 (Tyndale), and was used in the first Book of Common Prayer. THE FIRST BOOK OF COMMON PRAYER OF EDWARD VI 24 (Rev. Henry Baskerville Walton, ed., 1870) (1549). Catholics do not say the doxology at the end of the Lord's Prayer, though they do say it later in the Mass.

151. See Brief of Amici Curiae, Anti-Defamation League and Philip A. Cunningham, Ph.D., *supra* note 97, at 4–5. For a full version of the argument, see Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and*

missed the argument in a footnote; Justice Scalia said that the dispute was a minor one that would be invisible to a reasonable observer.¹⁵² But Jews who see the dispute—who understand that there are multiple versions of the Ten Commandments and that the government has gone with the Christian version—they are hardly unreasonable observers. They are, in fact, the ones seeing the situation for what it really is. Knowing little about Judaism and uninterested in finding out more, their government has put up a Christian text under the erroneous assumption that the Jewish text was identical (or at least similar enough that no one of sufficient importance would notice or care). These dangers of misunderstanding are magnified by the fact that even the smallest deviations in theological language can have vast import. Consider what happened in 1054, when the Eastern Orthodox Church and the Roman Catholic Church divided in part over the Filioque Clause of the Nicene Creed—the Orthodox Church claimed that the Holy Spirit “proceeds from the Father,” while the Catholic Church insisted that it “proceeds from the Father *and the Son*.”¹⁵³ A fight over three small words helped cause one of the largest schisms in the history of Christianity.¹⁵⁴

This is enough to make the necessary point. We can develop a more complicated account of the nonsectarian/sectarian distinction, going far beyond the easy dichotomy used in the past. But as we insist on a more accurate and standardized measure, our difficulties actually begin to increase. For as our account becomes more and more refined, it becomes more and more difficult to apply. Questions of administration and institutional competence begin to loom particularly large.

E. THE WORKABILITY OBJECTION

At this point then, we can reformulate the incoherence objection into a stronger one that relates to workability. We may

Elsewhere, 73 *FORDHAM L. REV.* 1477, 1481–1500 (2005).

152. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 909 n.12 (2005) (Scalia, J., dissenting) (“The sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not). In any event, the context of the display here could not conceivably cause the viewer to believe that the government was taking sides in a doctrinal controversy.”).

153. See 2 JAROSLAV PELIKAN, *THE CHRISTIAN TRADITION: A HISTORY OF THE DEVELOPMENT OF DOCTRINE 183–98* (1974).

154. *Id.*

be able to standardize measurements of denominational exclusivity along some sort of spectrum. But courts deal in dichotomies, not spectrums. At the end of the day, a reviewing court must make a thumbs-up or thumbs-down determination. The prayers are either constitutional or they are not. The question becomes whether a just and proper line can be fairly drawn, or whether the task is simply not suitable to judicial resolution.

We begin with a thoughtful articulation of the issue by the Eleventh Circuit in *Pelphrey v. Cobb County*.¹⁵⁵ In rejecting the nonsectarian standard and deciding to go with one more deferential to state and local governments, *Pelphrey* expressed skepticism about the ability of courts to draw a workable line:

We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the [plaintiff] taxpayers have been opaque in explaining that standard. Even the individual taxpayers cannot agree on which expressions are “sectarian.” Bats, one of the taxpayers, testified that a prohibition of “sectarian” references would preclude the use of “father,” “Allah,” and “Zoraster” but would allow “God” and “Jehovah.” Selman, another taxpayer, testified, “[Y]ou can’t say Jesus, . . . Jehovah, . . . [or] Wicca”

. . . When asked, for example, whether “King of kings” was sectarian, [plaintiffs’ counsel] replied, “King of kings may be a tough one . . . It is arguably a reference to one God . . . I think it is safe to conclude that it might not be sectarian.”

The difficulty experienced by taxpayers’ counsel is a glimpse of what county commissions, city councils, legislatures, and courts would encounter if we adopted the taxpayers’ indeterminate standard.¹⁵⁶

We should not dismiss this concern out of hand. Lower courts need guidance, as do the primary actors responsible for legislative prayer: the states, cities, and counties all engaging in it. But this workability problem is not unsolvable. There are legitimate ways of getting a judicially manageable rule out of the constitutional norm forbidding denominational discrimination. *Allegheny County* offers a valuable first approximation—legislative prayergivers, the Court said, have to “remove all references to Christ.”¹⁵⁷ Especially for a case not about legislative prayer, this is a reasonable first attempt. It mirrors Justice Scalia’s insistence that prayers not take positions on issues

155. *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008) (alteration in original).

156. *Id.* at 1272.

157. *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (quoting *Marsh v. Chambers*, 463 U.S. 783, 793 n.14 (1983)).

that would divide monotheists, such as on “the divinity of Christ.”¹⁵⁸ And it parallels the *McCreary County* dissenters’ insistence that religious speech at least be consistent with “[t]he three most popular religions in the United States, Christianity, Judaism, and Islam.”¹⁵⁹

These standards together suggest a possible response to Judge Pryor. Religious language objectionable to any of the three major monotheistic religions (Christians, Jews, and Muslims) is overly sectarian and unconstitutional; language acceptable to all three religions is nonsectarian and constitutional. Thus, terms like Lord, Father, and King of Kings should all be constitutionally acceptable. Only more specific terms—like devotional references to Jesus or Allah—should be constitutionally off limits.

Of course, this standard will face withering criticism from both sides. Some will see it as unduly rigorous. Some will see it as insufficiently rigorous. Both will see it as drawing arbitrary distinctions. But these are inevitable problems whenever spectrum variables are dichotomized. They are the cost of having to break a very generalized and amorphous standard down into a set of bright-line rules. Now no one doubts that doctrinal rules must relate to the constitutional harms they seek to prevent. As Justice Scalia recently put it in *Vieth v. Jubelirer*, “[t]his Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms.”¹⁶⁰ But the constitutional harm here—denominational discrimination—is plain, and of prominent importance in the constitutional order. And the constitutional standard—the prohibition on sectarian references—bears an obvious connection to it. This then seems the acceptable sort of “mild substantive distortion” that comes whenever a court creates a judicially manageable rule to implement a more generalized constitutional command.¹⁶¹

158. *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

159. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 894 (2005) (Rehnquist, C.J., Scalia, Kennedy, & Thomas, JJ., dissenting).

160. *Vieth v. Jubelirer*, 541 U.S. 267, 295 (2004) (plurality opinion); see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1282–85 (2006).

161. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (“Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.”).

Bolstering the claim of workability is the fact that this nonsectarian standard has already been adopted before in some of the political branches. “In February 2006, both the Air Force and the Navy issued guidelines that included restrictions on the use of sectarian language in ceremonial prayer.”¹⁶² Legislation that would have changed these guidelines was introduced in Congress but failed, although the Air Force has apparently retracted the guidelines.¹⁶³ The congressional chaplains are not bound by any formal rules regarding the content of their prayers, but they now go out of their way to accommodate people from a wide variety of religious backgrounds.¹⁶⁴ Much seemed to change when a case filed shortly after *Marsh* was decided, where a plaintiff claimed that the Senate chaplain had disparaged nonbelievers with certain prayers.¹⁶⁵ The chaplain apologized and took steps not to do it again, and the case was dismissed as moot.¹⁶⁶

162. Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 149 (2007).

163. *Id.* at 150–51.

164. *See, e.g.*, 149 CONG. REC. H9821, H9823–03 (daily ed. Oct. 28, 2003) (prayer of Chaplain Coughlin) (“Over the weekend, Jews of this country again kept holy the Sabbath, Christians celebrated their discipleship in Jesus, and Muslims began the great fast and spiritual renewal of Ramadan.”); 147 CONG. REC. H10,175, H10,179–03 (daily ed. Dec. 18, 2001) (prayer of Chaplain Coughlin):

Our Jewish brothers and sisters bring light to a dark world during Hanukkah, praying for the end of violence in the Middle East; they assure us that the lamp of faith is not diminished, but grows stronger day by day.

Our Christian brothers and sisters long for the celebration of the birth of Jesus. They pray that this assembly further the incarnation of peace, justice, and love in this world.

Our Muslim brothers and sisters, having finished their purifying fast, now with hearts and minds renewed, turn to You with greater faith that a new day of understanding, compassion, and prophetic truth is rapidly approaching.

165. *See Kurtz v. Baker*, 644 F. Supp. 613, 615 (D.D.C. 1986).

Awaken us to the reality that to govern without God is to be a godless government and a godless government soon loses its concern for human rights, minorities and all people.

We are grateful for our legacy as a Nation . . . Help us never to forget that this is fundamental to our system of values which would be nonexistent if our Founding Fathers had declared: “We hold these truths to be self-evident, that all men are descended from monkeys. . . .”

Help us . . . to realize that the God-factor is fundamental to our system, that if we refuse to be “governed by God,” we will be ruled by tyrants.

And while some challenge the workability of the nonsectarian standard, the potential alternatives seem more unworkable. Some have suggested, for example, that prayers be evaluated collectively rather than individually.¹⁶⁷ Only when a certain percentage of the prayers use Christian references would the overall prayer experience become unconstitutionally denominational. Yet shifting the focus in this way just amplifies the line-drawing problems. For now not only must we still decide what makes a prayer overly denominational, we must also decide what proportion of overly denominational prayers triggers a finding of unconstitutionality.

There are no easy points of differentiation here. The *Santa Fe* dissenters who voted in favor of having graduation prayer casually suggested a 90% line—that is, if nine out of ten prayers were identifiably Christian, the overall experience might suggest undue favoritism for Christianity.¹⁶⁸ Now where that number came from, nobody really knows. Lower courts, facing real-life scenarios, have made a number of judgments, not all reconcilable with each other. The Seventh Circuit enjoined a prayer practice where 64% of the prayers were Christian.¹⁶⁹ The Eleventh Circuit upheld two practices that came in at 68% and 70%.¹⁷⁰ One California court struck down a prayer practice with just 20% of the prayers being Christian.¹⁷¹ Of course, any number here will be arbitrary; to say that the breaking point is

Id. (listing three examples of prayers by Chaplain Halverson that the plaintiff found disparaging).

166. *Id.* at 613.

167. See *infra* notes 168–69 and accompanying text.

168. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 321 (2000) (Rehnquist, C.J., dissenting):

It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the Establishment Clause or unduly suppressed minority viewpoints.

169. See *Hinrichs v. Bosma*, 440 F.3d 393, 394 (7th Cir. 2006) (upholding a preliminary injunction against the prayer practice after noting that “[o]f the 45 invocations for which transcripts are available, 29 were identifiably Christian”).

170. See *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008) (upholding two prayer policies where “70 percent of prayers before the County Commission and 68 percent of prayers before the Planning Commission contained Christian references”).

171. See *Rubin v. City of Burbank*, 101 Cal. Rptr. 2d 1194, 1204 (Ct. App. 2002) (striking down the policy even though “only about 20 percent of the volunteers providing the legislative prayer mentioned Jesus Christ in the invocation”).

at 50% or 75% or 90% or 99% Christian prayers is merely to choose a number out of the air.¹⁷² *Marsh* managed to avoid this sticky issue because the chaplain there had agreed to stop using denominational references by the time of the litigation, but modern courts are not so lucky.¹⁷³

And simply choosing a number will not end the difficulties. Courts will still have to make other difficult decisions—such as sample sizes, for example. The Fifth Circuit once had a case where there were four stipulated prayers in the record, all of which were Christian in nature,¹⁷⁴ but the judges disagreed on whether that legitimately proved some favoritism for Christianity.¹⁷⁵ Another issue here regards sliding scales—perhaps some prayers are so overtly denominational that they should reduce the overall percentage of denominational prayers necessary to sustain a plaintiff's claim.

Yet there is a deeper problem with considering prayers collectively, one that goes to the heart of the issue. And it is this: framing our inquiry in terms of percentages risks losing sight of what denominational neutrality really requires. If we begin from the premise that there is an acceptable percentage of

172. Some courts have resisted such a quantitative analysis. See *Turner v. City Council of Fredericksburg*, No. 3:06CV23, 2006 WL 2375715, at *4 (E.D. Va. August 14, 2006) (rejecting the claim that the court should undertake a “quantitative analysis of the number and percentage of references to a specific deity”).

173. One wonders how it would have changed the dynamics in *Marsh* had the chaplain not so agreed—in the trial court, the *Marsh* plaintiffs went through a published book of the chaplain's legislative prayers and determined that forty-eight percent of them were identifiably Christian. See Joint Appendix at 55, *Marsh v. Chambers*, 463 U.S. 783 (1983) (Deposition of Chap. Palmer) (“Q: And during that five year period approximately 48 percent of the prayers that were at least published used the word Jesus or reference to Jesus Christ, would that be correct, sir? A: I'll take your word for it, I haven't counted them up.”) (on file with the author).

174. *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 192–93 (5th Cir. 2006) (“The stipulations contained four of the prayers given; each contained a reference to ‘Jesus Christ’ or ‘God’ and ‘Lord.’ . . . It was not stipulated that the above four prayers were representative, or typical, of those offered at Board meetings. Each prayer in the stipulations is Christian in tenor, if not in fact.”) (emphasis omitted), *reh'g en banc granted*, 478 F.3d 679 (5th Cir. 2007).

175. Compare *id.* at 204 (“[N]o evidence exists that any prayers were given by non-Christians. Based on the four prayers in the stipulations, it is reasonable to infer none were. Accordingly, by providing only Christians who presented Christian prayers, the Board . . . aggressively advocated Christianity.” (citations and quotations omitted)), with *id.* at 215 (Clement, J., dissenting) (“The foundation for the holding that the Board improperly advanced Christianity is . . . nothing more than an inference based on the four prayers in the stipulations.” (citations and quotations omitted)).

overtly denominational prayers, we are tempted to engage in demographics. We might say, for example, that denominational bias for Christianity exists only when the percentage of Christian prayers exceeds the percentage of Christians in the surrounding community. Denominational neutrality in this sense becomes a requirement of denominational proportionality and nothing more.

But this is a terribly incomplete notion of denominational neutrality. In fact, it is perfectly consistent with the rankest forms of denominational exclusivity. It essentially takes the Mayor's position in the *Wynne* case, where the plaintiff alleged that the town's legislative prayers were almost always Christian and the Mayor responded by testifying that, well, "ninety-nine percent of the people in the town are Christian."¹⁷⁶ This is really religious majoritarianism; it is not denominational neutrality at all.

One other alternative remains to be tried. Consider the prime alternative to a strict ban on denominational references—namely the language from *Marsh* that asked merely if "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."¹⁷⁷ This standard looks at things differently. Instead of looking exclusively at denominational references, it focuses on other things like proselytization and disparagement. But such a standard too seems far less workable than a strict ban on sectarian (or denominational) references. Take, for example, the concept of proselytizing. Although the Court has at times tried to explain what it means for a prayer to be sectarian,¹⁷⁸ it has never tried to define what it means to proselytize.¹⁷⁹ Justice Kennedy tried to give meaning to the term in his *Allegheny County* dissent, but he ended up suggesting that the two words were mostly synonyms for each other—or at least that *clearly*

176. *Wynne v. Great Falls*, 376 F.3d 292, 296 n.2 (4th Cir. 2004).

177. *Marsh*, 463 U.S. at 794–95.

178. See *supra* notes 124–32 and accompanying text.

179. See Christian M. Keiner, *Preaching from the State's Podium: What Speech is Proselytizing Prohibited by the Establishment Clause?*, 21 *BYU J. PUB. L.* 83, 85 (2007) ("[The Supreme Court has] never defined the term 'proselytize,' much less provided any workable legal test for determining precisely what qualifies as prohibited proselytizing."). For a thoughtful analysis of the ambiguities of the term, see Richard W. Garnett, *Changing Minds: Proselytism, Freedom, and the First Amendment*, 2 *U. ST. THOMAS L.J.* 453, 465–72 (2005).

sectarian speech amounted to proselytizing.¹⁸⁰ Lower courts have run into the same difficulty. In *Pelphrey*, for example, the Eleventh Circuit rejected the strict nonsectarian requirement as being unworkable, going instead with the proselytization standard described above. But in deciding whether the prayer was proselytizing, the court turned to several factors it thought relevant—the most prominent of which was whether the prayer was sectarian.¹⁸¹ That was an extraordinary irony; *Pelphrey* claimed to find the nonsectarian standard thoroughly unworkable, but then incorporated it as a factor into a more complicated yet somehow now workable test.¹⁸²

The proselytizing test seems inevitably to boil down to one of two things. It could become a variant of the nonsectarian standard; one could see it, for example, as requiring that a certain percentage of prayers be sectarian before the process as a whole is considered proselytizing. Or it could simply become a way that courts get out of the business of reviewing legislative prayers. The latter seems more likely. If past cases are any guide, the proselytizing language of *Marsh* would likely lead to almost complete judicial deference to state and local governments.

Again the *Pelphrey* case offers us an instructive example. Rejecting the stricter nonsectarian standard, Judge Pryor applied the more deferential proselytizing standard.¹⁸³ Here is

180. See *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., dissenting, joined by Rehnquist, C.J., Scalia, and White, J.J.) (“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. . . . 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.”).

Note that Justice Kennedy was not even talking about actual speech being proselytizing; he was talking about the impact of viewing a religious display. This would suggest that all clearly sectarian language is inherently proselytizing. Indeed, the majority in *Allegheny County* understood it that way. See *id.* at 608 (majority opinion) (“[P]erhaps the only real distinction between Justice Kennedy’s ‘proselytization’ test [and the majority’s test] is a burden of ‘unmistakable’ clarity that Justice Kennedy apparently would require of government favoritism for specific sects in order to hold the favoritism in violation of the Establishment Clause.”).

181. See *Pelphrey v. Cobb County*, 547 F.3d 1263, 1277–78 (11th Cir. 2008).

182. See *id.* at 1271 (considering “several factors to determine whether the legislative prayers had been exploited to advance one faith” and noting that “[t]he ‘nonsectarian’ nature of the chaplain’s prayers [is] one factor in this fact-intensive analysis; it [does] not form the basis for a bright-line rule”).

183. See *id.* at 1266–67.

Judge Pryor's analysis of that issue, with regard to the one of the two legislative bodies at issue:

Our main task is to evaluate whether the factual findings by the district court, which we review for clear error, are supported by the record. The district court found that the prayers of the county commission had not been exploited to proselytize or advance any one, or to disparage any other, faith or belief

. . . .

The finding that the diverse references in the prayers, viewed cumulatively, did not advance a single faith also was not clearly erroneous. The prayers included references from Christianity and other faiths, which the district court found tended to further militate against a finding that the Commissions' practices had been exploited to affiliate the government with a particular faith. Most of the references were brief and occurred at the end of each prayer. Some prayers included references to "Jesus Christ," but others referenced "Allah," "Mohammed," and the Torah. Prayers included a variety of terms, such as "king of kings and lord of lords," "Heavenly Father," and "God of Abraham, Isaac, and Jacob, God of history, Lord of creation, Lord of love, our Father." The diversity of the religious expressions, in contrast with the prayers in the Judeo-Christian tradition allowed in *Marsh*, supports the finding that the prayers, taken as a whole, did not advance any particular faith.¹⁸⁴

The Eleventh Circuit here avoids any intrusive examination into the operation of Cobb County's legislative prayer practice. For one thing, the court applies the wrong standard of review. While factual findings are reviewed for clear error, the disagreement here was not factual. There was no dispute about the content of the County's prayers or the frequency of the sectarian references. What the parties disagreed about was the legal implications of the facts—that is, whether the agreed-upon facts constituted a violation of the legal standard.¹⁸⁵ Such decisions are reviewed *de novo*.¹⁸⁶ But even more noticeable is *Pelphrey's* almost conclusory nature. *Pelphrey* lays out the legal

184. *Id.* at 1277–78 (citations and quotations omitted).

185. *Id.* at 1271–74 (describing the taxpayers' arguments regarding the appropriate legal standard and whether the facts at issue violated that standard).

186. See 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588, at 599 (2d ed. 1995) ("If the findings of the trial court are not challenged on appeal, the reviewing court is concerned only with the legal conclusions to be drawn from the facts as found by the trial judge [which means] that the 'clearly erroneous' restriction is not applicable and that the trial court's rulings on questions of law are reviewable as in other legal contexts without any comparable limitation."); see also *Carmichael v. Nissan Motor Acceptance Corp.*, 291 F.3d 1278, 1279 (11th Cir. 2002) ("Because the material facts are not in dispute and the only issue is one of law, we review the order of the district court *de novo*.").

standard, then recites the agreed-upon facts, and then concludes that the district court did not clearly err in upholding Cobb County's program.¹⁸⁷ It does not try to demarcate the constitutional boundary; it offers no suggestions about what a violation of the legal standard would look like. It ends up suggesting that the presence of a few non-Christian references or speakers saves a legislative prayer program, regardless of how frequent the Christian references are.¹⁸⁸ It might even allow individual prayers that are proselytizing, as long as there is a thread of diversity in the whole scheme. If such token diversity is all that the Establishment Clause requires, states and local governments will have no real problem. But little will be left of the requirement of denominational neutrality. In the last analysis then, *Pelphrey* and other cases suggest that in the absence of a bright-line rule against sectarian references, the ban on denominational preferences will likely go almost entirely unenforced by the judiciary. If there are to be judicially enforceable limitations on the content of legislative prayer, those limitations will have to look something like *Allegheny County's* non-sectarian requirement.

F. THE CENSORSHIP OBJECTION

Having found the nonsectarian standard to be a relatively workable implementation of the prohibition on denominational preferences, we now turn and face the most disturbing of its implications. The nonsectarian standard protects listeners, but in doing so, it necessarily imposes restrictions on *speakers*. Prayer will not come in a nonsectarian fashion merely by accident. Government will have to restrain itself. And because the government speaks through people, this means engaging in a disturbing sort of censorship—denominational language will have to be redacted, and nonconforming speakers will have to be excluded. This is, to put it mildly, an unsavory task. This section addresses the claim that such censoring is unconstitutional. It concludes that while the constitutional arguments fail, the underlying moral issues are more vexing.¹⁸⁹

187. *Pelphrey*, 547 F.3d at 1266–68, 1277.

188. *Id.* at 1277–78 (emphasizing how “[t]he diversity of religious expressions . . . supports the finding that the prayers, taken as a whole, did not advance any particular faith”).

189. For the arguments that this censoring is unconstitutional, see Delahunty, *supra* note 141, at 528–32; Klukowski, *supra* note 144, at 277–80; Luther & Caddell, *supra* note 115, at 585–87; see also Brief Amicus Curiae of

1. The Constitutionality of Censorship

Since *Marsh*, there have been several cases involving the distinct posture of a speaker claiming a right to offer sectarian prayers.¹⁹⁰ Consider *Turner v. City of Fredericksburg*, where the City Council of Fredericksburg adopted a policy requiring all prayers (which were traditionally given by City Council members) to be nonsectarian.¹⁹¹ One city council member, Hasmel Turner, insisted on giving sectarian prayers, and when he was excluded from giving prayers altogether, he sued.¹⁹² His claim was straightforward—the City Council discriminated against him precisely because of the kind of prayer he wanted to give.¹⁹³

This argument has natural force. Government usually cannot discriminate against private speakers based on the content or viewpoint of their speech.¹⁹⁴ And, to be sure, nonsecta-

the American Center for Law & Justice in Support of Defendants-Appellants, *supra* note 95, at 15–19.

190. Many local government bodies have adopted policies requiring prayers to be nonsectarian. See Larissa Chinwah, *Guidelines Set for Prayer at Carpentersville Board Meetings*, DAILY HERALD (Arlington, Ill.), June 5, 2008, at 4, available at <http://dailyherald.com/story/?id=203228&src=5> (announcing the nonsectarian policy of the Carpentersville, Ill. Village Board); Carlos Illescas, *City Goes Lite on Invocations*, DENVER POST, Nov. 21, 2006, at A01, available at 2006 WLNR 20208624 (explaining the nonsectarian policy of the Aurora, Colo. City Council); Melinda Johnston, *Invocation Will Be Either Silent or Nonsectarian*, CHARLOTTE OBSERVER, Sept. 20, 2007, at 4S, available at 2007 WLNR 18383676 (explaining the nonsectarian policy of the Mint Hill, N.C. Town Commissioners); Tom Steadman, *Council Votes on Prayer*, GREENSBORO NEWS & REC., July 17, 2007, at A1, available at 2007 WLNR 13681870 (announcing the nonsectarian policy of the High Point, N.C. City Council). *Contra* Michael Hewlett, *Prayer Policy Passes 6 to 1: Thomasville Board Bucks Legal Advice*, WINSTON-SALEM J., Mar. 20, 2007, at 1, available at 2007 WLNR 5275786 (announcing a policy permitting sectarian prayer at the Thomasville, N.C. City Council).

191. *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 353 (4th Cir. 2008).

192. See Kiran Krishnamurthy, *Prayer Led By Council Reviewed: Appeals Court Debates Dispute Over Member's Pre-Meeting Invocation*, RICHMOND TIMES DISPATCH, Mar. 20, 2008, at A1, available at 2008 WLNR 5681721.

193. *Turner*, 534 F.3d at 354. This issue also frequently arises in cases where there is a challenge to a local governmental body's policy of permitting sectarian prayers. In such situations, the government sometimes argues in its defense that not only are sectarian prayers constitutional, but that it cannot dare to censor such prayers without running afoul of the Constitution. See, e.g., *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006).

194. In the Court's terminology, content-based and viewpoint-based discriminations on private speech are presumptively invalid. See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

rian prayer policies are the epitome of both content-based discrimination and viewpoint-based discrimination.¹⁹⁵ Yet there is an important twist—while government cannot discriminate among private speakers on the basis of their speech, no such rules apply to speech that comes from the government itself. When the government itself speaks, it can usually say what it likes.¹⁹⁶ The question then is whether legislative prayer represents governmental or private speech. If the latter, Turner's claims of unconstitutional censorship might have some validity. If the former, his claims are meritless.

Distinguishing between government speech and private speech is famously difficult—only at the extremes is the difference clear. Generally speaking, the government-speech moniker applies when the government seeks to send a message of its own, even if private parties are used to deliver the government's message.¹⁹⁷ The leading case here remains *Rust v. Sullivan*, which involved a challenge to a law that provided doctors with family planning funds but conditioned the money on the doctors not discussing abortion.¹⁹⁸ The Supreme Court in *Rust* upheld this gag rule, explaining that the government was trying to send an antiabortion message¹⁹⁹—and that, in so doing,

195. Nonsectarian prayer policies bar speakers from presenting certain prayers because of their content—i.e., their sectarian references. They are thus the sine qua non of content-based discrimination. They are also clear examples of viewpoint discrimination. The distinction between viewpoint discrimination and content discrimination, of course, is not entirely clear. See, e.g., Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 105 (1998) (“[I]t is hardly clear that the line between viewpoint and other forms of content discrimination can be sustained, except possibly in extreme cases.”). But the Supreme Court has repeatedly held that excluding all religious perspectives on a subject matter while permitting secular messages constitutes viewpoint discrimination. See *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 110 (2001) (holding that “the exclusion of the Good News Club’s activities . . . constitutes unconstitutional viewpoint discrimination”); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845 (1995) (finding “viewpoint discrimination inherent in the University’s regulation”); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). To exclude sectarian religious speeches while barring nonsectarian ones thus seems a fortiori viewpoint discrimination—in fact, it is just a more particularized and blatant type of viewpoint discrimination than that in the *Good News* line of cases.

196. See Joseph Blocher, *School Naming Rights and the First Amendment’s Perfect Storm*, 96 GEO. L.J. 1, 30 (2007) (“Government speech essentially operates as an ‘exception’ to the First Amendment . . .”).

197. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991).

198. See *id.* at 179–81.

199. See *id.* at 192–93.

the government had unbridled discretion to shape the message it wanted to convey and to regulate any private speakers (such as the doctors) to make sure they conveyed it accurately.²⁰⁰

On the other hand, when the government is not trying to send a message of its own, but is instead trying to create a place for individuals to speak, the resulting speech is considered private.²⁰¹ The paradigmatic example of this was *Rosenberger v. Rector & Visitors of the University of Virginia*, where a public university denied generally available school funding to a student publication because of the publication's religious character.²⁰² The Court explained that this publication was not government speech because the university was not "speak[ing] or subsidiz[ing] transmittal of a message it favors."²⁰³ Instead, by funding a wide variety of student organizations, the school was "encourag[ing] a diversity of views from private speakers,"²⁰⁴ making the resulting speech private in nature. From this, the Supreme Court concluded that the government's denial of funding discriminated against private speakers on the basis of the content of their speech and thus was unconstitutional.²⁰⁵

The line between governmental speech and private speech is often thin and hard to discern.²⁰⁶ But legislative prayer clear-

200. *Rust* is also consistent with the one of the Supreme Court's more recent government speech cases, which reaffirms that speech of ostensibly private actors is still "government speech" when the government is directing the message. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding."). *Rust* is also consistent with the Supreme Court's most recent government speech case, which reaffirms that speech of ostensibly private actors is still "government speech" when the government is directing the message. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005).

201. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995).

202. See *id.* at 822-23.

203. See *id.* at 834.

204. See *id.*

205. See *id.* at 837.

206. See, e.g., *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dept. of Motor Vehicles*, 305 F.3d 241, 251 (4th Cir. 2002) (Gregory, J., dissenting from denial of rehearing en banc) ("What is, and what is not, 'government speech' is a nebulous concept, to say the least."); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 612 (2008) ("While the existence of the government speech doctrine is now firmly established, its contours are not.").

ly falls on the government speech side of the line. The name itself does some of the work: legislative prayer is prayer by a *legislature*—it is government speech by definition. This conclusion is clearest when government employees give the prayer. Take, for example, the congressional chaplains—Congress hired them to give prayers, and Congress pays their salaries. Their speech is Congress’s speech,²⁰⁷ and if Congress wants them to pray in a particular fashion (nonsectarian or otherwise), it will have the authority to so demand.²⁰⁸ This same logic applies to all government employees. When a city councilman or county commissioner has the chance to offer a prayer because of his governmental position, such a prayer is governmental speech.²⁰⁹ The proper result in cases like *Turner*, therefore, seems clear.²¹⁰

As an example of how government speech and private speech often bleed together, consider the flurry of litigation in recent years over state-issued license plates that take controversial positions, like the “Choose Life” license plate that South Carolina commissioned for its citizens to choose whether to put on their cars. If such a plate is considered government speech—if it is just South Carolina’s statement that its citizens should choose life—there is no constitutional problem with it. But if such a plate is considered private speech—if it is a statement by drivers with such plates that *they* choose life—then the government is unconstitutionally discriminating against private pro-choice speakers by not offering pro-choice plates. The problem is that the plates are both. They are both government speech (after all, the government chose to only make pro-life plates) as well as private speech (after all, the individual chose to display those plates). See *ACLU of Tenn. v. Bredeesen*, 441 F.3d 370, 380 n.1 (6th Cir. 2006) (Martin, J., concurring in part and dissenting in part) (noting that “at least three circuits (4th, 5th, and 6th) will have spoken on the [license plate] issue, reaching at least three different conclusions, via at least sixteen separate opinions”).

207. As the Senate put it in the Badger Report in 1853, a congressional chaplain is “an officer of the house which chooses him, and nothing more.” S. REP. NO. 32-376, at 2 (1853).

208. This is clear enough from *Rust* and *Rosenberger*, but the Supreme Court in fact held as much in a recent case, which concluded that statements made by governmental employees in conducting their official duties simply did not implicate the First Amendment. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006) (“Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”).

209. This logic also applies to cases where military chaplains claim a constitutional right to engage in sectarian prayer, despite being directed not to do so. See *Lupu & Tuttle*, *supra* note 162, at 137. For an example of such a claim, see *Klingenschmitt v. Winter*, 275 F. App’x 12, 13 (D.C. Cir. 2007).

210. Justice Brennan saw the public/private speech issue in his *Marsh* dissent and responded forcefully: “we are faced here with the regularized practice of conducting official prayers, on behalf of the entire legislature, as part of the order of business constituting the formal opening of every single session of the

The same conclusion follows even when governments allow outside persons to come in and offer prayers.²¹¹ It is true that the speech now has aspects of private speech: the people praying are now not government officials, and they usually retain quite a bit of discretion over what they choose to say. But this still falls within the doctrinal boundaries of government speech. Just as the government can impose a gag rule on doctors to satisfy the objectives of its program,²¹² so too the government can impose a gag rule on speakers to satisfy the objectives of a nonsectarian prayer program.²¹³

Indeed, the conclusion that legislative prayer does not involve private speech quickly follows almost as a corollary from what was said earlier about the purposes of legislative prayer. The point of having legislative prayer is to foster an inclusive legislative atmosphere. It is not to provide a place for private speech; private citizens already have plenty of places to pray.²¹⁴ The point, again, is unity—this was the rationale upon which legislative prayer was approved in *Marsh*.²¹⁵ And so to accomplish this objective—to ensure that legislative prayer continues to serve its proper purpose—the government speech doctrine gives government unchecked authority to exclude prayers that are not unifying. To put it in other words, the government's desire to present a nonsectarian message acts as the constitutional justification for excluding sectarian prayers. To the uninitiated, this may sound like circular reasoning—government

legislative term. If this is free exercise, the Establishment Clause has no meaning whatsoever." *Marsh v. Chambers*, 463 U.S. 783, 813 (1983) (Brennan, J., dissenting).

211. Local governments do this in different ways. Sometimes clergy are nominated by a government official. See *Hinrichs v. Bosma*, 440 F.3d 393, 395 (7th Cir. 2006) (permitting outside clergy to give invocations when nominated by a state representative). Sometimes there is little process at all. See *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 279 (4th Cir. 2005) (permitting outside clergy to give invocations when chosen by going through religious congregations listed in the neighborhood phone book).

212. *Rust v. Sullivan*, 500 U.S. 173, 178 (1991).

213. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 554 (2001) (Scalia, J., dissenting) ("If the private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech.")

214. See *Simpson*, 404 F.3d at 288 ("[T]his issue turns on the characterization of the invocations as government speech: . . . 'The invocation is not intended for the exchange of views or other public discourse. Nor is it intended for the exercise of one's religion.'" (quoting *Simpson v. Chesterfield County Bd. of Supervisors*, 292 F. Supp. 2d 805, 819 (E.D. Va. 2003))).

215. See *supra* note 134 and accompanying text.

obtains the power to censor prayers by deciding it wants the power to censor prayers. The response is that it is indeed circular reasoning, but that this is a strange doctrinal area which “grants the government authority to restrict speech by fiat.”²¹⁶

2. The Fairness of Censorship

Yet while the government retains the constitutional power to censor sectarian prayers, the exercise of this power is deeply troubling. Those who pray in nondenominational terms can pray as they would normally. But those who pray in the name of Jesus are permanently excluded from the prayer opportunity, precisely because of their religious commitments.²¹⁷

Although the government-speech doctrine allows such exclusion, it too is a kind of denominational discrimination. In *Larson v. Valente*, the Court considered a Minnesota statute that imposed certain registration and reporting requirements on religious organizations that solicited more than half of their funds from nonmembers.²¹⁸ The Supreme Court saw this as an easy case of denominational discrimination.²¹⁹ Now imagine such a statute tailored to apply only to religious organizations that used sectarian references in worship. That would surely be considered a denominational preference, and just as unconstitutional.²²⁰

In the context of legislative prayer, the government-speech doctrine ratifies this sort of denominational discrimination. As long as the speech remains governmental, speakers have no

216. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694 (1992) (Kennedy, J., concurring); see also Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 993 (1998) (“Armed with immunities whenever it speaks, government might too easily be tempted to expand its authority by extending its claimed speech activity to the speech of any private persons with whom it has a relationship.”).

217. See *supra* notes 191–92 and accompanying text. Some Christians claim a religious duty to pray in the name of Jesus Christ. See, e.g., Brief of Appellant at 7, *Turner v. City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008) (No. 06-1944), 2006 WL 3203326 (“Councilor Turner’s deeply held religious beliefs require him to pray in the name of Jesus Christ.”).

218. *Larson v. Valente*, 456 U.S. 228, 230 (1982).

219. See *id.* at 246 (holding that the statute “clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents”).

220. Some have disputed whether it is fair to call this denominational discrimination at all. See, e.g., Lupu & Tuttle, *supra* note 162, at 153–54 (“Such a definition of discrimination has no support in constitutional jurisprudence. The restrictions on ceremonial prayer are formally neutral with respect to all denominations.”).

rights over it; no one has a constitutional right to make the government pray to Jesus rather than to God. The problem, however, is that the distinction between governmental and private speech gets muddy in the middle, leading many legislative prayers to be technically classified as government speech even while they retain certain aspects of private speech. Imagine, for example, a program inviting a number of outside clergy to pray, as compared to a program where the same hired chaplain always prays. As prayers take on aspects of private speech, the denominational discrimination becomes more and more disquieting—justified by the government-speech doctrine, but troubling nonetheless.

Part of the trouble relates back to the rationale underlying the government-speech doctrine. The justification for why the government is usually allowed unfettered freedom over its speech has traditionally been that “government speech is subject to democratic accountability.”²²¹ If you do not like what the government says about abortion or inflation or beef, you have a remedy—vote the relevant government officials out of office and replace them with people who will voice your views instead.²²² This then is the alleged source of the government’s power to exclude Turner from being able to pray. If Turner really wants to pray, he should go out and win elections.

But this does not make sense on a number of levels. First, sectarian prayergivers will not be allowed to pray the way they want, no matter how many elections they win. The nonsectarian standard is a constitutional limitation on governmental prayer—it is not subject to democratic override. And even if it were, the general premise that the government’s religion

221. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 563 (2005); *see also* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“The latitude which may exist for restrictions on speech where the government’s own message is being delivered flows in part from our observation that, when the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.”).

222. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009) (“[A] government entity is ultimately ‘accountable to the electorate and the political process for its advocacy.’” (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000))); *Velazquez*, 531 U.S. at 541–42 (“If the citizenry objects, newly elected officials later could espouse some different or contrary position.”). For a similar description of the government-speech doctrine, see Christopher C. Lund, *Keeping the Government’s Religion Pure: Pleasant Grove City v. Summum*, 104 NW. U. L. REV. COLLOQUY 46, 52 (2009), <http://www.law.northwestern.edu/journals/lawreview/Colloquy/2009/28/>.

should be decided by a majority vote contradicts the most basic of the Court's Religion Clause principles. Over half a century ago, the Court insisted that matters of religion "may not be submitted to vote; they depend on the outcome of no elections."²²³ Elections work well for some things. If the government wants to say things about beef, elections make sense as a means of determining what should be said.²²⁴ But having elections as a way of determining the government's position on religious questions ends up disenfranchising religious minorities and turning elections into referendums on religion.

Finally, for those unconvinced that there is any real problem here, it may help to remember that the issue does not just affect Christian speakers who want to pray in a distinctively Christian manner. It applies in other contexts as well—it will affect, for example, those Jews who want to pray in a distinctly Jewish manner, as well as Muslims who want to pray in a distinctly Muslim manner. Consider *Hinrichs v. Bosma*, a case over whether identifiably Christian prayers were unduly sectarian.²²⁵ The district judge there touched off a firestorm when he offhandedly suggested that legislative prayers addressed to Allah would be constitutionally acceptable because they were sufficiently nonsectarian.²²⁶ Christian communities understandably demanded to know why Jesus was impermissible but Allah somehow was not.²²⁷ Applying the nonsectarian standard earnestly would indeed mean that both sets of such prayers should be off-limits. Prayers to Allah may seem nonsectarian. In fact, Christians in other countries pray to Allah—Allah being the Arabic name for God.²²⁸ But Christians here in the United States do not appreciate this point; they do not see the word Allah as being synonymous with the word they use for God. And, of course, the conclusion that Muslim prayers are unduly secta-

223. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) ("Simply by establishing this school-related procedure, which entrusts the inherently non-governmental subject of religion to a majoritarian vote, a constitutional violation has occurred.")

224. See *Johanns*, 544 U.S. at 562 (applying the government-speech doctrine to statements about beef advertising).

225. *Hinrichs v. Bosma*, 440 F.3d 393, 395–96 (7th Cir. 2006).

226. *Hinrichs v. Bosma*, No. 105-0813, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005).

227. This was the entire focus of one amicus brief. See, e.g., Brief for Theologians and Scholars of Religion as Amici Curiae Supporting Appellant, *supra* note 142, at 22.

228. See *Delahunty*, *supra* note 141, at 546.

rian is deeply discomfoting. Particularly in an age where Americans strive for good relations in the Muslim world, excluding Muslims from prayer opportunities because they pray like Muslims seems both cruel and self-defeating.

G. THE ORIGINAL MEANING OBJECTION

Before concluding our discussion of the nonsectarian requirement, we should add a word about originalism. It is telling how little it is mentioned in these cases, but occasionally parties do claim that a proper respect for originalism demands that sectarian references be tolerated. In one case, the United States itself (somewhat surprisingly) claimed that "*Marsh* requires reversal [of a judgment striking down sectarian prayer] because the practice of legislative prayer the Supreme Court validated in that case, based on longstanding history and tradition, has always included sectarian references."²²⁹ It is surely true that the history of legislative prayer has included sectarian references.²³⁰ But this proves far too much. This conception of originalism would mean removing all restrictions on the content of legislative prayer—for there is no evidence of any constitutional tradition barring proselytizing or disparaging prayers either.²³¹ A better originalism would have to deal with

229. See Brief for Amicus Curiae the United States of America, *supra* note 145 at 8.

230. See *supra* Part I.A (explaining how the nonsectarian standard is inconsistent with the history behind legislative prayer); see also Epstein, *supra* note 68, at 2104 ("[W]ithin the last six years alone, over two hundred and fifty opening prayers delivered by congressional chaplains have included supplications to Jesus Christ.").

As another example, the prayers and columns of one congressional chaplain were bound together and published. Many of those prayers are quite poetic and moving. But many are sectarian, in the sense of referring to Jesus devotionally. See, e.g., FREDERICK BROWN HARRIS, SENATE PRAYERS AND SPIRES OF THE SPIRIT 16 (1970) ("In Jesus' name."); *id.* at 18 ("In the dear Redeemer's name."); *id.* at 31 ("[I]n Christ Jesus, our Lord."); *id.* at 34 ("In Christ's conquering name we pray."); *id.* at 36 ("[I]n the name of Jesus Christ, our Lord."); *id.* at 41 ("[I]n the name of the risen Christ . . ."). Other religious leaders, it should be noted, spoke well of Rev. Harris. See *id.* at 9 (reporting a statement by Rabbi Normal Gerstenfield that, "to [Gerstenfield,] Reverend Harris is the anchor man on the American spiritual team").

231. Even imprecatory prayers—that is, prayers that openly seek the misfortune of others—would have to be allowed. For example, several years ago, a guest chaplain before the Kansas legislature gave a withering prayer to which many in the legislature objected as imprecatory. See Grace Hobson, *Prayer Provokes Passions: Wichitan's Message Upsets Kansas House*, WICHITA EAGLE, Jan. 24, 1996, at 1A, available at 1996 WLNR 9174190 ("We confess we have ridiculed the absolute truth of your word and called it moral pluralism . . . We

the principle of denominational discrimination almost undeniably made a part of the Establishment Clause,²³² from which the ban on sectarian references seems to flow easily. And *Marsh* too sidelines originalism on this point. For while it applied principles of originalism in its upholding of the chaplaincies, the restrictions *Marsh* imposed on legislative prayer were not grounded in those same principles.²³³

H. SUMMARY AND SYNTHESIS

The nonsectarian standard has virtues and vices that are sometimes obvious and sometimes obscure. Its chief virtue is that it seems the only workable solution to the problem of denominational exclusivity, a problem that the Court has recognized as a core concern of the Establishment Clause. Its chief vice is the unfair censorship it requires. There is no obviously superior alternative, and there seems to be no way of separating the vice from the virtue.²³⁴ In a way though, this should create some common ground. We all can agree that *Marsh* has placed us in a position from which it is impossible to steer a truly neutral course. Religious liberty for all cannot really be served in *any* legislative prayer scheme. Such a conclusion should propel us to reconsider *Marsh*, a line of thought that will be examined in more detail in the last Part of this Article.

have worshipped other gods and called it multiculturalism. We have endorsed perversion and called it an alternative lifestyle. We have exploited the poor and called it the lottery. We have neglected the needy and called it self-preservation. We have rewarded laziness and called it welfare. We have killed our unborn and called it choice. We have shot abortionists and called it justifiable.”). This prayer was widely circulated, and when it was given eight years later in a council meeting of a small Pennsylvania town, the town voted to reject having prayer altogether. See Reid Kanaley, *Downingtown Council Rejects Prayer*, PHILA. INQUIRER, May 24, 2004, at B1, available at 2004 WLNR 19392569.

232. See *supra* Part II.E.

233. One could draw an analogy to the Supreme Court’s recent decision in *D.C. v. Heller*, 128 S. Ct. 2783 (2008), where the Court issued an opinion grounded in originalism, but made several exceptions to its rule that seem to have little justification within originalism. See, e.g., Brian Leiter’s Legal Philosophy Blog, <http://leiterlegalphilosophy.typepad.com/leiter/2008/06/a-puzzle-about.html> (June 27, 2008).

234. Another alternative solution, the idea of the public forum, will be considered and rejected later. See *infra* Part IV.

III. PROTECTING SPEAKERS: THE IMPERMISSIBLE MOTIVE REQUIREMENT

We now turn to the other requirement laid out in *Marsh*, the "impermissible motive" requirement. While the nonsectarian standard seeks to protect listeners, the impermissible motive requirement seeks to protect speakers by forbidding governments from picking and choosing among potential prayergivers on the basis of their religious affiliations.

As discussed earlier, the plaintiff in *Marsh* attacked legislative prayer generally, but also attacked specific facets of Nebraska's chaplaincy, one of which related to the content of the chaplain's prayers.²³⁵ Another specific charge leveled against Nebraska's chaplaincy was that the Presbyterian minister, Robert Palmer, had held the post for sixteen years.²³⁶ To the plaintiff, this was evidence of governmental support not just for religion, but for Presbyterianism in particular.²³⁷ But the Supreme Court responded with the following passage:

The Court of Appeals was concerned that Palmer's long tenure has the effect of giving preference to his religious views. We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him. . . . Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.²³⁸

The general gist of this passage is clear—the fact that Palmer was a Presbyterian did not mean that Palmer was selected *because* he was a Presbyterian. The latter would be unconstitutional. But the former is fine. Indeed, the former is inevitable, as prayergivers will *always* be from *some* particular denomination.²³⁹ Because Palmer was not selected because of "his religious views," but rather because "his performance and personal qualities were acceptable," the Court found no constitutional problem with his long tenure.²⁴⁰

235. See *Marsh v. Chambers*, 463 U.S. 783, 793 (1983).

236. See *id.*

237. See *id.*

238. *Id.* at 793–94 (footnote omitted).

239. Cf. *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233 (10th Cir. 1998) (en banc) ("[T]his genre of government religious activity cannot exist without the government actually selecting someone to offer such prayers. . . .").

240. *Marsh*, 463 U.S. at 793–94.

This language can be taken too seriously. Taken without context and common sense, it can suggest that chaplains now must be chosen on a strictly religion-neutral basis. This would indeed be hard to imagine. When it comes to getting a job as a congressional chaplain, a Jewish rabbi almost assuredly does not stand on equal ground with a comparably credentialed mainline Protestant minister. After all, we have had hundreds of Protestant chaplains and no Jewish ones.²⁴¹ This is only circumstantial evidence, but of an awfully persuasive sort. Any employment discrimination lawyer would take that case.²⁴² And surely no one thinks that Wiccan and Christian ministers have equal chances of being hired as congressional chaplains.

Realistically speaking, we could not expect it to be otherwise. Deep down, we all know that Congress does not (and probably cannot) truly divorce a chaplain's "performance and personal qualities" from his religiosity, so any suggestion that Congress must choose chaplains based on purely secular criteria seems sensible but is entirely unrealistic. All this is to say that *Marsh* surely intended a degree of judicial underenforcement here. Yet despite that, the clear import of the passage is that government does not have an unrestricted ability to go picking and choosing prayergivers on the basis of their religious denominations.

The impermissible motive requirement has been the focus of two federal appellate cases that came to opposite conclusions as to its meaning. One case, *Pelphrey*, concerned the prayer practice of the Cobb County Planning Commission, which had a long tradition of having volunteer clergy open meetings with prayer.²⁴³ The deputy clerk of the Planning Commission compiled a list of available clergy from various sources, including the Yellow Pages.²⁴⁴ This list, however, excluded certain religious groups—when the clerk's phone book was turned over in discovery, it was revealed that she had crossed out the categories of "Churches-Islamic," "Churches-Jehovah's Witnesses,"

241. See Lund, *supra* note 44, at 1203.

242. This is an example of the "inexorable zero," sometimes referred to as a hallmark of guilt in employment discrimination cases. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority [bus] drivers. . . . [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero.'" (citation omitted)).

243. See *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008).

244. See *id.*

“Churches-Jewish,” and “Churches-Latter Day Saints.”²⁴⁵ Clergy from all the other denominations were invited to participate in the legislative prayer program, but clergy from those denominations were not.²⁴⁶

The other case, *Simpson*, dealt with the prayer policy of the Chesterfield County Board of Supervisors.²⁴⁷ Chesterfield County also had a policy of opening meetings with a prayer from a local clergyperson.²⁴⁸ But instead of creating an official list, Chesterfield County opened up the opportunity to volunteers.²⁴⁹ Cynthia Simpson, a local Wiccan with a leadership role in her religious community, wrote the Board asking for her turn.²⁵⁰ The Board wrote back to her, explaining that “Chesterfield’s non-sectarian invocations are traditionally made to a divinity that is consistent with the Judeo-Christian tradition” and that “[b]ased upon our review of Wicca, it is neo-pagan and invokes polytheistic, pre-Christian deities.”²⁵¹ As a result, the Board rejected her request to be on the list of prayergivers.²⁵²

Pelphrey and *Simpson* adopt quite different approaches to the impermissible motive requirement. The Eleventh Circuit in *Pelphrey* explained it along the lines of the quoted paragraph from *Marsh*. The requirement, the Court said, was “directed at the conscious selection of a speaker from one denomination or sect for the purpose of promoting or endorsing the beliefs held by that speaker.”²⁵³ What was “constitutionally unacceptable” was “the selection and retention of a particular speaker because of that speaker’s sectarian affiliation or religious beliefs.”²⁵⁴ As

245. *Id.* at 1267.

246. *See id.* at 1267–68.

247. *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 278–80 (4th Cir. 2005).

248. *See Simpson v. Chesterfield County Bd. of Supervisors*, 292 F. Supp. 2d 805, 807 (E.D. Va. 2003), *rev’d in part and aff’d in part*, 404 F.3d 276 (4th Cir. 2005).

249. *See id.*

250. *See id.* at 808.

251. *See id.*

252. *Id.* (“Accordingly, we cannot honor your request to be included on the list of religious leaders that are invited to provide invocations at the meetings of the Board of Supervisors.”).

253. *See Pelphrey v. Cobb County*, 547 F.3d 1263, 1281 (11th Cir. 2008) (citations and quotations omitted).

254. *Id.*

such, Cobb County's exclusion of Mormon, Jewish, Islamic, and Jehovah's Witness clergy was unconstitutional.²⁵⁵

The Fourth Circuit in *Simpson*, however, took a very different position. It dismissed Simpson's claim with a very straightforward logic. Given that *Marsh* upheld Nebraska's practice of having a single Presbyterian chaplain give prayers for sixteen years, surely Chesterfield County could adopt a more inclusive policy that included at least some other religious groups—that is, Baptists, Catholics, Jews, Muslims, but not Wiccans. That the more ecumenical policy would be the unconstitutional one, the Court reasoned, “would achieve a particularly perverse result.”²⁵⁶

The Eleventh Circuit's approach is the better one, for the Fourth Circuit's reasoning in *Simpson* simply does not square with the Court's discussion of the impermissible motive requirement in *Marsh*. *Marsh* again took pains to explain why Palmer's selection did not reflect any denominational discrimination. Palmer was chosen not because he was Presbyterian, but because he was the best candidate for the job. Simpson, by contrast, was rejected precisely because of her theological beliefs.²⁵⁷ She was the only one rejected, and the letter rejecting her specified that it was her religious denomination that was the basis for her exclusion.²⁵⁸ *Simpson*'s logic suggests that local governments have unbridled discretion to pick and choose prayergivers on all manner of religious criteria—Chesterfield County could choose Christians but not Jews, Protestants but not Catholics, or Lutherans but not Baptists. *Simpson* seems to

255. See *id.* at 1282 (“[W]e agree with the district court that the categorical exclusion of certain faiths based on their beliefs is unconstitutional.”).

256. *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 287 (4th Cir. 2005).

257. On a related point, the Board was also mistaken about what Simpson's religious beliefs actually were. The Board, in its letter, assumed that because Simpson was Wiccan, she was not monotheistic. This, however, was incorrect. See *id.* at 280 (“Simpson identified herself as ‘a monotheistic witch’ who believes in the goddess . . .”).

258. There was no argument that Simpson's prayer was properly excluded because it was sectarian, proselytizing, or disparaging. See *Simpson v. Chesterfield County Bd. of Supervisors*, 292 F. Supp. 2d 805, 808 (E.D. Va. 2003) (“Plaintiff was prepared to present a non-sectarian invocation espousing basic values consistent with general themes about life, death, and creation, and about how to live a good and ethical life.” (citations and quotations omitted)). At the time Simpson sued, it was unclear whether there was a nonsectarian requirement in the Fourth Circuit; that requirement was adopted in another case when *Simpson* was on appeal. See *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004).

vitiate the impermissible motive requirement altogether; it is hard to imagine a clearer case of denominational discrimination than what happened to Cynthia Simpson.²⁵⁹

Of course, *Simpson* and *Pelphrey* are both instances of extraordinarily explicit religious discrimination. When Chief Justice Burger drafted the impermissible motive requirement, he surely imagined that it would largely go unenforced by the judiciary—it is hard to imagine a candidate for a single permanent state or congressional chaplaincy ever being able to demonstrate religious discrimination with the necessary clarity.²⁶⁰ With rotating chaplaincies, the impermissible motive requirement develops more teeth. Yet even so, both *Pelphrey* and *Simpson* underscore how difficult impermissible motives will be in practice to prove. In *Pelphrey*, the governmental defendant documented, and then preserved, evidence proving its own impermissible motives; in *Simpson*, the government actually mailed that evidence to the plaintiff. In general, it will be very difficult for plaintiffs to win these cases, particularly once de-

259. Perhaps the best diagnosis of *Simpson* comes from Judge McConnell:

If members of minority religions (or other cultural groups) feel excluded by government symbols or speech, the best solution is to request fair treatment of alternative traditions, rather than censorship of more mainstream symbols. If a government refuses to cooperate with minority religious (and other cultural) groups within the community, there may be a basis for inferring that the choice of symbols was a deliberate attempt to use government influence to promote a particular religious position. Courts should not encourage the proliferation of litigation by offering the false hope that perfect neutrality can be achieved. . . . [But c]ertainly they should not allow official acts that declare one religion, or group of religions, superior to the rest. . . .

McConnell, *supra* note 121, at 193–94. McConnell wrote this passage fifteen years before *Simpson*, but it reads well even today as a defense of her claim.

260. Several other courts have entertained claims by would-be chaplains who claimed they were rejected for essentially theological reasons. These challenges were all rebuffed on grounds of insufficient proof. See *Bogen v. Doty*, 598 F.2d 1110, 1114 (8th Cir. 1979) (rejecting a challenge to legislative prayer because “[w]e have no reason to believe that persons of any religious persuasions have volunteered and been turned down by the board[,]” but “[i]f in the future this should occur the board will be in a very difficult position to defend against an allegation that it is excessively entangled in religion by giving public approval to some groups while denying it to others”); *Soc’y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 939 (Utah 1993) (rejecting a challenge to legislative prayer because the plaintiffs “have not shown that the City Council favored particular religions” because “the record indicates that the City Council made efforts to assure that a broad cross-section of the community was represented”); *Colo. v. Treasurer & Receiver Gen.*, 392 N.E.2d 1195, 1199 (Mass. 1979) (upholding the appointment of two Catholic chaplains as there was no evidence that “such decisions were based on religious discrimination”).

fendants begin to recognize the need to conceal their impermissible motives.

IV. PROTECTING LISTENERS AND SPEAKERS: THE PUBLIC FORUM AS IMPOSSIBLE IDEAL

Though *Marsh* itself did not explain them this way, the two restrictions aim to make legislative prayer as nonpreferential as possible. Listeners are protected by the nonsectarian limitation; speakers are protected by the impermissible motive limitation. At first blush, the two limitations appear to be complementary safeguards, entitling both speakers and listeners protection against denominational discrimination. But while these two limitations are partially reinforcing, they are also partially contradictory.

To put it another way, in the impermissible motive and nonsectarian restrictions, *Marsh* contains the seeds of two entirely different notions of legislative prayer. If we want to protect listeners (as the nonsectarian standard does), we will make legislative prayer as inoffensive and generic as possible, because that will offend the fewest listeners. Prayers that have divisive content, or that come from divisive people, are inconsistent with that premise and are properly excluded. But if we want to protect speakers (as the impermissible motive standard does), we will free speakers from all restrictions, entitling anyone to offer whatever sort of prayer they think appropriate.

These two visions thus partially contradict each other. In a sense, one tries to minimize the establishment of religion, while the other tries to partition it equally. The two limitations could be adopted together, but this would mean only partial protection for both listeners and speakers. Listeners would be protected from offensive content (because of the nonsectarian requirement), but would have to tolerate offensive speakers (because of the impermissible motive requirement). Speakers would be protected in terms of their affiliation (the impermissible motive requirement), but not in terms of the content of their prayers (the nonsectarian requirement). Here again, we face the familiar dilemma—to increase protection for speakers, we must decrease protection for listeners and vice-versa. And again, religious liberty within the sphere of legislative prayer looks like a zero-sum game.

One persistent question has been whether it is possible to go further—to completely protect both speakers and listeners. This is the idea of the public forum. Some have suggested that

the public-forum concept can solve the problems associated with legislative prayer.²⁶¹ This idea has understandable appeal. If the public-forum idea could be extended to legislative prayer, it would mean that the resulting prayers would be private, rather than public, speech. Speakers would have constitutional rights both to speak and to say what they like. And listeners would be protected in the sense that they would recognize the speech as not coming from the government, but from their fellow private citizens. In fact, not only would government not be responsible for this speech, government would lack the power to stop it.

Unfortunately however, as this section shows, the public-forum idea will simply not work. The problems here are many, but they are traceable back to one simple fact: public forums require government to give up control, and no government will likely be willing to give up this much control over legislative prayer.

We start with some basics regarding public forums. The government can create a public forum by designating a place as a forum for private speakers to assemble and speak.²⁶² The government can lay down rules regarding who can speak at the forum and what they can say. But the rules have to be content and viewpoint-neutral.²⁶³ And, once they are set, the government becomes bound by those rules, and has to permit all speakers and all speech that satisfies them.²⁶⁴ Public forums

261. As will be discussed below, this idea was pushed the furthest in *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006). See, e.g., Reply Brief for the Defendant-Appellant Brian Bosma, *Hinrichs*, 440 F.3d 393 (No. 05-46040), 2006 WL 4820661; Brief of Amici Curiae Indiana Family Institute, Inc. et al. in Support of Speaker Bosma Seeking Reversal, *Hinrichs*, 440 F.3d 393 (No. 05-4604), 2006 WL 4820683; Brief of Advance America, Inc., as Amicus Curiae in Support of Defendant-Appellant, *Hinrichs*, 440 F.3d 393 (No. 05-4604), 2006 WL 4820687.

262. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (“[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.”).

263. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (explaining that content discrimination is permitted only “to preserve the purposes of th[e] limited forum” and viewpoint discrimination is never permitted).

264. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (“If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.”).

are not created by inaction or by allowing a few people to speak; rather, they are only created when the government deliberately makes a space generally available to an entire class of speakers.²⁶⁵ Finally, when a public forum is created, the resulting speech becomes private, and the strictures of the Establishment Clause no longer apply.²⁶⁶

Thus, the first step in creating a public forum is defining the limits of the forum by choosing the topic of the forum and the class of speakers that will be permitted to participate. And at this very first step, we can begin to see the deep incompatibility between legislative prayer and public-forum doctrine. Consider again *Hinrichs v. Bosma*, in which a plaintiff challenged sectarian prayers given at sessions of the Indiana Legislature.²⁶⁷ The defendants raised several arguments to save their practice of legislative prayer, including the standard argument that sectarian prayers are not unconstitutional.²⁶⁸ But the defendants and their amici also raised a public-forum argument. They argued that the government had created a limited public forum, and was thus no longer constitutionally responsible for what was said.²⁶⁹ This was private speech, they argued, not public speech. And thus the government could not stop sectarian speakers even if it so desired.²⁷⁰ Most important

265. See *id.* at 678 (“To create a forum of this type, the government must intend to make the property ‘generally available’ . . . to a class of speakers.” (citing *Widmar v. Vincent*, 454 U.S. 263, 264 (1981))); see also *Cornelius*, 473 U.S. at 802 (“The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”).

266. This at least seems to be the current position of the Court. In *Capitol Square Review & Advisory Board v. Pinette*, four Justices suggested that when the government creates a public forum for private speech, it is no longer responsible for the religious content of that speech. See 515 U.S. 753, 770 (1995) (plurality opinion) (“Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum publicly announced and open to all on equal terms.”). Several Justices were somewhat more reserved, and suggested that the government had a duty to ensure the forum not only was opened equally, but also operated equally. See *id.* at 775 (O’Connor, J., concurring) (suggesting that, for the connection to be cut, it must be the case that “truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly”). However, this detail is not essential, as it is clear that the creation of a true public forum will usually be enough to cut the government’s connection to the speech.

267. *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006).

268. See Reply Brief for the Defendant-Appellant, *supra* note 261, at 1.

269. See *id.* at 11.

270. See *id.* at 12.

here was the defendants' definition of the public forum. The defendants and their *amici* argued that the government had created a public forum specifically for *prayer*, and thus anyone who wanted to offer a prayer would have a right to speak before the Indiana legislature. But no one would have any right to offer anything that was not a prayer.²⁷¹

This whole argument, however, is premised on a deep misunderstanding of public-forum doctrine.²⁷² This misunderstanding becomes clear when one reconsiders the long line of cases involving religious organizations suing for equal access to public spaces.²⁷³ In *Good News Club v. Milford Central School*, for example, a local school district had excluded a Christian club from meeting on elementary school property after school.²⁷⁴ While the school district generally allowed after-school clubs to meet and admitted that it had created a public forum for some clubs to meet,²⁷⁵ it claimed that Good News Club was properly excluded from the forum because of its religious nature. The Supreme Court disagreed. "[T]he exclusion of the Club on the basis of its religious perspective," the Court explained, "constitutes unconstitutional viewpoint discrimination."²⁷⁶ The message of *Good News* was clear—the government cannot define the subject matter of a forum so as to exclude religion.²⁷⁷

But if excluding religious viewpoints on a topic while permitting secular ones is viewpoint discrimination, it must also

271. See *id.* at 11 ("In this context, the forum may be limited to prayer."); Brief of Indiana Family Institute et al., *supra* note 261, at 12 ("The Indiana House Has Limited The Forum To Prayer."); Brief of Advance America, Inc., *supra* note 261, at 5 ("[T]he government [can open] a forum for a particular limited type of activity—to prayer in this case. . .").

272. This argument was not addressed by the Seventh Circuit, which ended up dismissing the case on standing grounds. See *Hinrichs v. Speaker of House of Rep. of Ind. Gen. Assem.*, 506 F.3d 584 (7th Cir. 2007).

273. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

274. *Good News Club*, 533 U.S. at 98.

275. See *id.* at 106 ("[T]he parties have agreed that Milford created a limited public forum."); *id.* at 108 ("Milford has opened its limited public forum to activities that serve a variety of purposes . . . [and] interprets its policy to permit discussions of subjects such as child rearing, and 'of the development of character and morals.'").

276. *Id.* at 108 n.2.

277. See *id.* at 110 (holding that "the exclusion of the Good News Club's activities . . . constitutes unconstitutional viewpoint discrimination"). For a thoughtful view critical of the *Good News* line of cases, see Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).

be viewpoint discrimination to exclude secular viewpoints on a topic while permitting religious ones. If it violates equality to treat religious speech worse than secular speech, it violates equality just as much to treat it better. To put this another way, government simply cannot define the subject matter of the forum in terms of religion. The forum cannot be set up either to exclude religious speech altogether or to insist that all the speech in the forum be religious.

What this means, of course, is there cannot be a public forum for legislative prayer specifically. The forum cannot be defined in religious terms; a “religious public forum” is a constitutional oxymoron. Now, one can try to define the forum’s subject matter in secular terms. The best attempt would be to define the forum’s subject matter by reference to the secular functions that legislative prayer is supposed to serve—formally opening the session, solemnizing the proceedings, and unifying the attendees.²⁷⁸ The point here would be to enable individual speakers to give solemnizing prayers and other messages, but still entitle the government to stop speakers from delivering religious harangues or going entirely off-topic.

Yet defining the subject matter of the public forum in this way still presents a problem. For it is hardly viewpoint neutral to allow only “solemnizing” speech. It is, in fact, just a clever gerrymander—an attempt to subvert the prohibition on viewpoint discrimination by building the discrimination into the definition of the forum’s subject matter. This area of the law is unclear; the Court has never given a complete explanation of what viewpoint neutrality means.²⁷⁹ But, at the very least, it requires opposing viewpoints to be treated equally. Secular speech cannot be excluded while religious speech is permitted; speech by Democrats cannot be preferred over speech by Republicans. Permitting unifying speech requires permitting speech that questions the need for unity; permitting legislative prayer requires permitting speech questioning the appropriateness of legislative prayer. A public forum that allows the Lord’s Prayer must indeed allow the prayer of the citizen who wants to distort it by opening, “Our Mother, who art in heaven

278. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 797 (1983) (Brennan, J., dissenting) (arguing that the “secular functions legislative prayer might play” include “formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose”).

279. See *supra* note 195.

(if, indeed there is a heaven and if there is a god that takes a woman's form), hallowed be thy name."²⁸⁰

Much can be learned from the litigation in *Santa Fe Independent School District v. Doe*.²⁸¹ In that case, a school district had a policy allowing the student body to select a speaker to offer an invocation before school football games. One of the defenses raised by the school district and its amici was that it had created a public forum for invocations.²⁸² There too, the school district tried to build a public forum around the idea of solemnizing speech—the school's policy explained that invocations were "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."²⁸³ But this was again a rigged public forum. Students could only solemnize; they could not be flip-pant or iconoclastic. They could promote good sportsmanship, but they could not attack it or question its meaning. The school's policy said that invocations were to "establish the appropriate environment for the competition," but it was not up to the students to decide what environment to establish. The government had already decided that—the subject matter of the forum dictated to the students what their viewpoint was to be.²⁸⁴ For these reasons, the Fifth Circuit rejected the defendants' claim of a public forum, and the Supreme Court never took the claim seriously.²⁸⁵

All of this applies to public forums being built around the idea of legislative prayer, and it explains why the public-forum doctrine is not an easy fix to the legislative prayer conundrum.

280. *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1228 n.3 (10th Cir. 1998).

281. 530 U.S. 290 (2000).

282. *See Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 818–22 (5th Cir. 1999) (rejecting the public forum argument); *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302–04.

283. *See Santa Fe Indep. Sch. Dist.*, 168 F.3d at 834 n.17 (Jolly, J., dissenting).

284. *See* Brief of Respondents at 17, *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000) (No. 99-62), 2000 WL 140928 ("Neither a parody, nor a math lesson, nor the school's latest gossip, nor a demand to fire the football coach, nor an attack on the school board, nor a political stump speech, nor a discussion of this Court's cases, nor a disquisition on any other controversial issue would serve the stated purposes of the Football Policy. . . . [This] is certainly not an opportunity for robust and uninhibited debate.")

285. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302–04 (rejecting the public forum argument); *Santa Fe Indep. Sch. Dist.*, 168 F.3d at 818–22 (same). The dissent in the Supreme Court, which took the school district's side, did not advance this argument. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 318–26 & nn.1–5 (Rehnquist, C.J., dissenting).

The public-forum doctrine requires the government to give up virtually all control over the resulting speech. Not only will the government have to tolerate all kinds of legislative prayer—even those that are disparaging and proselytizing—it cannot even draw a line at prayer altogether. It will have to allow entirely secular invocations. It will have to have to allow speeches that question the appropriateness of legislative prayer, and speeches that reject prayer altogether.

Legislative bodies will naturally hesitate before permitting such speeches. Yet we should not dismiss the possibility out of hand; it has happened in practice at least once. After the *Pelphrey* litigation, the Cobb County Board of Commissioners adopted such a policy, even allowing an atheist to give an invocation. The atheist used the time to speak out against governmental endorsements of religion, calling his invocation “a protest against invocations.”²⁸⁶ But he apparently was not interrupted nor sanctioned afterwards, although the Board Chairman later called his comments “repugnant and insulting.”²⁸⁷ Yet this sort of approach will have a hard time gaining much traction. Most local governments will view it as a last resort—something to be adopted only if all other possible legislative prayer formats somehow become impossible. Yet were it to gain widespread acceptance, for the reasons explained above, the public forum approach could well be the ideal solution to the problems posed by legislative prayer.²⁸⁸

V. THE PERILS OF RELIGIOUS ESTABLISHMENT: LEGISLATIVE PRAYER AS CASE STUDY

These modern battles over legislative prayer are interesting in themselves and for the light they cast on the Establishment Clause. But they also offer a glimpse into an alternate constitutional reality—one where the neutrality principle has faded and mild religious establishments (like legislative prayer) thrive. In future years as the Court changes, this alternative reality may become more and more a possibility. In this sense,

286. See Marcus K. Garner, *Atheist Gives Invocation at Cobb Meeting*, ATLANTA J.-CONST., July 30, 2009.

287. *Id.*

288. For another example of a jurisdiction considering a public forum approach, see Malia Wollen & Jesse McKinley, *City Decides to Continue Pre-Meeting Invocation*, N.Y. TIMES, Oct. 2, 2009, at A17, available at 2009 WLNR 19433701 (noting under the new prayer policy of Lodi that “[a]theists are also invited to speak”).

the modern legislative prayer cases may end up serving as canaries in the mine—the first warnings about the unforeseen and tragic consequences that can accompany superficially innocuous religious endorsements.

A. LEGISLATIVE PRAYER AND THE CURRENT CONVENTIONAL WISDOM

The neutrality principle has been the law for fifty years, but people still question its legitimacy. Indeed, it is probably more controversial now than at any other point in that fifty-year period. Several Justices now openly reject it.²⁸⁹ And even moderate Justices, judges, and commentators now seem willing to tolerate at least some religious endorsements. That list of names is long, and it includes some prominent figures in constitutional law—Judge Richard Posner,²⁹⁰ Steven Smith,²⁹¹ Noah Feldman,²⁹² Richard Schragger,²⁹³ Eugene Volokh,²⁹⁴ and Richard Garnett.²⁹⁵ They do not share identical views of the Establishment Clause. But they do seem to share the idea that the courts should tolerate at least some, and possibly quite many, endorsements of religion.²⁹⁶

Part of it is that they see little actual harm in these endorsements. Dissenters can often avoid passive displays, like Christmas displays and Ten Commandments monuments, by walking around them or by averting their eyes.²⁹⁷ And religious

289. This was not always the case. See Laycock, *supra* note 30, at 61 (explaining how, at the time of *Marsh*, only a single Justice rejected the neutrality principle).

290. See Posner, *supra* note 5.

291. See SMITH, *supra* note 6.

292. See FELDMAN, *supra* note 7.

293. See Schragger, *supra* note 8.

294. See Posting of Volokh, *supra* note 9.

295. See Garnett, *supra* note 10.

296. The Supreme Court's most recent forays in this area were two cases about Ten Commandments displays and one case about the phrase "under God" in the Pledge of Allegiance. Most of the commentary above is addressed at those cases. See *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

297. Indeed, in passive-display cases, plaintiffs sometimes lose on the threshold of standing, simply because they have not had regular contact with the display being challenged. See *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 266 (3d Cir. 2001) (en banc) (Alito, J.) (holding that the plaintiffs lacked standing to challenge a display because one plaintiff had not seen the display and the other apparently witnessed the display for the sole purpose of being able to bring suit).

endorsements that cannot be avoided outright—like, say, prayer at a public school graduation and the phrase “under God” in the Pledge—can be ignored. Dissenters can just treat them simply as social facts about our culture; they can choose not to take offense at them.²⁹⁸ Much of the time, the religious message is surrounded, and thus diluted, by secular messages anyway.²⁹⁹ For these reasons, Professor Schragger has called these cases “sideshow”—they are, he says, “much less consequential than [other Establishment Clause issues, such as] the funneling of government funds into religious coffers or the wholesale exemption of religious institutions from local regulatory regimes.”³⁰⁰

Part of it also is that these commentators see real harm arising when long-standing endorsements are challenged. The old view, of course, was that it was religious endorsements themselves that created political-religious conflict and division.³⁰¹ But that conventional wisdom too has now flipped. Striking down religious endorsements is now seen not as the solution to political strife, but as a cause of it.³⁰² Few used to care about the reference to God in the Pledge of Allegiance. But when the Ninth Circuit held it unconstitutional in 2003, a public outcry erupted.³⁰³ Had the Supreme Court affirmed the

298. See FELDMAN, *supra* note 7, at 242 (arguing that governmental endorsements really only reflect that a certain religious group makes up a majority in the community, and that “it is largely an interpretative choice to feel excluded by the fact of other people’s faith”); see also *id.* at 240 (“Just what is threatening to religious minorities about Christians celebrating the [Christmas] holiday and the state acknowledging that fact?”).

299. Judge Posner makes this point regarding Ten Commandment displays. See Posner, *supra* note 5, at 101 (“Most of the Commandments are not explicitly religious, and those that are get the least attention—who has been worrying lately about graven images, or even about taking the Lord’s name in vain?”).

300. Schragger, *supra* note 8, at 1881.

301. This view still has some sway. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (holding that the school policy encouraging football-game prayer “encourages divisiveness along religious lines”); *id.* at 311 (“The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause.”).

302. See Richard W. Garnett, “*Modest Expectations?*: Civic Unity, Religious Pluralism, and Conscience,” 23 CONST. COMMENT. 241, 246 (2006) (reviewing FELDMAN, *supra* note 7) (summarizing Feldman’s view as being that the Court’s “aggressive[] policing [of] public religious expression, symbols, and displays . . . is making things worse”).

303. See Steven G. Gey, “*Under God,*” the Pledge of Allegiance, and Other Constitutional Trivia, 81 N.C. L. REV. 1865, 1866–68 & nn.2–5 (2003) (summarizing the political controversy).

Ninth Circuit's judgment, we could have expected contentious struggles in both Congress and in state legislatures over whether to adopt a constitutional amendment reversing the decision (or perhaps going even further). Measured solely in terms of quieting nerves, the Supreme Court's decision that Newdow lacked standing surely makes a certain sense.³⁰⁴

This situation was made even more explicit a year later, when the Court considered a pair of Ten Commandments displays.³⁰⁵ Justice Breyer surprised everyone in a separate opinion affirming the constitutionality of a Ten Commandments display on the grounds of the Texas State Capitol.³⁰⁶ Breyer explained that he saw the issue as a close one, because the Ten Commandments had both deep secular and religious meaning.³⁰⁷ Speaking with a frankness that Supreme Court Justices usually eschew, Breyer acknowledged that though a government-sponsored Ten Commandments display is indeed divisive, striking down the display would probably be even more so.³⁰⁸ Breyer's vote to uphold the display was condemned by some, but praised by others.³⁰⁹

Especially in the past decade, this view—the view that religious endorsements are better tolerated than uprooted—has taken deeper roots in our constitutional culture. But it is not, of course, entirely new. It existed twenty-five years ago; Chief Justice Burger's opinion in *Marsh* reads in many ways like Justice Breyer's *Van Orden* opinion. Like Breyer, Burger surely believed that the best way of maintaining societal peace—the best way of making these disputes go away—was by approving the endorsement in question. But twenty-five years worth of history call into question this wisdom, or at least temper it signifi-

304. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004).

305. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 851 (2005); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

306. See *Van Orden*, 545 U.S. at 698–705 (2005) (Breyer, J., concurring) (providing the fifth vote).

307. See *id.* at 700–01 (explaining that this was “a borderline case,” largely because “the Ten Commandments can convey not simply a religious message but also a secular moral message”).

308. See *id.* at 704 (“[A] holding [striking down the Ten Commandments] might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”).

309. See Posner, *supra* note 5, at 100 (“It is hard to imagine not only a more divisive, but also a more doctrinaire and even absurd project [than the decision striking down the Ten Commandments display in *Van Orden*].”).

cantly. Legislative prayer has not gone away; it has led to continual controversy and concomitant division. This next section explores why, trying to articulate with some precision the roots of the problem.

B. WHAT MAKES LEGISLATIVE PRAYER DIFFERENT

The question then is why legislative prayer has developed into such a morass. The core of it seems to be that legislative prayer vests government with vast discretion. Legislatures do not simply decide to have legislative prayer; legislative prayer requires organization. Government must necessarily make a number of religious choices—not just whether to have legislative prayer, but how often, for how long, and so on. Most important, of course, are the choices the government must make about delegation—who will have the right to speak and what exactly will they be allowed to say? These decisions, as Justice Brennan saw long ago, require government to make a number of uncomfortable decisions.³¹⁰ They require the government to formulate prayer policies, and state and local governments will have to spend time drafting and debating the comparative wisdom of different options.³¹¹

The first question is who should be given the right to pray. Local governments could simply allow everyone to pray in a first-come, first-served format. But this poses problems. There are usually too many people who would want to pray and too few prayer opportunities. Moreover, there are inevitably some speakers whom audiences would find distasteful, and others who would take advantage of the situation in a way few people would want.³¹² Sensitive people will try to allocate the prayer

310. See *Marsh v. Chambers*, 463 U.S. 783, 799 (1983) (Brennan, J., dissenting) (“In the case of legislative prayer, the process of choosing a ‘suitable’ chaplain, whether on a permanent or rotating basis, and insuring that the chaplain limits himself or herself to ‘suitable’ prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid.”).

311. The Alliance Defense Fund, for example, has remarkably detailed model legislative prayer policies, tailored to the law of each federal circuit. ADF offers model policies both for having prayer performed by local officials and for prayer performed by invited clergy. See, e.g., Open Letter from Alliance Def. Fund to Interested Parties Regarding the Legality of Public Invocations (June 21, 2007), available at http://www.alliancedefensefund.org/userdocs/fpc/Circuit5_General.pdf.

312. See e.g., *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1228 n.3 (10th Cir. 1998) (involving a plaintiff who sought to present a prayer beginning, “Our Mother, who art in heaven (if, indeed there is a heaven and if there is a

opportunity as neutrally as possible—by, say, inviting clergy from all religious denominations. Even this is not entirely religion-neutral, of course. Some religions are too small to have clergy; others are theologically opposed to having clergy. Those religions will inevitably be excluded from clergy-centered legislative prayer programs.³¹³

But a larger problem lies in the temptation to play favorites.³¹⁴ It is deeply unnatural to let minority believers give prayers that few people in the audience would want to hear, unnatural especially for officials whose reelection chances hinge on how that audience votes later on. Professor Noah Feldman has argued that courts should abstain from striking down governmental religious speech in part because “[t]alk can always be reinterpreted, and more talk can always be added, so religious speech and symbols need not exclude.”³¹⁵ But this maybe ignores the fundamental reality: government usually does not want to add more talk. Cities and counties have no interest in a legislative prayer format where anyone can speak about anything. They want legislative prayer because they want to send a particular message, and to endorse every message is really to endorse no message at all. In this sense, legislative prayer always involves exclusion—for it is precisely in the exclusion of certain types of messages and messengers that legislative prayer sends its own message and serves its function.³¹⁶

For the better part of our country’s history, this reality was buried from view. In the congressional chaplaincies, chaplains now routinely serve for decades.³¹⁷ While there was something uncomfortable about how the Presbyterian chaplain in *Marsh*

god that takes a woman’s form) hallowed be thy name”); *infra* Part IV (discussing the alternative of a public forum and concluding that it would be practically impossible because most governments would be unwilling to give speakers truly free rein over what they would say).

313. See Lund, *supra* note 44, at 1204 n.168 (noting that Quakers and Mennonites, lacking ordained clergy, have not participated in the congressional chaplaincies).

314. See *infra* Part III (discussing *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008) and *Simpson v. Chesterfield County*, 404 F.3d 276 (4th Cir. 2005)).

315. FELDMAN, *supra* note 7, at 238–39.

316. See Lund, *supra* note 222, at 52 (“Exclusion and endorsement cannot be separated; they are flip sides of precisely the same coin.”).

317. See Lund, *supra* note 44, at 1202 (“The House of Representatives had fifty-two institutional chaplains in the nineteenth century; it had only five in the twentieth.”).

was the sole prayergiver for sixteen years, there was a positive flipside. For sixteen years, there were no debates about who would pray. For sixteen years, no one was denied the right to pray—or at least everyone was denied it equally. More and more, we have moved away from institutional chaplains toward rotating chaplaincies.³¹⁸ But spreading around the prayer opportunity has created even more problems, for the more local governments open up the prayer opportunity, the more they have to make difficult decisions about whom to exclude and the harsher it seems to the excluded speakers.³¹⁹ Rotating chaplaincies also amplify the constitutional problems in yet another sense. Having private citizens lead prayers makes censorship both more necessary (in the sense that invited speakers often do not restrain themselves and are not easily subject to political controls) and more troubling (in the sense that their speech bears more resemblance to quintessentially private speech). This dynamic led Judge Lucero to conclude that rotating chaplaincies should be held flatly unconstitutional.³²⁰ As a matter of

318. See Jeremy G. Mallory, Comment, "An Officer of the House Which Chooses Him, and Nothing More": How Should *Marsh v. Chambers* Apply to Rotating Chaplains?, 73 U. CHI. L. REV. 1421, 1428 (2006) (noting a tendency towards rotating chaplains, especially at lower levels of government).

319. Speaker selection can raise unexpected theological questions. Many Christian denominations now struggle with whether to ordain gay clergy. See, e.g., Manya A. Brachear, *Lutherans Split over Rule of Celibacy for Gay Clergy*, CHI. TRIB., Aug. 3, 2007, at 4, available at 2007 WLNR 14897220; John F. Burns, *Anglicans to Seek Pact to Prevent a Schism*, N.Y. TIMES, Aug. 4, 2008, at A6, available at 2008 WLNR 14490241; Paul Jeffrey, *Methodists Retain Policies on Homosexuality*, CHRISTIAN CENTURY, June 3, 2008, at 14, available at 2008 WLNR 11251495. To the extent that we have clergy conducting legislative prayers, legislatures must wrestle with it as well.

Different factions of the Oklahoma House of Representatives squared off on the issue last year, after a minister invited to give a legislative prayer spoke of his partner, Michael. Some representatives moved to have the prayer stricken from the House Journal; others protested such a move. But both sides agreed on one thing—for Oklahoma to have gay ministers lead them in prayer would be a stamp of government approval on the legitimacy of gay clergy. That approval was what the ministers' supporters wanted, and what his opponents feared. For coverage of the story, see Michael McNutt, *Gay Pastor Irks Critics Before Offering Prayer*, OKLAHOMAN, Feb. 12, 2009, at 14A, available at 2009 WLNR 2867665.

320. See *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1243 (10th Cir. 1998) (Lucero, J., concurring) ("It may appear ironic that the Establishment Clause should endorse official chaplaincies, while proscribing a practice of inviting prayer volunteers who represent many and varied religious faiths. But though this effect may appear establishmentarian, a closer inspection proves otherwise.").

existing constitutional doctrine, that analysis probably does not hold much water. But his point is well-taken.

The second question—and the second area of discretion—relates to the content of legislative prayers. Prayer comes in all forms, and so there are innumerable lines that a legislature could draw. A legislature could entirely fix the content of the prayer; it could specify, for example, that sessions will open with the Lord's Prayer or the Pledge of Allegiance.³²¹ A legislature could put firm requirements on speakers; it could require them, for example, to avoid sectarian references. A legislature could offer nonbinding suggestions, allowing speakers to say what they like while still giving them guidance. Or a legislature could take no position at all, giving speakers no direction and unfettered freedom. There are any number of lines to draw, and any number of ways of interpreting those lines.

Not only will local governments have to draft content limitations, they will have to enforce them as well. This is uncomfortable indeed. "Prayers will either have to be submitted for approval in advance . . . or else assessed on the spot—the gavel ready—for [inappropriate] content before the amen is spoken."³²² And legislatures will also have to agree on penalties. The rules will not enforce themselves—even those speakers who submit prayers for preapproval might choose to make unauthorized last-minute changes. Governments will have to decide what happens to a prayergiver who violates the prayer policies,³²³ as well as what happens to audience members who disrupt the prayergiver.³²⁴

321. See, e.g., Roscoe Barnes III, *Format Varies for Prayer in Meetings*, PUB. OPINION (Chambersburg, Pa.), July 30, 2009, available at 2009 WLNR 14684157 (noting, similarly, that some counties in Pennsylvania open with prayer while others open with the Pledge of Allegiance or a moment of silence); Faulconer, *supra* note 12 (noting that as an alternative to audible prayers, two county councils in Virginia open meetings with moments of silence and one city council recites the Pledge of Allegiance).

322. *Snyder*, 159 F.3d at 1239.

323. See, e.g., Johnson & Adams, *supra* note 12 (reporting that after an invited clergymember offered a prayer to Jesus Christ in apparent violation of council protocol, one city councilman called it, "a slap in our face and nothing we agreed to and is leading us down a road we have not agreed to"). Prayer-givers have gone off the government-approved script in other contexts as well. At a recent public school graduation, for example, a valedictorian submitted her proposed speech to school officials. They marked up her proposal, removing much of the religious language because they deemed it proselytizing and inappropriate. At the actual graduation, she departed from what they had approved, delivering her original speech. Her microphone was cut off in the middle of her address. The Ninth Circuit rejected her constitutional claims. See

All of these religious choices come with a price. Whenever it makes a decision regarding legislative prayer, government necessarily makes a judgment about religious truth. In determining who gets to pray, the government decides which religion or religions are true—or at least which are close enough to the truth to be worthy of respect. In determining the rules regarding the content of the prayers, the government must make decisions on certain religious propositions. Barring proselytizing prayers makes sense in an ecumenical world where God sees all religions as being of equal value and sees none as being worthy of condemnation. But barring proselytizing prayers makes less sense in a world where one's neighbors may really be on the wrong theological course and could potentially suffer lasting consequences as a result. Requiring gender-neutral language in prayers will strike some as sound theology and others as New Age nonsense.³²⁵

With each decision, of course, the government sends a message—these are the proper religious beliefs, and those who disagree are wrong. This hurt can be conceptualized along a number of lines. It can be thought of as a denial of equal citizenship,³²⁶ a failure of equal regard,³²⁷ or a rejection of equal

McComb v. Crehan, 320 F. App'x 507 (9th Cir. 2009); see also *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 985 (9th Cir. 2003) (giving schools significant latitude to censor religious speech in graduation addresses); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1105 (9th Cir. 2000).

324. For an example of a prayer being interrupted at the local level, see Kay Campbell, *Meeting Spiritual Needs*, HUNTSVILLE TIMES, May 23, 2008, at 1B, available at 2008 WLNR 13689842 (involving a prayer given by a reverend, who was interrupted by a man who shouted, "I want to proclaim that the Lord Jesus Christ is Savior," when it became clear that the reverend's prayer was going to be nonsectarian). For an example at the national level, see Lund, *supra* note 44, at 1205–06 (discussing how a Hindu guest chaplain in the U.S. Senate had his prayer interrupted by several people in the gallery who prayed over him).

325. Cf. *Lee v. Weisman*, 505 U.S. 577, 588 (1992) ("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'" (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962))).

326. Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2005/07/reciprocity-religion-clauses-and-equal.html> (July 1, 2005, 10:30 EST) ("I have always believed that at the heart of the jurisprudence of the religion clauses is the problem of securing equal citizenship in a country whose citizens have very different and sometimes contradictory beliefs about religion."); see also Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2349 & n.109 (1997).

327. See Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* (Stephen Feldman ed. 2000); see

political footing.³²⁸ None of these are far from Justice O'Connor's own original formulation over two decades ago, where she explained how "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."³²⁹

The price of these religious decisions is also paid, though in a more subtle and unseen way, by the prayergivers themselves. Giving a legislative prayer is a real honor. Religious individuals and groups will be tempted to curry favor with the government so as to give such prayers more often or to give them on particularly important occasions. Of course, some speakers will choose simply not to pray if praying means having to conform to some objectionable governmental requirements. But others will conform to the limitations that the government sets, even at the cost of their religious consciences. And they will conform even when the government sets no explicit limits—that is, they will conform to what they *believe* the government demands or expects. In one early legislative prayer case, for example, the city's attorney was asked whether the city council inquired into the content of a prayer before it was given. He responded, "[a]s far as I know, we've never asked. There has been no need to ask. Everybody has been so positive and *met the unwritten guidelines*."³³⁰ That last line is the killer. In other words, the city has put such a chilling effect on speech that would-be speakers engage in self-censorship automatically, without the government even needing to prompt them. In other First Amendment contexts, we would find this sort of thing deeply inconsistent with constitutional values.³³¹ And it probably hap-

also CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007).

328. See Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 738 (2006) (explaining "the structural function of the Establishment Clause" as "put[ting] everyone on an equal political footing, regardless of their idiosyncratic religious beliefs or lack of belief").

329. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); see also Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 320–22 (1996) (elaborating further on what Justice O'Connor meant).

330. *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1242 n.13 (10th Cir. 1998) (Lucero, J., concurring) (emphasis added) (citation omitted).

331. See, e.g., Kermit Roosevelt, Note, *The Cost of Agencies: Waters v. Churchill and the First Amendment in the Administrative State*, 106 YALE L.J. 1233, 1263 (1997) ("Uncertainty creates the familiar First Amendment chilling

pens quite frequently. By nature uncomfortable with setting explicit limits on prayer, legislatures often choose not to do so. But because everyone knows there are some boundaries, however tacit, legislatures push prayergivers into becoming the censor of their own prayers. This is hardly good for religious freedom.

Another cost of these religious decisions, albeit of a different sort, lies in their effect on the political process. Legislative prayer has an important temporal dimension. It is an ongoing process; governments make changes to their legislative prayer programs as time goes on. In this way, the government's religious choice today becomes a political issue for tomorrow. And like all political issues, we can expect citizens to campaign for certain positions and to vote for candidates that adopt them. Consider a newspaper article regarding a recent local election in a small North Carolina town:

Yadkin voters booted out incumbent commissioners Kim Clark Phillips and Joel Cornelius in the Republican primary last week as part of a backlash over the board's decision to drop sectarian prayer from meetings, residents said Of all the changes [the two commissioners introduced], last year's vote to limit prayer brought on the strongest attacks Voters began organizing against Phillips and Cornelius more than a year ago after a prayer rally in Yadkinville that drew more than 2,500 people in support of opening meetings with Christian prayers. "Once we realized that we had some commissioners who were going to basically ignore a major conservative voting bloc, we began from that day to let our voice be heard at the voting," said Bruce Freeman, the pastor of Peace Haven Baptist Church. "I think they paid the price for not heeding the concerns of the voters." Days before the primary, advertisements ran in newspapers in Elkin and Yadkinville that promoted Wooten as the only commissioner to stand up in support of sectarian prayer But some people in Yadkin County say that voters also had the jail issue on their minds when they went to the polls.³³²

That last line is poignant; the reporter felt it necessary to add that at least some voters may have considered something other than the legislative prayer issue in casting their ballots. There are other similar examples.³³³ One recent and notable

effect: To avoid the risk of punishment, speakers stay well within the bounds of protection."). To his credit, Judge Lucero also found it quite troubling: "[t]he Attorney's apparent cause for celebration is—to my mind—cause for grave constitutional concern." *Snyder*, 159 F.3d at 1242 n.13 (10th Cir. 1998) (Lucero, J., concurring).

332. See Youngquist, *supra* note 13.

333. See Maheras, *supra* note 13 ("Area Christian ministers met Monday to discuss the High Point City Council prayer issue and Tuesday's upcoming election."); Steadman, *supra* note 13 (explaining that after a nine-to-one vote

one took place in California, where a small town was considering a possible ban on sectarian prayers.³³⁴ It received a letter from a citizens' group threatening to purchase billboard space on nearby highways and publicly display each council member's vote as either being "For Jesus" or "Against Jesus."³³⁵

We should not be surprised at this. This is the natural and inevitable result of allowing the government to take religious positions. And if we feel there is nothing wrong with the government taking religious positions, we should not shy away from this sort of religiously oriented campaigning and electioneering. Indeed, we should *embrace* it. That is, we should embrace elections on religion—for, after all, elections are how democracies make most of their important decisions. Better, one might say, to have our collective religion chosen by fifty-one percent of the people rather than forty-nine. So if we share an intuition that there is something troubling in the above examples, what we share must be the intuition that government should not be taking positions on religious questions.³³⁶ Douglas Laycock has put it best:

Conceding government power to lead religious opinion implies the legitimacy of voting and campaigning on religious propositions, because voting and campaigning are how democracies choose positions for their governments to take. But voting on the truth of religious propositions is utterly inconsistent with committing religious faith to individual choices and commitments.³³⁷

Having said all this, the fights over the Ten Commandments and the Pledge of Allegiance offer a nice contrast. There the government has significantly less discretion.³³⁸ Most impor-

to allow only nonsectarian prayers, one minister "critical of the council vote, ended his comments with a political threat . . . 'We're going to remember in 2008,'" which was followed by a "loud standing ovation").

334. See Maggie Creamer, *Group Threatens to Display on Billboards How Council Members Vote on Invocation*, LODI NEWS-SENTINEL, Sept. 29, 2009.

335. See *id.*

336. Even the right side of the Court has expressed this intuition; everyone seems to share a visceral discomfort with elections on religion. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 321 (2000) (Rehnquist, C.J., dissenting) ("[I]t is possible that the students might vote not to have a pregame speaker . . . [or would focus] on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions."). Chief Justice Rehnquist's last line is telling; if elections on religion are no more troubling than elections on public speaking ability or social popularity, there would be no need for campaign restrictions.

337. Laycock, *supra* note 54, at 230.

338. The government's discretion over Ten Commandments displays is narrowed by the unusual split decision in *McCreary County v. ACLU of Ky.*,

tant is that the government has virtually no discretion over the religious content; no one wants to change the text of the Ten Commandments or rewrite the Pledge. So a city council may debate whether to adopt or uproot a Ten Commandments display; a school board may argue as to whether to implement or discard the Pledge of Allegiance in its classrooms.³³⁹ But these are more like simple thumbs-up, thumbs-down votes. There is less debate about the relative merits or demerits of various theological statements or religious groups.³⁴⁰ And there are also no fights over who gets to send the message. The message in a Ten Commandment display is delivered by no one in particular; it is seen as a general message by the undifferentiated government.³⁴¹ The Pledge is usually led by a teacher, but the teacher

545 U.S. 844 (2005) and *Van Orden v. Perry*, 545 U.S. 677 (2005). These two cases together suggest that older Ten Commandments displays are constitutional, but that the government cannot put up new ones. Thus, local governments seem to have discretion to take Ten Commandment displays down, but not to put them up.

339. *Id.*

340. *But see supra* notes 151–52 and accompanying text (noting there is some potential for disagreement between Protestants, Catholics, and Jews, who, for example, have different versions of the Ten Commandments). Sometimes governments can make perhaps unfortunate decisions about content. One example involves an Oklahoma county deciding to put up a Ten Commandments display on a courthouse lawn, and entrusting the whole process to a private citizen (Michael Bush):

After receiving approval from the Board, Mr. Bush raised the necessary funds through religious groups in the community. With the assistance of a friend, Mr. Bush decided on the wording of the Ten Commandments to appear on the Monument, condensing and paraphrasing from the King James Version of the Bible. At some point in the process of designing the Monument, Mr. Bush decided to include the Mayflower Compact as well. As it relates to the Ten Commandments, the Board did not review or approve Mr. Bush's design of the Monument or the version of the Ten Commandments that he selected to be inscribed on it. With regard to the Mayflower Compact, the Board apparently was not apprised of Mr. Bush's plan to add it to the Monument and did not authorize him to do so.

Green v. Bd. of Comm'rs, 568 F.3d 784, 790–91 (10th Cir. 2009). The district court called Bush's Ten Commandments "a butchered paraphrase of the KJV [King James Version]." *Green v. Bd. of County Comm'rs*, 450 F. Supp. 2d 1273, 1278 (E.D. Okla. 2006). The plaintiff suggested that the end result was a "uniquely Christian" Ten Commandments monument lacking any ecumenical qualities. *See Green*, 568 F.3d at 790 n.3.

341. This perception is not necessarily true—many of the litigated Ten Commandments cases involve displays that were given to the government by the Fraternal Order of Eagles. *See Laycock, supra* note 54, at 236–37 ("Many of these monuments were donated by the Fraternal Order of Eagles in conjunction with promotions of Cecil B. DeMille's 1956 movie, *The Ten Commandments*."). But the point is that the government did not put up the Ten

is chosen separately on religion-neutral criteria. Perhaps that could change; one could imagine a school board inviting a select group of clergy into the public schools to lead the Pledge. But so far that has not happened.

This is not to minimize the disputes that have developed over the Pledge and over the Ten Commandments. Those religious messages intrinsically impart the same sort of harm Justice O'Connor warned about.³⁴² And, even after *Newdow*, *Van Orden*, and *McCreary County*, there are some live issues³⁴³ and some danger that religious issues might become political footballs.³⁴⁴

Yet the problem with legislative prayer runs deeper—again, precisely because legislative prayer involves more discretion and more choice.³⁴⁵ And an important aspect to this is that the problems with legislative prayer are in some ways intractable. As long as legislative prayer is constitutionally permissible, it will remain a divisive political issue, no matter how the Supreme Court resolves the second-order constitutional questions relating to how it can be conducted. Assume, for example, that the Supreme Court ends all the constitutional litigation with a simple holding that no one—neither speakers nor listeners—has any constitutional rights in the matter. Legislatures can have legislative prayer programs as they see fit. Such

Commandments at the behest of some religious group in a way that would suggest government favoritism for the religious views of that particular group.

342. See *supra* note 329 and accompanying text (warning that endorsement sends a message to nonadherents that they are outsiders).

343. See, e.g., *Frazier v. Alexandre*, 434 F. Supp. 2d 1350, 1368–69 (S.D. Fla. 2006) (striking down a Florida statute requiring that students get parental permission before being able to opt out of the Pledge); see also *Circle Sch. v. Pappert*, 381 F.3d 172, 183 (3d Cir. 2004) (same regarding Pennsylvania's statute). The Court said long ago that students could not be forced to say the Pledge. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 670–71 (1943). But the issue of parental permission remains.

344. See *Habecker v. Town of Estes Park*, 452 F. Supp. 2d 1113, 1117 (D. Colo. 2006) (involving a claim by an elected town official who claims he was recalled for failing to support the religious aspects of the Pledge of Allegiance).

345. In a way, this discussion parallels Justice O'Connor's opinion in the *Newdow* case. There O'Connor gave four factors to differentiate between constitutional ceremonial deism and unconstitutional endorsements of religion: the "history and ubiquity" of the government's religious statement, the "absence of worship or prayer," the "absence of reference to particular religion," and the "minimal religious content" of the statement. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37–44 (2004) (O'Connor, J., concurring). Though Justice O'Connor had no occasion to phrase it this way, her opinion also suggests that the problem is governmental discretion; when her four factors are met, government will have very little discretion indeed.

a holding would put a quick end to all the constitutional litigation regarding legislative prayer. But this would simply move the issues from the courts back into the political branches. Listeners and speakers would continue to face the same harms that they currently do—and the political fight over legislative prayer would become only more heated.

CONCLUSION

[H]istory tells us that legislative prayers do not represent any realistic potential for the kind of strife the Establishment Clause was intended to prevent, because no such strife has ever surfaced as a result thereof.

—Petitioners' Brief in *Marsh v. Chambers*³⁴⁶

How different those words seem a generation later. Twenty-five years of history have demonstrated, better than any dissent ever could, the ways in which legislative prayer constitutes an establishment of religion. The willingness of the people to fight tooth-and-nail for control over legislative prayer has given us the most perfect proof of its character as a religious establishment.

In deciding *Marsh* twenty-five years ago, the Court could not have foreseen the path legislative prayer would take. It could not have predicted the battles, both constitutional and political, that legislative prayer would create. The root of the problem lies in the extensive set of religious choices that legislative prayer requires the government to make. Each choice marginalizes the religious segment that disagrees with it; each choice invites a struggle for future control of it; each choice furthers religious division along political lines.

Marsh has committed us to a second-best theory of religious liberty. It would be better if it were overruled. But as long as *Marsh* lives, there will be the question of how to best provide for religious liberty within its framework. Maximizing the liberty comes from minimizing the harms, and minimizing the harms comes from minimizing the scope of the government's religious choices. That is the chief benefit of the nonsectarian and impermissible motive restrictions; they cabin the most dangerous aspects of governmental discretion.

346. Petitioners' Brief on the Merits at 16, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23) (on file with author).

Of course, unless *Marsh* is overruled completely, the problems associated with legislative prayer will not disappear. Constitutional restrictions on legislative prayer's operation may narrow some of the government's discretion, but there will always be issues to fight about. The larger message of these legislative prayer cases is that ostensibly benign religious endorsements can grow to have real meaning and real power, and they can be a real force for religious division in our society. Religious endorsements that initially seem innocuous can grow into something quite pernicious. The costs of minor religious endorsements are real. And in the years to come when the Court again considers whether to adhere to the neutrality principle (or how far to depart from it), those costs must be kept in mind.