

October 2011

WHEN THE EXCEPTION BECOMES THE RULE: MARSH AND SECTARIAN LEGISLATIVE PRAYER POST-SUMMUM

Scott Gaylord

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>

Recommended Citation

Scott Gaylord, *WHEN THE EXCEPTION BECOMES THE RULE: MARSH AND SECTARIAN LEGISLATIVE PRAYER POST-SUMMUM*, 79 U. Cin. L. Rev. (2011)

Available at: <https://scholarship.law.uc.edu/uclr/vol79/iss3/3>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

WHEN THE EXCEPTION BECOMES THE RULE: MARSH AND SECTARIAN LEGISLATIVE PRAYER POST-SUMMUM

Scott W. Gaylord*

Across the country, federal, state, and local legislative bodies begin their meetings with prayer. Yet, as recent challenges to sectarian legislative prayer demonstrate, legislative prayer rests uneasily at the intersection of the Free Speech and Establishment Clauses. While the government has the right to speak for itself, many contend that it is precluded from engaging in paradigmatic religious activity, such as sectarian prayer. As a result, although legislative prayer has been part of the “fabric of our society” since at least the First Continental Congress, sectarian prayer teeters on the brink of unconstitutionality.

Despite the pervasiveness of legislative prayer and the importance of the constitutional issues it raises, the United States Supreme Court did not decide a legislative prayer case until Marsh v. Chambers in 1983. In Marsh, the Court upheld legislative prayers generally but did not explain how Marsh fit within the Court’s broader Establishment Clause jurisprudence. Subsequent Supreme Court and lower court decisions, therefore, have treated Marsh as a narrow exception to the Supreme Court’s general Establishment Clause rules.

This Article examines recent developments that undermine the traditional view of Marsh as a limited exception and places Marsh at the center of the Court’s current view of facially religious government speech. In particular, after analyzing the Court’s discussions of legislative prayer in Marsh and Allegheny, this Article focuses on the recent flood of challenges to sectarian legislative prayers, comparing the widely divergent conclusions reached by the seven circuit courts that have heard such cases. It then explores how the Supreme Court’s 2009 decision in Summum v. Pleasant Grove City provides a new lens

* Associate Professor of Law, Elon University School of Law. The author had primary responsibility for preparing the “Brief of Amicus Curiae Independence Law Center in Support of Forsyth County, North Carolina” in *Joyner v. Forsyth County, North Carolina*, United States Court of Appeals for the Fourth Circuit, Record No. 10-1232, which currently is on appeal to the Fourth Circuit and which directly implicates many of the issues discussed in this Article.

1018 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

through which Marsh may be interpreted, contending that the Court’s “recently minted” government speech doctrine (1) is inconsistent with the endorsement test and, in fact, (2) mandates the Establishment Clause test the Court first developed in Marsh. In the last Part, this Article considers the constitutionality of sectarian and nonsectarian legislative prayer in light of Marsh and Sumnum, arguing that, under this “new” standard, federal, state, and local governments can continue to engage in legislative prayer, even if those prayers contain sectarian references.

Introduction.....	1019
I. The <i>Marsh</i> “Exception”: The Establishment Clause and the Unique History of Legislative Prayer.....	1022
A. Marsh and Legislative Prayer: The Shift Away from Lemon	1023
1. Marsh’s New Establishment Clause Test—Impermissible Government Intent	1026
2. Justice Brennan and the <i>Lemon</i> Test—What the Majority Opinion Does Not Mean	1029
B. The Rise of the Endorsement Test—Legislative Prayer Gets Stuck in the Marsh.....	1033
II. <i>Marsh</i> , <i>Sumnum</i> , and Sectarian Legislative Prayer	1037
A. The Circuit Split	1038
1. Eleventh Circuit— <i>Marsh</i> and <i>Allegheny</i> Permit Sectarian Legislative Prayers.....	1039
2. Fifth and Seventh Circuits—No Standing, No Decision on the Merits.....	1041
3. Sixth and Ninth Circuits—School Prayer and an Unpublished Decision.....	1042
4. Fourth and Tenth Circuits—Selecting and Rejecting Invocational Speakers.....	1044
B. <i>Sumnum</i> and the Government Speech Doctrine— <i>Marsh</i> Makes a Comeback	1048
1. <i>Sumnum</i> and the Control Test for Government Speech.....	1050
2. <i>Marsh</i> and <i>Sumnum</i> Preclude Application of the Endorsement Test to Legislative Prayers.....	1053
III. Sectarian Legislative Prayer under <i>Marsh</i> and <i>Sumnum</i>	1057
A. A Model Prayer Policy	1058
B. Applying the Model Policy—Government Speech v. Private Speech.....	1061
1. Sectarian Legislative Prayer as Government	

2011]	<i>SECTARIAN LEGISLATIVE PRAYER</i>	1019
	Speech.....	1061
	2. Sectarian Legislative Prayers as Private Speech.....	1067
	Conclusion	1073

INTRODUCTION

*Marsh v. Chambers*¹ is generally known as the case that held legislative prayer to be consistent with the requirements of the Establishment Clause. But *Marsh* is also commonly known as an outlier in the Supreme Court’s Establishment Clause jurisprudence and as an exception to the Court’s traditional rules, such as the *Lemon* and endorsement tests.² This reputation resulted, in part, from the Court’s failure to explain how *Marsh* fit within existing Establishment Clause jurisprudence. The Court approved legislative prayer without mentioning, let alone distinguishing, *Lemon v. Kurtzman*, which set forth the then-dominant Establishment Clause test.³ Moreover, the Court’s subsequent discussion of *Marsh* in *Allegheny* and *Lee* reinforced the view that *Marsh* was justified only by virtue of the “unique history” of legislative prayer.⁴ Although neither case involved legislative prayer, both suggested that *Marsh* should not be extended to other contexts, such as holiday displays or high school graduations.

But there is another, more fundamental reason why courts treat *Marsh* as an exception: legislative prayer sits uneasily at the intersection of the Free Speech and Establishment Clauses. While the government has the right to speak for itself, it cannot engage in paradigmatic religious activity, such as sectarian prayer—i.e., legislative prayers that make express references to specific deities.⁵ Thus, even if *Marsh* allows for

1. 463 U.S. 783 (1983).

2. See, e.g., *id.* 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.”); *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (“The *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers*, where the Court held that the Nebraska Legislature’s practice of opening a session with a prayer by a chaplain paid by the State did not violate the Establishment Clause.” (citation omitted)); *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263, 1269 (11th Cir. 2008) (“Our ‘delicate and fact-sensitive’ inquiry is evident in the area of legislative prayer, which the Supreme Court, in *Marsh* . . . , excepted from the traditional analysis under the Establishment Clause.”); *id.* at 1286 (Middlebrooks, J., dissenting) (“*Marsh* is an outlier in Establishment Clause jurisprudence.”).

3. 403 U.S. 602 (1971).

4. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989); *Lee v. Weisman*, 505 U.S. 577, 585 (1992).

5. See, e.g., Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972 (2010); Robert Luther III, “Unity Through Division”: *Religious Liberty and the Virtue of Pluralism in the Context of Legislative Prayer Controversies*, 43 CREIGHTON L. REV. 1 (2009); Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J.

generic legislative prayers, lower courts and commentators contend that it cannot permit sectarian references because through such prayers the government would be espousing specific deities and religious beliefs, which directly violates the Establishment Clause. Consequently, these groups argue that *Marsh* must be limited to nonsectarian invocations.

Yet, *Marsh* does not expressly limit its holding in this way. In fact, the Court in *Marsh* states that courts should not “parse the content of a particular prayer” unless there is evidence that the government intended to exploit “the prayer opportunity . . . to proselytize or advance any one, or to disparage any other, faith or belief.”⁶ But if courts cannot look at the content of the legislative prayer, how can they distinguish between sectarian and nonsectarian prayers? Is the distinction irrelevant under *Marsh*? And, if not, does the same test apply to each type of prayer under the Establishment Clause?

In the last few years, several circuit courts have addressed these questions and, as a result, have brought *Marsh* out of the shadows and into the Establishment Clause spotlight. Given the uncertain status of *Marsh*, these courts understandably have struggled in deciding whether the Establishment Clause permits sectarian legislative prayer and have reached different conclusions. For example, while the Eleventh Circuit approved a Georgia policy permitting sectarian legislative prayer,⁷ the Sixth, Ninth, and Tenth Circuits have held that certain sectarian invocations were unconstitutional.⁸ The Fifth Circuit originally issued a fractured opinion rejecting sectarian prayer,⁹ but the en banc court, unable to garner a majority view on the proper scope of *Marsh*, ultimately dismissed the case on standing grounds.¹⁰ The Seventh Circuit disposed of a case in the same way.¹¹ And the Fourth Circuit

1171 (2009); Robert J. Delahunty, “*Varied Carols*”: *Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517 (2006); 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 (2008); 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 (2008); Anne Abrell, Note, *Just a Little Talk With Jesus: Reaching the Limits of the Legislative Prayer Exception*, 42 VAL. U. L. REV. 145 (2007); 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 (2006).

6. *Marsh*, 463 U.S. at 794–95.

7. *Pelphrey*, 547 F.3d 1263.

8. *Stein v. Plainwell Cmty. Sch.*, 822 F.2d 1406 (6th Cir. 1987); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App’x 355 (9th Cir. 2002) (unpublished opinion); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998).

9. *Doe v. Tangipahoa Parish Sch. Bd. (Doe I)*, 473 F.3d 188 (5th Cir. 2006).

10. *Doe v. Tangipahoa Parish Sch. Bd. (Doe II)*, 494 F.3d 494 (5th Cir. 2007) (en banc).

11. *Hinrichs v. Speaker of the House of Rep. of the Ind. Gen. Assembly (Hinrichs II)*, 506 F.3d 584 (7th Cir. 2007).

2011]

SECTARIAN LEGISLATIVE PRAYER

1021

currently is considering an appeal of a district court decision that struck down a policy that permitted sectarian prayers at the beginning of County Commissioner meetings.¹²

Amid all of this uncertainty, the Supreme Court recently decided *Summum v. Pleasant Grove City*,¹³ which this Article argues establishes a “new” standard for facially religious government speech, such as legislative prayers. But, as it turns out, the new standard is *Marsh*’s old one. If the government “controls” the speech, it may engage in facially religious speech provided that it does not have an impermissible motive. In other words, consistent with *Marsh*, sectarian and nonsectarian legislative prayers are constitutional provided that the government does not promote or disparage a particular religion: “[W]here, 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[,] . . . it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.”¹⁴ Thus, post-*Summum*, *Marsh* is no longer an exception but rather a cornerstone of the Court’s Establishment Clause analysis of legislative prayer and other forms of facially religious government speech.

To explore this recent development in the Supreme Court’s Establishment Clause jurisprudence, Part I of this Article focuses on the Court’s reasoning in *Marsh*, specifically how it diverged from the then-current *Lemon* test and how the Court’s subsequent reliance on the endorsement test limited *Marsh*’s scope. Part II explores the current circuit split regarding sectarian invocations, arguing that, in light of *Summum*, *Marsh* has assumed a central place within the Court’s Establishment Clause analysis, fulfilling the broad role that Justice Kennedy and three other Justices championed in dissent in *Allegheny*. Finally, Part III considers the constitutionality of a particular prayer policy modeled on the policy that the Fourth Circuit is currently considering in *Joyner v. Forsyth County*. This Article argues that this type of prayer policy—which is open to all religious groups in the community and allows diverse religious leaders to make sectarian references to their own deities—is constitutional under *Marsh*. Moreover, this is true whether the legislative prayers are deemed to be government speech under *Summum* or private speech under the Court’s

12. *Joyner v. Forsyth County*, No. 1:07CV243, 2009 WL 3787754 (M.D.N.C. Nov. 9, 2009).

13. 129 S. Ct. 1125 (2009).

14. *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983). See also *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

2010 decision in *Salazar v. Buono*.¹⁵ As a result, *Marsh* is no longer an outlier; rather, the Court now embraces the principles of *Marsh* and is apt to apply those principles to facially religious government speech. Stated differently, the exception has become the rule.

I. THE *MARSH* “EXCEPTION”: THE ESTABLISHMENT CLAUSE AND THE UNIQUE HISTORY OF LEGISLATIVE PRAYER

Despite the prevalence of legislative prayer at the time of the Founding,¹⁶ the Constitution does not expressly address the practice. The religion clauses of the First Amendment, which apply to the states and local governments through the Fourteenth Amendment,¹⁷ provide only that the government “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹⁸ Given the importance of religion in our nation’s history as well as in the lives of many of its citizens, it is not surprising that the Supreme Court has decided numerous cases involving the Establishment and Free Exercise Clauses. What is surprising, however, is that, given the long-standing history of legislative prayer in the United States,¹⁹ the Court did not decide a case challenging legislative prayer until *Marsh* in 1983.²⁰

By the time it finally heard a legislative prayer case, the Court appeared to have settled on the *Lemon* test as the governing Establishment Clause framework. Pursuant to this three-prong test, to survive Establishment Clause review, the challenged government action (1) “must have a secular legislative purpose,” (2) “its principal or primary effect must be one that neither advances nor inhibits religion,” and (3) “must not foster ‘an excessive government entanglement with religion.’”²¹ Applying this test to the facts in *Marsh*, the Eighth Circuit

15. 130 S. Ct. 1803 (2010).

16. *Marsh*, 463 U.S. at 787–88.

17. *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (assuming that the First Amendment is incorporated against the states through the Fourteenth Amendment in allowing the state to reimburse parents for the cost of public transportation to public and parochial schools).

18. U.S. CONST. amend. I.

19. *Marsh*, 463 U.S. at 788 (“[T]he practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”).

20. For a detailed account of the history of congressional chaplains, which directly implicates the history surrounding legislative prayer, see Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171 (2009). Although various challenges were made to the practice throughout our nation’s history, politics, congressional wrangling, and even standing requirements prevented the Supreme Court from hearing a challenge to legislative prayer until *Marsh*. *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 88 (1968).

21. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (quoting *Walz v. Tax Comm’n of the City*

2011] *SECTARIAN LEGISLATIVE PRAYER* 1023

held that the invocations at the start of Nebraska's legislative sessions violated the Establishment Clause.²² Although the Eighth Circuit's analysis was unremarkable in light of *Lemon*, the United States Supreme Court's analysis had a novel and unexpectedly originalist bent. Instead of applying—or even mentioning—*Lemon*, the *Marsh* majority looked to “historical evidence” to determine “what the draftsmen intended the Establishment Clause to mean” as well as “how they thought that Clause applied to the [legislative prayer] practice authorized by the First Congress.”²³ *Marsh*'s new “test” for legislative prayer, though, directly conflicted with *Lemon*. And as a majority of the Court began shifting from *Lemon* to the endorsement test, this conflict only increased, entrenching *Marsh* as an exception to the Court's general Establishment Clause rules.²⁴

A. *Marsh and Legislative Prayer: The Shift Away from Lemon*

For more than a century, the Nebraska legislature began its legislative sessions with an invocation. In 1965, Nebraska hired Robert E. Palmer, a Presbyterian minister, to give the opening prayer at the start of each legislative session. For the next sixteen years, Nebraska paid Mr. Palmer a monthly stipend for each month the legislature was in session. Although his prayers originally contained some expressly Christian references, the minister removed specific references to “Christ” in 1980 and subsequently gave only nondenominational invocations.²⁵ Despite the generic character of the legislative prayers, Ernie Chambers, a member of the Nebraska legislature, filed an action to enjoin both the practice of having legislative prayers and the state's paying the minister out of state funds.

Although the district court found the prayer practice constitutional, it struck down Nebraska's paying its chaplain out of state funds. The

of New York, 397 U.S. 664, 674 (1970)).

22. *Chambers v. Marsh*, 675 F.2d 228, 234–35 (8th Cir. 1982), *rev'd*, 463 U.S. 783 (1983); *Marsh*, 463 U.S. at 786 (“Applying the three-part test of *Lemon v. Kurtzman* . . . , the [Eighth Circuit] held that the chaplaincy practice violated all three elements of the test: the purpose and primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression; use of state money for compensation and publication led to entanglement.”).

23. *Marsh*, 463 U.S. at 790.

24. *See, e.g., supra* note 2 and accompanying text; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 872 n.2 (1995) (Souter, J., dissenting) (“[T]his unique history’ justified carving out an exception for the specific practice in question. Given that the [*Marsh*] decision upholding this practice was expressly limited to its facts, then, it would stand the Establishment Clause on its head to extract from it a broad rule permitting the funding of religious activities.” (quoting *Marsh*, 463 U.S. at 791)).

25. *Marsh*, 463 U.S. at 793 n.14.

Eighth Circuit, reversing in part, held that both practices violated all three prongs of the *Lemon* test:

Such a practice violates all three elements of the constitutional test applicable here. The purpose of the practice as a whole must be to advance and give preference to one religious view over others. . . .

The primary effect of the practice as a whole is unmistakably to advance religion and to give preference to one religious view. The state has placed its official seal of approval on one religious view for sixteen years and has stood behind that seal with its funds—both to compensate the minister and to publish his prayer books. . . .

The prayer practice also entangles the state with religion in precisely the manner warned of in *Bogen*. By using state monies to compensate the same minister for sixteen years and to publish his prayer books, the state engenders serious political division along religious lines.²⁶

In so holding, the Eighth Circuit foreshadowed Justice Brennan's dissent. According to Justice Brennan, allowing the same Presbyterian minister to give Judeo-Christian prayers for sixteen years, regardless of whether such prayers were "nondenominational," demonstrated the government's intent to promote that denomination over all others.²⁷ The effect of Nebraska's policies was to promote religion over non-religion and to promote Presbyterianism over other sects.

Although *Lemon* was dispositive for the Eighth Circuit and the *Marsh* dissenters, the Court's majority opinion did not mention *Lemon* or *Engel v. Vitale*.²⁸ Instead of relying on Establishment Clause precedent, the majority focused on what it viewed as more fundamental—the meaning of the Establishment Clause at the time of the Founding. According to the majority, legislative prayer was "deeply embedded in the history and tradition of this country,"²⁹ reaching back to at least 1774 when the Continental Congress, like Nebraska's unicameral legislature, "open[ed] its sessions with a prayer offered by a paid chaplain."³⁰ Moreover, the

26. *Chambers*, 675 F.2d at 234–35. Although frequently overlooked, the Eighth Circuit specifically acknowledged that, even under *Lemon*, neither legislative prayers nor retaining a paid chaplain are per se unconstitutional: "We do not hold that invocations alone are unconstitutional. Indeed, *Bogen* demonstrates that some invocation practices can be constitutionally conducted. Nor do we hold that a legislative chaplaincy, even a paid chaplaincy, is per se unconstitutional." *Id.* at 235.

27. *Marsh*, 463 U.S. at 797–98 (Brennan, J., dissenting) ("That the 'purpose' of legislative prayer is preeminently religious rather than secular seems to me to be self-evident. 'To invoke Divine guidance on a public body entrusted with making the laws' . . . is nothing but a religious act. . . . The 'primary effect' of legislative prayer is also clearly religious. . . . [I]nvocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State.")

28. 370 U.S. 421 (1962) (holding, in the first case dealing with government-sponsored prayer, that the state could not create a prayer to be recited at the start of each school day).

29. *Marsh*, 463 U.S. at 786.

30. *Id.* at 787.

2011]

SECTARIAN LEGISLATIVE PRAYER

1025

Court emphasized that the Founders approved the language of the Bill of Rights three days after the First Congress, “as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer.”³¹

But historical practice was critical to the *Marsh* majority not because it validated all contemporaneous religious practices but because it revealed the meaning of the Establishment Clause:

Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. . . .

. . . In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.³²

Because the First Congress expressly provided for paid chaplains while finalizing the language of the First Amendment, legislative prayer is consistent with both the intent of the Founders and the meaning of the religion clauses: “*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practice and understandings.”³³

Two important and often overlooked consequences flow from the majority’s appeal to history. First, the history of legislative prayer demonstrates that the Establishment Clause does not require the complete separation of church and state. In certain circumstances, such as legislative invocations, the government can engage in facially religious speech even if it has the effect of promoting religion over non-religion. Rather than threatening Establishment Clause principles, the long-standing history of legislative prayers reflects an important, shared system of beliefs upon which our country and its institutions were founded:

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these

31. *Id.* at 787–88.

32. *Id.* at 788–89.

33. *See, e.g.,* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 670 (1989) (Kennedy, J., dissenting).

circumstances, an “establishment” of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, “[w]e are a religious people whose institutions presuppose a Supreme Being.”³⁴

Second, although historical practice may help determine the meaning of the Establishment Clause, it does not, by itself, provide a means to distinguish legislative prayers that are consistent with the Establishment Clause from those that are not. The two hundred year unbroken history indicates that “the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government’s ‘official seal of approval on one religious view,’”³⁵ but not all legislative prayer policies are constitutional: “To invoke Divine guidance on a public body entrusted with making the laws is not, *in these circumstances*, an ‘establishment’ of religion or a step toward establishment.”³⁶ Hence, following its review of historical practices, the Court does something that most courts and commentators have ignored—it sets out a new Establishment Clause test for legislative prayers. To better understand the nature and scope of this test, one must look not only at the majority’s opinion, but also at what it necessarily rejects—the reasoning of the *Lemon* test.

1. *Marsh*’s New Establishment Clause Test—Impermissible Government Intent

Because historical practice does not justify all forms of legislative prayer,³⁷ the *Marsh* majority needed to provide a test for distinguishing between constitutional and unconstitutional legislative prayers.³⁸ And

34. *Marsh*, 463 U.S. at 792 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

35. *Id.*

36. *Id.* (emphasis added); *id.* at 791 (There is “no real threat to the Establishment Clause arising from a *practice of prayer similar to that now challenged.*”) (emphasis added).

37. *See, e.g.*, *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 678 (1970) (“It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside.”); *Marsh*, 463 U.S. at 790 (“Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . .”).

38. The Court frequently has applied specific Establishment Clause tests in certain situations but not others: “Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test.” *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O’Connor, J., concurring in part and concurring in judgment). Accordingly, it is not surprising that an Establishment Clause test developed in the context of display cases would not apply in a different context, namely, legislative prayers: “The Court today does only what courts must do in many Establishment Clause cases—focus on specific features of a particular government action to ensure that it does not violate the Constitution.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819,

the majority did just that in the last section of its opinion. In particular, to determine whether Nebraska's prayer policy was constitutional, the Court looked at the specific "features" of the challenged policy, namely the selection process, the use of public funds to pay the chaplain, and the use of Judeo-Christian prayers.³⁹ The Court, however, did not subject each feature to the *Lemon* test. Instead, given that the Establishment Clause generally permits legislative prayer, the majority focused on the government's intent—whether it meant to use the prayer opportunity for an impermissibly religious purpose. That is, because the Founders did not intend the Establishment Clause to preclude invocations, legislative prayer violates that Establishment Clause only if the government engages in the practice for improper reasons—to proselytize, promote, or disparage a particular religion. In this way, *Marsh* is consistent with the overarching requirement of the Establishment Clause: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."⁴⁰

For example, with respect to Nebraska's selecting the same Presbyterian minister to give the legislative invocations for sixteen years, the Court held that there is no Establishment Clause violation "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive."⁴¹ That is, unless there is evidence that the government used the selection process to "advance[] the beliefs of a particular church,"⁴² the Nebraska legislature could retain the same person to give the invocations without running afoul of the Establishment Clause. Similarly, the majority found no Establishment Clause problem in paying the invocation speaker with public funds. Given that the first Congress and various states paid their chaplains out of public funds, such "remuneration is grounded in historic practice" and does not violate the Establishment Clause.⁴³

The fact that Nebraska's legislative prayers were in the Judeo-Christian tradition, however, might create an Establishment Clause problem even though chaplain selection and remuneration did not. Even if the Founders understood the Establishment Clause to allow for legislative prayer, they did not intend to permit the government to "advance any one, or to disparage any other, faith or belief."⁴⁴ But, so

852 (1995) (O'Connor, J., concurring).

39. *Marsh*, 463 U.S. at 792–93; *id.* at 792 ("We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause.").

40. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

41. *Marsh*, 463 U.S. at 793–94 (emphasis added).

42. *Id.* at 793.

43. *Id.* at 794.

44. *Id.* at 794–95.

the argument goes, Judeo-Christian prayers violate the Constitution because they do just that.

The majority rejected this line of argument, recognizing that by its very nature prayer is always from some perspective;⁴⁵ as a practical matter, the person giving an invocation cannot give a prayer that refers to all religious faiths or traditions. Moreover, the practice of legislative prayer that had “become part of the fabric of our society” was from this same Judeo-Christian perspective.⁴⁶ Accordingly, the Court declined to scrutinize the particular perspective (i.e., the content of the legislative prayer) unless there was evidence that the government sought to use the prayer to advance a particular faith: “The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”⁴⁷ As with the chaplain selection process, the intent of the legislature was critical to the Court’s analysis. When deciding whether a legislative prayer violates the Establishment Clause, courts must first determine whether there is any indication of improper motive. And Justice Stevens, in his *Marsh* dissent, interpreted the majority’s decision in just this way: “The Court holds that a chaplain’s 16-year tenure is constitutional as long as there is no proof that his reappointment ‘stemmed from an impermissible motive.’ Thus, once again, the Court makes the subjective motivation of legislators the decisive criterion for judging the constitutionality of a state legislative practice.”⁴⁸

Under *Marsh*’s impermissible intent test, then, legislative invocations are constitutional provided that the government neither intends to promote one faith through the selection of the prayer-giver nor improperly uses the prayer opportunity to advance or disparage a particular faith. In this way, *Marsh* builds off *Lemon*’s purpose prong and rejects the other prongs. But, instead of burdening the government by requiring it to show a secular purpose, one challenging the legislative prayer must demonstrate that the government has the impermissible

45. See, e.g., Delahunty, *supra* note 5, at 522 (“Every prayer, by its very nature, reflects and conveys a particular system of beliefs about the nature of ultimate reality and is thus ‘sectarian.’”). For a more detailed analysis of the Establishment Clause problems related to mandated nonsectarian prayer, see John Witte, Jr., *From Establishment to Freedom of Public Religion*, 32 CAP. U. L. REV. 499, 515 (2004); William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11, 199 (2002); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 163 (1986); and the sources cited in *supra* note 5.

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

47. *Id.* at 794–95.

48. *Id.* at 823 n.1 (Stevens, J., dissenting).

2011] *SECTARIAN LEGISLATIVE PRAYER* 1029

intent “to proselytize or advance any one . . . faith or belief.”⁴⁹ Thus, *Marsh* does more than simply create a limited exception to the *Lemon* test; *Marsh* establishes a new way of analyzing facially religious government speech, articulating an “intent” standard that, at the time, was unique to legislative prayers.

2. Justice Brennan and the *Lemon* Test—What the Majority Opinion Does Not Mean

The majority and dissents had two fundamental disagreements regarding the scope of the Establishment Clause: (1) the applicable test for legislative prayer and (2) the underlying purpose of the Establishment Clause. As if to highlight these differences, Justice Brennan immediately tried to limit the scope of *Marsh*, characterizing it as an exception to the Court’s general Establishment Clause rules: “That [the Court did not apply any of the traditional Establishment Clause tests] simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.”⁵⁰ Instead of invoking history to create an exception, Justice Brennan would have applied *Lemon* and held Nebraska’s legislative prayer policy unconstitutional: “In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”⁵¹ Echoing the Eighth Circuit, Justice Brennan claimed that Nebraska’s legislative invocations violated all three prongs of the *Lemon* test. For Justice Brennan, it was “self-evident” that the purpose of legislative prayer—“‘invok[ing] Divine guidance on a public body entrusted with making the laws’”—was preeminently religious.⁵² To the extent such religious activity serves any secular function, that function can be accomplished just as easily through non-religious means.⁵³ Whereas the majority invoked cases that expressly allow the government to consider religion,⁵⁴ Justice Brennan appealed to the public school cases in which

49. *Id.* at 794–95 (majority opinion).

50. *Id.* at 796 (Brennan, J., dissenting).

51. *Id.* at 800–01.

52. *Id.* at 797.

53. See also *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 673 (1989) (Kennedy, J., dissenting) (criticizing the endorsement test and stating “I fail to see why prayer is the only way to convey these messages; appeals to patriotism, moments of silence, and any number of other approaches would be as effective, were the only purposes at issue the ones described by the *Lynch* concurrence”).

54. See, e.g., *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947) (upholding a state

1030 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

the Court struck down the posting of the Ten Commandments, banned the teaching of creationism, and prohibited state-sponsored Bible reading in schools.⁵⁵ Because the purpose of the religious activity is the same in the schools and in the legislature—to advance religion over non-religion—both violate *Lemon*'s purpose prong.

According to Justice Brennan, Nebraska's invocations also failed the second prong of *Lemon* because the "'primary effect' of legislative prayer is also clearly religious."⁵⁶ Drawing on the school prayer cases once again, Justice Brennan focused on two impermissible effects of having official prayers: the "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion"⁵⁷ and the "explicit[] link" created between "religious belief and observance [and] the power and prestige of the State."⁵⁸ The latter was of greater concern to Justice Brennan because even the "mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."⁵⁹ Moreover, some people, learning that the government has "linked" itself with religion through legislative prayer, will feel disaffected. Yet, for Justice Brennan, the Establishment Clause was meant to insure "that no American should at any point feel alienated from his government because that government has declared or acted upon some 'official' or 'authorized' point of view on a matter of religion."⁶⁰

Finally, Justice Brennan argued that Nebraska's prayer policy created an "excessive entanglement" between the government and religion. This

program that reimbursed parents for the costs of transporting their children to parochial schools on buses operated by the public transportation system); *Tilton v. Richardson*, 403 U.S. 672 (1971) (finding that beneficial grants for higher education at religious schools were constitutional); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970) (holding that a state statute exempting religious institutions from real property tax was constitutional).

55. See *Stone v. Graham*, 449 U.S. 39, 41 (1980) (holding that the "pre-eminent purpose" of a statute requiring the posting of the Ten Commandments in public school classrooms was "plainly religious in nature" despite the legislature's professed secular purpose); *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968) (striking down a state statute banning the teaching of evolution in public schools because of its primarily religious purpose); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223–24 (1963) (finding that a public school's practice of starting each day with a Bible reading and recitation of the Lord's Prayer violated the Establishment Clause).

56. *Marsh*, 463 U.S. at 798 (Brennan, J., dissenting).

57. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

58. *Marsh*, 463 U.S. at 798 (Brennan, J., dissenting).

59. *Id.* (quoting *Larkin v. Grendel's Den*, 459 U.S. 116, 125 (1982)).

60. *Id.* at 805–06. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (stating that the Establishment Clause prohibits the government from "send[ing] 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").

entanglement took two forms. First, the government “program might involve the state impermissibly in monitoring and overseeing religious affairs” by requiring the state to select an appropriate chaplain and to monitor that person to make sure that person gives prayers that conform to the requirements of the Establishment Clause.⁶¹ Second, legislative prayer results in entanglement because of its “divisive political potential,” which creates controversy along religious lines.⁶²

Moreover, in applying *Lemon* to legislative prayer, Justice Brennan highlighted a central disagreement regarding the purpose of the Establishment Clause. Whereas the majority focused on the history at the time of and subsequent to the drafting of the First Amendment, Justice Brennan relied on a much broader history—the frequently violent history of sixteenth and seventeenth century England and Europe: “The Establishment Clause embodies a judgment, born of a long and turbulent history, that, in our society, religion ‘must be a private matter for the individual, the family, and the institutions of private choice’”⁶³ Because religion is a private matter, the government should not and cannot interject itself into religious affairs such as legislative prayers. According to Justice Brennan, the Establishment Clause requires the government to remain neutral between and among religions as well as between religion and non-religion: “Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not . . . aid, foster, or promote one religion or religious theory against another. . . . The First Amendment mandates governmental neutrality between religion and nonreligion.”⁶⁴ As a result, while the majority would allow legislative prayers unless there was evidence that the government intended to proselytize or advance a particular religion through the invocations,⁶⁵ the dissent would “strike[e] down all official legislative invocations.”⁶⁶

The contrast between the majority and Justice Brennan is instructive for at least two reasons. First, it clarifies the majority’s “intent” test by showing what it does not mean. Because the Establishment Clause allows for legislative prayer, the majority necessarily rejected Justice Brennan’s claim that such prayers are unconstitutional because they “explicitly link religious belief [and] the power and prestige of the

61. *Marsh*, 463 U.S. at 798–99 (Brennan, J., dissenting).

62. *Id.* at 799 (internal quotation marks omitted).

63. *Id.* at 802 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971)).

64. *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968)).

65. *Id.* at 794–95 (majority opinion).

66. *Id.* at 818 (Brennan, J., dissenting).

State . . . ‘in the minds of some.’”⁶⁷ The majority declined to apply *Lemon*’s effect prong because the Establishment Clause analysis does not depend on the effect of the government practice on the minds of third party observers. That some, “like respondent, believe that to have prayer in this context risks the beginning of the establishment . . . is not well founded [because] [t]he unbroken practice for two centuries in the National Congress . . . gives abundant assurance that there is no real threat ‘while this Court sits.’”⁶⁸ Even though the majority and dissent agreed that “the federal judiciary should not sit as a board of censors on individual prayers,” they disagreed regarding the best way to avoid the government’s taking on such a role.⁶⁹ Whereas the dissent avoided the problem by prohibiting legislative prayer, the majority relied on the judiciary to monitor and assess the reasons for the government’s actions as opposed to the content of specific prayers. Regardless of the effect of the legislative prayer on adults, who are assumed capable of warding off the dual threats of religious indoctrination and peer pressure,⁷⁰ the majority interpreted the Establishment Clause to generally allow for legislative prayer, thereby avoiding the need to review the content of individual prayers.

Second, Justice Brennan’s dissent demonstrates why the Court’s subsequent adoption of the endorsement test further limits the apparent

67. *Id.* at 798. The dissent’s “explicit linking” test still survives, at least in some opinions. Recently, the Middle District of North Carolina reintroduced the *Marsh* dissenters’ test in a challenge to sectarian invocations given at the start of County Commissioner meetings in Forsyth County, North Carolina. Instead of applying *Marsh*, the district judge claimed that the central inquiry is whether the sectarian invocations “have the effect of affiliating the Government with that particular faith or belief.” *Joyner v. Forsyth County*, No. 1:07CV243, 2009 WL 3787754 (M.D.N.C. Nov. 9, 2009) (on appeal to the Fourth Circuit) (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989)). That is, the court limited *Marsh* to nonsectarian invocations and reverted back to the endorsement test (the modern incarnation of *Lemon*) when analyzing sectarian legislative prayer. Because it rejected the “effect of linking” test, *Marsh* also is inconsistent with the district court’s test as well.

68. *Marsh*, 463 U.S. at 795 (citation omitted).

69. *Id.* at 818 (Brennan, J., dissenting).

70. The majority did not rely on the dissent’s school prayer cases because the “heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools” do not apply in the legislative prayer context where the listeners are adults who are free to come and go as they please. *Id.* at 792 (majority opinion); *Lee v. Weisman*, 505 U.S. 577, 596–97 (1992) (“Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh*. . . . The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend.”). *Id.* See also *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 287 (1990) (“We have always treated with special sensitivity the Establishment Clause problems that result when religious observances are moved into the public schools.”); *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987) (“The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.”).

2011] *SECTARIAN LEGISLATIVE PRAYER* 1033

scope of *Marsh*. As a majority of the Court started to apply the “reasonable observer” standard, *Marsh*’s rejection of such a standard looked more like a historical aberration instead of a general test for facially religious government speech. This tension became apparent in *Allegheny*, which is the focus of the next subpart.

B. The Rise of the Endorsement Test—Legislative Prayer Gets Stuck in the Marsh

In the wake of *Marsh*, the Court struggled to cobble together a majority that could agree on the appropriate Establishment Clause test. The dissenters in *Marsh* sought to limit *Marsh* to legislative prayers and sought to apply *Lemon* more broadly in other contexts. But with the addition of Justices Scalia and Kennedy to the Court in the 1980s, *Lemon* received greater scrutiny.⁷¹ In response to these criticisms, Justice O’Connor started articulating her endorsement test, most prominently in holiday display cases, such as *Lynch v. Donnelly*.⁷² And by 1989, a majority of the Court adopted her endorsement test in *Allegheny*. But in addition to creating a new Establishment Clause test, *Allegheny* marked an important shift away from *Marsh*. Whereas Justice Kennedy, writing for the four dissenters in *Allegheny*, would have extended *Marsh* to give “government some latitude in recognizing and accommodating the central role religion pays in our society,”⁷³ the majority sought to limit *Marsh* to the “unique history” that justified nonsectarian legislative prayers.⁷⁴ As a result, although *Allegheny* involved neither legislative prayers nor government speech,⁷⁵ it affirmed

71. As has been well-documented, the *Lemon* test has been the object of much criticism from within and without the Court. See, e.g., *Edwards*, 482 U.S. at 636 (Scalia, J. dissenting) (“I have to this point assumed the validity of the *Lemon* ‘purpose’ test. In fact, however, I think the pessimistic evaluation that THE CHIEF JUSTICE made of the totality of *Lemon* is particularly applicable to the ‘purpose’ prong: it is ‘a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results’” (citation omitted)); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (“It is not surprising . . . that our most recent opinions have expressed doubt on the usefulness of the *Lemon* test.”); *Salazar v. Buono*, 130 S. Ct. 1803, 1819 (2010) (applying the endorsement test but expressing doubt that the “reasonable observer” test is appropriate for Establishment Clause review); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 14–15 (2d ed. 1988).

72. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (holding that a Christmas display that included a crèche as well as other traditional holiday symbols such as reindeer, candy-striped poles, a Christmas tree, carolers, a teddy bear, and hundreds of colored lights, did not violate the Establishment Clause).

73. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 658 (1989) (Kennedy, J., dissenting).

74. *Id.* at 603 (majority opinion) (“The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain ‘had removed all references to Christ.’”) (citation omitted).

75. See, e.g., *id.* at 600–01 (“On the contrary, the sign simply demonstrates that the government

the dissent's view in *Marsh* that *Marsh* is a narrow exception to the Establishment Clause.

In *Allegheny*, the Court considered whether two holiday displays—a crèche on the main staircase of a public courthouse and a display on a sidewalk comprised of a menorah, a Christmas tree, and a salute to liberty sign—violated the Establishment Clause. Rejecting *Marsh*, a majority of the Court applied the endorsement test. Unlike *Marsh*'s intent test, the endorsement test “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *avored* or preferred.”⁷⁶ The central inquiry under the endorsement test, therefore, is whether the government signals to observers that it is conveying a message of endorsement: “The effect of the display depends upon the message that the government’s practice communicates: the question is ‘what viewers may fairly understand to be the purpose of the display.’”⁷⁷ If a reasonable observer, who is aware of the history and context surrounding the government action, would view that action as conveying a message that the government favors or disfavors religion generally or a particular sect over others,⁷⁸ then the action violates the Establishment Clause.⁷⁹ If the message has “the purpose or effect of ‘endorsing’” religion over nonreligion or a specific faith to a hypothetical reasonable observer,⁸⁰ then the government’s action is unconstitutional.

Applying this test to the holiday displays in *Allegheny*, the Court held that the crèche had the “effect of promoting or endorsing religious beliefs” but that the Christmas tree and menorah did not.⁸¹ But, more

is endorsing the religious message of that organization, rather than communicating a message of its own. . . . Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government’s lending its support to the communication of a religious organization’s religious message.”).

76. *Id.* at 593 (internal quotation marks and citation omitted).

77. *Id.* at 595 (quoting *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring)); *id.* at 620 (“[T]he constitutionality of [the display’s] effect must also be judged according to the standard of a ‘reasonable observer . . .’”).

78. *Salazar v. Buono*, 130 S. Ct. 1803, 1819 (2010) (questioning the endorsement test but acknowledging that the endorsement test “requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement”).

79. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in judgment) (“It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears. As I explained in *Allegheny*, ‘the “history and ubiquity” of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.’”) (citation omitted).

80. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989).

81. *Id.* at 621. Justice Blackmun, however, did not take the endorsement test to supplant *Lemon*

2011]

SECTARIAN LEGISLATIVE PRAYER

1035

importantly for present purposes, the Court also distinguished *Marsh* in response to Justice Kennedy's dissent. Contrary to the majority, Justice Kennedy rejected the endorsement test as "flawed in its fundamentals and unworkable in practice."⁸² In its place, Justice Kennedy advocated *Marsh*'s historical approach: "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings" and "must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion."⁸³ Given the history of "[g]overnment policies of accommodation, acknowledgment, and support for religion,"⁸⁴ the Establishment Clause must be understood to allow the government to accommodate and promote legislative prayer as well as other religious practices and displays, such as the crèche and menorah:

In permitting the displays on government property of the menorah and the crèche, the city and county sought to do no more than "celebrate the season," and to acknowledge, along with many of their citizens, the historical background and the religious, as well as secular, nature of the Chanukah and Christmas holidays.⁸⁵

Consistent with *Marsh*, Justice Kennedy took the government's intent—what it "sought to do"—to be critical when deciding whether the government's accommodation of religion transgresses the Establishment Clause. Because legislative prayer is consistent with the Establishment Clause even though it might engender "feelings of exclusion,"⁸⁶ Justice Kennedy argued that the government can engage in a broad array of religious activity without violating the Establishment Clause.⁸⁷

In responding to Justice Kennedy, the majority limited *Marsh* in two primary ways. First, the Court expressly attempted to confine *Marsh*'s historical reasoning to nonsectarian legislative prayer. Although history "may affect the constitutionality of nonsectarian references to religion by the government," the history upon which Justice Kennedy relies

and left open the possibility that the menorah display might violate the purpose and entanglement prongs of *Lemon*. *Id.*

82. *Id.* at 669 (Kennedy, J., dissenting).

83. *Id.* at 670.

84. *Id.* at 657.

85. *Id.* at 663 (citation omitted); *see also id.* at 603 (majority opinion) ("Justice Kennedy, however, argues that *Marsh* legitimates all 'practices with no greater potential for an establishment of religion' than those 'accepted traditions dating back to the Founding.'" (citations omitted)).

86. *Id.* at 673 (Kennedy, J., dissenting).

87. *Id.* at 665 ("If Congress and the state legislatures do not run afoul of the Establishment Clause when they begin each day with a state-sponsored prayer for divine guidance offered by a chaplain whose salary is paid at government expense, I cannot comprehend how a menorah or a crèche, displayed in the limited context of the holiday season, can be invalid.").

1036 *UNIVERSITY OF CINCINNATI LAW REVIEW* [Vol. 79]

“cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.”⁸⁸ Second, the Court interpreted *Marsh* through the lens of the newly adopted endorsement test:

Marsh itself . . . 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.”⁸⁹

Under this view, the endorsement test’s “effect of affiliating” requirement sets out the general Establishment Clause rule, and *Marsh* is simply an exception to that rule. Given its “unique history,” nonsectarian legislative prayers survive Establishment Clause review, but the majority did not even consider *Marsh*’s intent test.

To limit *Marsh* in this manner, however, the *Allegheny* majority significantly re-characterized the reasoning in *Marsh*. In fact, it interpreted *Marsh* according to a test that *Marsh* refused to apply. Recall that Justice Brennan would have struck down Nebraska’s prayer policy because the “invocations . . . explicitly link religious belief and observance to the power and prestige of the State.”⁹⁰ But the “effect of linking” test is just the “effect of affiliating” requirement that the *Allegheny* majority applied to *Marsh*. Under both tests, “the government [must] remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.”⁹¹

The problem is that if the *Marsh* majority took this to be the proper test, *Marsh* would have been decided differently. After all, as Justice Kennedy acknowledged, legislative prayer, whether nondenominational or not, affiliates the government with religious beliefs at some level.⁹²

88. *Id.* at 603 (majority opinion).

89. *Id.* (citations omitted).

90. *Marsh v. Chambers*, 463 U.S. 783, 798 (1983) (Brennan, J., dissenting).

91. *Allegheny*, 492 U.S. at 610; *see also id.* at 612 (“And once the judgment has been made that a particular proclamation of Christian belief, when disseminated from a particular location on government property, has the effect of demonstrating the government’s endorsement of Christian faith, then it necessarily follows that the practice must be enjoined to protect the constitutional rights of those citizens who follow some creed other than Christianity.”).

92. Justice Kennedy expressed this concern (that the majority’s interpretation of *Marsh* in *Allegheny* is inconsistent with *Marsh*) in a slightly different way:

The majority suggests that our approval of legislative prayer in *Marsh v. Chambers* is to be distinguished from these cases on the ground that legislative prayer is nonsectarian, while crèches and menorahs are not. In the first place, of course, this purported distinction is utterly inconsistent with the majority’s belief that the Establishment Clause “mean[s] no official preference even for religion over nonreligion.”

2011]

SECTARIAN LEGISLATIVE PRAYER

1037

But *Marsh* does not consider the effect of the legislative prayers on third party listeners; rather, *Marsh* focuses on the government's intent—whether it sought to exploit the prayer opportunity to proselytize or advance a particular faith (a standard that is noticeably lacking from the *Allegheny* majority's discussion of *Marsh*). Thus, by explaining *Marsh* through the filter of *Allegheny*, *Allegheny* promotes the view—suggested by Justice Brennan at the very beginning of his *Marsh* dissent⁹³—that *Marsh* is an exception to the Establishment Clause and is justified only because of the “unique history” of nonsectarian invocations. And, as the Court has applied the endorsement test more frequently, *Marsh* has continued to be viewed as a historical aberration. But two recent events have altered the status of *Marsh* yet again—the balance of the Court shifted with the additions of Chief Justice Roberts and Justice Alito and the Court decided *Summum*, which reevaluated the standard for facially religious government speech.

II. MARSH, SUMMUM, AND SECTARIAN LEGISLATIVE PRAYER

The status of legislative prayers is uncertain under *Marsh* and *Allegheny*. *Allegheny* precludes “official preference even for religion over nonreligion.”⁹⁴ But legislative prayers do just that. And under *Marsh*, such prayers are constitutional. So after *Allegheny*, are only some types of legislative prayers constitutional and, if so, which ones? Whereas *Marsh* provided a test to distinguish between constitutional and unconstitutional prayers, *Allegheny* does not. Does *Allegheny* therefore overrule the *Marsh* test or simply limit *Marsh* to nonsectarian invocations?

Without additional guidance from the Court, lower courts have struggled to decide how *Marsh* applies to the variety of prayers that have been used to open federal, state, and local governmental meetings. Because *Allegheny* noted that the minister in *Marsh* “removed all references to Christ after a 1980 complaint from a Jewish legislator,”⁹⁵ some lower courts interpreted *Marsh* to allow only nonsectarian legislative prayers. But nothing in *Marsh* or *Allegheny* precludes sectarian invocations because such prayers were not before the Court in either case. Moreover, if the government does not use the prayer opportunity to proselytize, promote, or disparage any specific religion,

Id. at 665 n.4 (Kennedy, J., dissenting); *id.* at 673 (“If the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation.”).

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

94. *Allegheny*, 492 U.S. at 605.

95. *Marsh*, 463 U.S. at 793 n.14.

1038 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

then *Marsh* precludes a court's parsing the content of the prayer. As a result, sectarian prayers might be constitutional under *Marsh*. Fortunately, the Supreme Court's recent decision in *Sumnum* provides courts with new guidance by clarifying the relationship between facially religious government speech, the Free Speech Clause, and the Establishment Clause. And, in the process, *Sumnum* sets the stage for a broader application of *Marsh* in Establishment Clause cases.

A. The Circuit Split

Although *Marsh* was decided in 1983, circuit courts have only recently confronted the constitutional problems presented by sectarian legislative prayers. As the use of legislative invocations grew, so did the public attention that these prayers received. To date, however, the circuit courts have not come close to reaching a consensus on the governing Establishment Clause standard in such cases. Drawing on *Marsh* and *Allegheny*, the circuits are splintered on the constitutionality of sectarian legislative prayer. While the Fourth and Eleventh Circuits have indicated that sectarian prayer policies can survive Establishment Clause review, the Sixth and Ninth Circuits have refused to "extend" *Marsh* to sectarian prayers. Moreover, an en banc panel of the Fifth Circuit, unable to cobble together a majority to decide these questions on the merits, dismissed a challenge to sectarian invocations on standing grounds. The Seventh Circuit followed suit, dismissing a similar action for lack of taxpayer standing. As a result, these cases illustrate the tensions that have developed as courts try to reconcile *Marsh* and *Allegheny* and provide a background to better understand how *Sumnum*'s government speech doctrine requires courts to apply *Marsh*'s impermissible intent test when deciding Establishment Clause challenges to facially religious government speech.⁹⁶

96. Three other circuits—the Second, Third, and Eighth—have mentioned *Marsh* in passing but have not yet decided a case directly dealing with legislative prayer practices. See, e.g., *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 430 (2d Cir. 2002) (applying *Lemon* but explaining that *Marsh* permitted Nebraska's legislative prayer policy because it "did not confer a substantial and impermissible benefit on religion in general or on Christianity in particular"); *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247, 266 (3d Cir. 2003) (declining to apply *Marsh* to a Ten Commandments display but stating that "the Supreme Court has acknowledged the proposition that history can transform the effect of a religious practice"); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 777 (8th Cir. 2005) ("[T]he Court has approved certain government activity that directly or indirectly recognizes the role of religion in our national life.").

2011] *SECTARIAN LEGISLATIVE PRAYER* 10391. Eleventh Circuit—*Marsh* and *Allegheny* Permit Sectarian Legislative Prayers

In 2008, the Eleventh Circuit considered sectarian invocations in *Pelphrey v. Cobb County, Georgia*.⁹⁷ The taxpayer plaintiffs in *Pelphrey* challenged the policy of starting the meetings of two commissions, the Cobb County Commission and the Cobb County Planning Commission, with a prayer. Pursuant to long-standing practice, each commission allowed volunteer clergy from various religions and other members of the community to provide an invocation at the beginning of its meetings. The clergy who offered the invocations represented a variety of faiths, including Christianity, Islam, Unitarian Universalism, and Judaism, and because neither of the commissions composed or censored the prayers, many of the prayers included sectarian references.⁹⁸ In particular, “[t]he prayers have included references to ‘Jesus,’ ‘Allah,’ ‘God of Abraham, Isaac, and Jacob,’ ‘Mohammed,’ and ‘Heavenly Father.’”⁹⁹ Although the commissions used clergy volunteers on a rotating basis, the majority of speakers were Christian, “reflect[ing] the composition of the religious institutions in Cobb County.”¹⁰⁰

After the commissions refused the American Civil Liberties Union’s request to stop allowing invocational speakers to make sectarian references in the opening prayers, the plaintiffs sued, asking the district court to find the sectarian invocations unconstitutional and to enjoin the practice. Although the district court held that the Planning Commission’s selection process in 2003–04 violated the Establishment Clause, the court otherwise upheld the use of invocations at the meetings of both commissions.¹⁰¹

97. 547 F.3d 1263 (11th Cir. 2008).

98. According to the panel in *Pelphrey*, between 1998 and 2008, “70 percent of prayers before the County Commission and 68 percent of prayers before the Planning Commission contained Christian references.” *Id.* at 1267.

99. *Id.* at 1266.

100. *Id.* at 1267. According to the plaintiffs, the vast majority—96.6%—of the clergy who gave invocations at the meetings were Christian, which they claimed demonstrated a violation of the endorsement test. *Id.*

101. The evidence showed that in 2003–04 the Planning Commission relied on the Yellow Pages when selecting clergy to provide the invocation and that the deputy clerk had drawn a line through several categories of churches in the Yellow Pages, including “Churches-Islamic,” “Churches-Jehovah’s Witnesses,” “Churches-Jewish,” and “Churches-Latter Day Saints.” Not surprisingly, then, “[n]o clergy from those subcategories were asked to provide the invocation during 2003–2004.” *Id.* at 1267–68. Accordingly, the district court held that the 2003–04 selection process was unconstitutional, relying on *Marsh’s* admonition that appointment cannot “stem[] from an impermissible motive.” *Marsh v. Chambers*, 463 U.S. 783, 793 (1983).

1040 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

On appeal, the Eleventh Circuit affirmed. Specifically, the circuit court held that the sectarian prayers in *Pelphrey* were constitutional, given the “unambiguous and unbroken history of more than 200 years” of legislative prayer upon which the Court relied so heavily in *Marsh*;¹⁰² and the *Marsh* majority’s insistence 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 . . . faith or belief.”¹⁰³ Because there was no evidence that either commission sought to use the invocations to proselytize or promote one religion over another, the Eleventh Circuit declined the invitation “to parse the content of a particular prayer.”¹⁰⁴ As a result, the prayers at commission meetings, even though frequently sectarian, did not violate the Establishment Clause.

In its opinion, the Eleventh Circuit noted that, although the Court’s decisions in *Allegheny* and *Lee v. Weisman*¹⁰⁵ “provide insight about the boundaries for legislative prayer,”¹⁰⁶ they did not change the result. In particular, *Pelphrey* took *Allegheny* to be consistent with “the lesson of *Marsh* that legislative prayers should not ‘demonstrate a [government] preference for one particular sect or creed.’”¹⁰⁷ According to the Eleventh Circuit, *Allegheny* did not mandate that all prayers be nondenominational, only that they “do not ‘have the effect of affiliating the government with any one specific faith or belief.’”¹⁰⁸ *Lee*, in turn, “clarified that the government ordinarily should have no role in determining the content of public prayers,”¹⁰⁹ which is consistent with *Marsh*’s prohibiting judicial review of the content of such prayers absent evidence of an impermissible motive.¹¹⁰ Thus, even under *Allegheny*’s “effect of affiliating test,” the Eleventh Circuit found the prayers constitutional. Because the prayers did not show that the government preferred one particular creed or sect over another, the court could not

102. *Id.* at 792.

103. *Pelphrey*, 547 F.3d at 1270 (quoting *Marsh*, 463 U.S. at 794–95). The dissent in *Pelphrey*, echoing Justice Brennan’s dissent in *Marsh*, argued that the sectarian prayers violated *Lemon*: “It would be incredulous to argue any purpose other than a religious one for ‘invoking divine guidance’ upon the commissions. . . . It is equally axiomatic that the primary effect of the prayers is to advance religion.” *Id.* at 1283 (Middlebrooks, J., dissenting). Of course, *Marsh* rejected this line of argument, as did the majority in *Pelphrey*.

104. *Marsh*, 463 U.S. at 795.

105. 505 U.S. 577 (1992) (prohibiting school from inviting local clergy members to give nonsectarian prayers at public school graduations).

106. *Pelphrey*, 547 F.3d at 1270.

107. *Id.* at 1272.

108. *Id.*

109. *Id.* at 1271.

110. *Id.*

2011] *SECTARIAN LEGISLATIVE PRAYER* 1041

(and did not) “embark on a sensitive evaluation or [] parse the content of a particular prayer.”¹¹¹

2. Fifth and Seventh Circuits—No Standing, No Decision on the Merits

The Eleventh Circuit’s analysis in *Pelphrey* did not draw on a consensus among its sister circuits. In fact, the other circuits that have heard challenges to sectarian invocations have reached widely different conclusions. For example, the Fifth and Seventh Circuits issued initial panel opinions prohibiting sectarian prayer practices but ultimately dismissed the actions on standing grounds. As a result, neither circuit has issued a binding precedent on the underlying Establishment Clause issues.

In *Doe v. Tangipahoa Parish School Board*,¹¹² the Fifth Circuit heard a challenge to the Tangipahoa Parish School Board’s practice of opening its meetings with prayer. Although the original panel was splintered, with each of the three judges writing separately regarding the proper Establishment Clause standard, the court held in a 2–1 opinion that the prayer policy was unconstitutional.¹¹³ But that decision was quickly vacated when the court granted rehearing en banc. In an 8–7 ruling, the en banc panel remanded the case to the district court with instructions to dismiss the case for lack of taxpayer standing.¹¹⁴ Consequently, the Fifth Circuit did not reach the merits of the school board’s particular prayer policy.

Although following a slightly different path, the Seventh Circuit eventually reached the same conclusion. In an action to stop Indiana’s 188 year practice of beginning its legislative sessions with a prayer, the original panel upheld an injunction against the practice, holding that *Marsh* “hinge[d] on the nonsectarian” nature of the legislative prayers.¹¹⁵ Unlike *Marsh*, the invocations were not given by the same person; rather, clergy from different religions and some state representatives delivered the prayers. In addition, many of the prayers contained sectarian references to Jesus, Christ, God, Almighty God, or Heavenly Father.¹¹⁶ Because the invocations included sectarian references, the panel denied the motion for stay pending appeal. When

111. *Id.* at 1272 (quoting *Marsh*, 463 U.S. at 795).

112. *Doe v. Tangipahoa Parish Sch. Bd. (Doe I)*, 473 F.3d 188 (5th Cir. 2006).

113. *Id.*

114. *Doe v. Tangipahoa Parish Sch. Bd. (Doe II)*, 494 F.3d 494 (5th Cir. 2007) (en banc).

115. *Hinrichs v. Bosma (Hinrichs I)*, 440 F.3d 393, 394–95 (7th Cir. 2006).

116. *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly (Hinrichs II)*, 506 F.3d 584, 586 (7th Cir. 2007).

1042 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

the appeal of the original action was finally heard, however, the Seventh Circuit reversed the injunction and, following the Fifth Circuit in *Doe II*, remanded the case with instructions to dismiss for lack of standing because “[t]he plaintiffs have not tied their status as taxpayers to the House’s allegedly unconstitutional practice of regularly offering a sectarian prayer.”¹¹⁷

3. Sixth and Ninth Circuits—School Prayer and an Unpublished Decision

Unlike the Fifth and Seventh Circuits, other circuits have reached the merits and issued opinions contrary to the Eleventh Circuit’s decision in *Pelphrey*. In particular, the Sixth and Ninth Circuits have stated that sectarian references in legislative prayers violate the Establishment Clause. These decisions are of only modest help in determining the constitutionality of sectarian legislative prayer, however, because neither circuit’s opinion addressed the issue in a manner that constitutes a binding precedent. In 1987, before the Supreme Court decided *Allegheny* or *Lee*, the Sixth Circuit, in *Stein v. Plainwell Community School*,¹¹⁸ had to resolve a challenge to sectarian references at a public school graduation. The court interpreted *Marsh* to allow only nonsectarian prayers.¹¹⁹ Of course, the Supreme Court in *Lee* subsequently distinguished prayers in public schools from those given at the start of legislative sessions: “[i]nherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh*.”¹²⁰ Thus, the fact that sectarian and nonsectarian prayers are not permitted at high school graduations does not mean that such prayers violate the Establishment Clause when given at the start of legislative meetings. That is, given that *Lee* precludes all prayers at graduations, it is unremarkable that the Sixth Circuit found graduation invocations that “employ[ed] the language of Christian theology and prayer” unconstitutional.¹²¹

Yet, as Justice Kennedy’s dissent in *Allegheny* and his opinion in *Salazar* suggest, the current Supreme Court is apt to apply *Marsh* more broadly outside the school context: “The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. . . . The Constitution does not oblige government to avoid

117. *Id.* at 599.

118. 822 F.2d 1406 (6th Cir. 1987).

119. *Id.* at 1409.

120. *Lee v. Weisman*, 505 U.S. 577, 596 (1992).

121. *Stein*, F.2d at 1410.

2011] *SECTARIAN LEGISLATIVE PRAYER* 1043

any public acknowledgment of religion's role in society."¹²² Thus, because the Sixth Circuit's decision predated important Supreme Court cases and because the Supreme Court has subsequently distinguished between graduation and legislative settings, the Sixth Circuit's opinion in *Stein* does not shed much light on the current status of sectarian invocations.

Similarly, although the Ninth Circuit decided a sectarian prayer case, its opinion does not provide useful guidance with respect to legislative invocations for two reasons. First, the Ninth Circuit's decision in *Bacus v. Palo Verde Unified School District Board of Education*¹²³ is unpublished and, therefore, is not binding precedent under either the Federal Rules of Procedure or the Ninth Circuit's local rules.¹²⁴ Second, in *Bacus*, the Ninth Circuit considered sectarian prayers that were offered at school board meetings. Given *Marsh*, the Ninth Circuit determined that it did not need to address whether school board meetings were more similar to legislative sessions or classroom prayers. Because the "same individual almost always offered the invocation, always 'in the Name of Jesus,' and no individuals of other religions ever gave the invocation[s],"¹²⁵ the prayer practice advanced one faith or belief over others in violation of *Marsh*, regardless of the nature of the school board. The panel, however, expressly left open the question "whether the prayers 'in the Name of Jesus,' would be a permissible solemnization of a legislature-like body, provided that invocations were, as is traditional in Congress, rotated among leaders of different faiths, sects, and denominations."¹²⁶ As a result, whether sectarian legislative prayer violates the Establishment Clause still is an open question in the Fifth, Sixth, Seventh, and Ninth Circuits.¹²⁷

122. See, e.g., *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010).

123. 52 F. App'x 355 (9th Cir. 2002) (unpublished decision).

124. See FED. R. APP. P. 32.1(a) ("A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as 'unpublished,' . . . or the like; and (ii) issued on or after January 1, 2007."); 9TH CIR. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.").

125. *Bacus*, 52 F. App'x at 356–57.

126. *Id.* at 356.

127. *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly (Hinrichs II)*, 506 F.3d 584, 604 (7th Cir. 2007) (Wood, J., dissenting).

4. Fourth and Tenth Circuits—Selecting and Rejecting Invocational Speakers

Although most of the circuit court cases have challenged the constitutionality of the prayer policies themselves, the Fourth and Tenth Circuits have heard claims testing the process by which invocational speakers are selected. In *Marsh*, the repeated reappointment of the same Presbyterian minister did not violate the Establishment Clause absent proof of an “impermissible motive.”¹²⁸ But is the test the same when the government refuses to allow someone to give an invocation? Given the limited number of meetings each year, it may be impossible to give everyone the opportunity to lead a prayer at the start of a meeting. But then how must the government choose between the different speakers?

In *Snyder v. Murray City Corp.*,¹²⁹ an en banc panel of the Tenth Circuit upheld a city council’s decision to deny a citizen’s request to give an invocation.¹³⁰ Pursuant to its policy, the city council sent a form letter to local religious groups asking if they would like to give an opening prayer. In response to this request, various religious leaders, including members of Jewish, Christian, Zen Buddhist, and Native American traditions, gave invocations at city council meetings. The plaintiff, Tom Snyder, “draft[ed] a prayer that calls on public officials to cease the practice of using religion in public affairs.”¹³¹ In particular, Mr. Snyder’s “prayer” included the following:

“We pray that you prevent self-righteous politicians from mis-using the name of God in conducting government meetings; and, that you lead them away from the hypocritical and blasphemous deception of the public, attempting to make the people believe that bureaucrats’ decisions and actions have thy stamp of approval if prayers are offered at the beginning of government meetings.”¹³²

Viewing *Marsh* as a limited exception, the court noted that “the constitutionality of legislative prayers is a *sui generis* legal question.”¹³³ As a result, because the traditional rules did not apply, *Marsh* did not require the government to open the prayer opportunity to everyone who wanted to participate: “The Establishment Clause and *Marsh* simply do not require that a legislative body ensure a kind of equal public access to

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

129. 159 F.3d 1227 (10th Cir. 1998) (en banc).

130. *Id.*

131. *Id.* at 1228.

132. *Id.* at 1228 n.3.

133. *Id.* at 1232.

2011] *SECTARIAN LEGISLATIVE PRAYER* 1045

a legislative body's program of invocational prayers."¹³⁴ Rather, in permitting invocations, *Marsh* necessarily granted a legislative body the authority to select who would give the prayers, be it the same Presbyterian minister in *Marsh* or a variety of local religious leaders in *Snyder*. Provided the method of selection did not violate the Constitution, the exclusion of some willing speakers created no Establishment Clause problem: "if *Marsh* allows a legislative body to select a speaker for its invocational prayers, then it also allows the legislative body to exclude other speakers."¹³⁵

Even though courts cannot parse the content of the prayer, *Marsh* did not prevent the city council from evaluating the proposed prayer to insure that it did not "proselytize or advance any one . . . faith or belief."¹³⁶ Because "all prayers 'advance' a particular faith or belief in one way or another," the government can exclude certain "faith[s] or belief[s]" and permit others without violating the Establishment Clause.¹³⁷ Provided that the overall selection process does not evince an improper motive, the city council can reject a prayer that "aggressively proselytizes for his particular religious views and strongly disparages other religious views."¹³⁸ Moreover, because the prayers in *Marsh* were "Judeo-Christian," the Tenth Circuit held that the Establishment Clause cannot be read to prohibit any and all prayers that appeal to "particular concept[s] of God."¹³⁹ Thus, under the Tenth Circuit's analysis, where there is no evidence that the government intended to proselytize or to select a speaker for an impermissible motive, sectarian legislative prayer would survive Establishment Clause review.

In a series of cases, the Fourth Circuit considered challenges to both prayer policies and selection procedures, reaching different conclusions based on the facts of each case.¹⁴⁰ In *Wynne v. Town of Great Falls, South Carolina*,¹⁴¹ the Fourth Circuit analyzed prayers at the start of city council meetings.¹⁴² Unlike the prayer policy in *Snyder*, the Town of

134. *Id.* at 1233.

135. *Id.*

136. *Id.* at 1234.

137. *Id.* at 1234 n.10.

138. *Id.* at 1234 n.10, 1235.

139. *Id.* at 1234 n.10. *See also* *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 285 (4th Cir. 2005) ("A party challenging a legislative invocation practice cannot, therefore, rely on the mere fact that the selecting authority chose a representative of a particular faith, because some adherent or representative of some faith will invariably give the invocation.").

140. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("[T]he inquiry calls for line-drawing: no fixed, *per se* rule can be framed.").

141. 376 F.3d 292 (4th Cir. 2004).

142. *Id.*

Great Falls did not invite various religious leaders from the community to lead the prayers, relying instead on the council members themselves. Because the council members were Christian, the prayers frequently referred to “Jesus,” “Jesus Christ,” or “Savior,” and those in attendance customarily stood or bowed their heads during the prayers. When the plaintiff, Ms. Wynne, complained about such sectarian references, the council did not change its policy. Instead, council members solicited support for the practice from local ministers, singled Ms. Wynne out for failing to participate in the prayers, and refused to allow her to speak at a meeting even though she was listed on the agenda.¹⁴³ Others in attendance also made Ms. Wynne feel uncomfortable and unwelcome at the meetings.¹⁴⁴ Under these circumstances, the panel found that “the record . . . is replete with powerful ‘indication[s]’ that the Town Council did indeed ‘exploit’ the prayer opportunity ‘to proselytize or advance’ one faith.”¹⁴⁵ In addition, interpreting *Marsh* through the lens of *Allegheny*, the court found the practice unconstitutional because the government made religion relevant to Ms. Wynne’s political standing in the community by “advanc[ing] its own religious views in preference to all others.”¹⁴⁶ Thus, although some forms of sectarian prayer might survive Establishment Clause review, this particular policy did not.¹⁴⁷

One year later, in *Simpson v. Chesterfield County Board of Supervisors*,¹⁴⁸ the Fourth Circuit upheld a prayer policy pursuant to which the county invited clergy from a “wide cross-section of the County’s religious leaders,” including rabbis, imams, priests, pastors, and ministers, to provide “a wide variety of prayers” at the county meetings.¹⁴⁹ Reflecting the county’s attempt to promote “nonsectarianism,” the prayers included “wide and embracive” sectarian references to “‘Lord God, our creator,’ ‘giver and sustainer of life,’ ‘the God of Abraham, Isaac and Jacob,’ ‘the God of Abraham, of Moses, Jesus, and Mohammad,’ ‘Heavenly Father,’ [and] ‘Lord of Lords, King of Kings, creator of planet Earth and the universe and our own

143. *Id.* at 295.

144. *Id.*

145. *Id.* at 298 n.4.

146. *Id.* at 302. See also *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989).

147. See, e.g., *Wynne*, 376 F.3d at 300 n.5. But the court also suggests that *Marsh* might be limited to nonsectarian prayer by (1) distinguishing *Snyder*’s claim that the Establishment Clause prohibited only the “more aggressive form of advancement, i.e., proselytization,” and (2) stating that prayers “[n]ot ‘all prayers’ ‘advance’ a particular faith.’ Rather, nonsectarian prayers, by definition, do not advance a particular faith.” *Id.* at 301 n.6.

148. 404 F.3d 276, 285 (4th Cir. 2005).

149. *Id.* at 284–85.

2011] *SECTARIAN LEGISLATIVE PRAYER* 1047

creator.”¹⁵⁰ Unlike *Wynne*, where the “pervasively and exclusively sectarian” nature of the prayers “undermined . . . participation by person of all faiths in public life,”¹⁵¹ the diversity of religious speakers and prayers in *Simpson* fell within “the spacious boundaries” set forth in *Marsh*.¹⁵² Furthermore, the policy did not violate the Free Speech Clause because the prayers were government speech “subject only to the proscriptions of the Establishment Clause.”¹⁵³ But the county’s policy did not violate the Establishment Clause because it was “in many ways more inclusive than that approved by the *Marsh* Court” and because prohibiting such a policy “would push localities intent on avoiding litigation to select only one minister from only one faith [making] America and its public events more insular and sectarian rather than less so.”¹⁵⁴

Finally, in *Turner v. City Council of City of Fredericksburg, Virginia*,¹⁵⁵ the Fourth Circuit, with Justice O’Connor sitting by designation and writing for the court, upheld the city’s decision to deny a council member’s request to offer a sectarian prayer at a city council meeting.¹⁵⁶ Because the city’s prayer policy allowed only nonsectarian prayers, the Fourth Circuit did not have to decide whether the Establishment Clause might permit sectarian references under certain circumstances.¹⁵⁷ Rather, the panel had to decide only whether the government could limit the opening invocation to nondenominational prayers. The panel held that it could, given that the policy “is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith.”¹⁵⁸

The Fourth Circuit currently is considering *Joyner v. Forsyth County*,¹⁵⁹ which asks the court to determine the constitutionality of a policy that permits sectarian legislative prayer. Pursuant to its policy, the Forsyth County Board of Commissioners invites religious leaders from the community to give an invocation “according to the dictates of

150. *Id.* at 284.

151. *Id.* at 283.

152. *Id.* at 284.

153. *Id.* at 288 (quoting *Rosenberger Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 820 (1995)).

154. *Id.* at 285, 287.

155. 534 F.3d 352 (4th Cir. 2008).

156. *Id.*

157. *See id.* at 356 (“We need not decide whether the Establishment Clause *compelled* the Council to adopt their legislative prayer policy, because the Establishment Clause does not absolutely dictate the form of legislative prayer.”).

158. *Id.* at 356.

159. No. 1:07CV243, 2009 WL 3787754, at *2 (M.D.N.C. Nov. 9, 2009).

1048 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

[each leader's] own conscience," provided the prayer does not proselytize or disparage any other faith.¹⁶⁰ The invocations frequently contain references to "Jesus," "Christ," and "Trinity." Thus, the court will have to decide whether sectarian references violate the Establishment Clause. But even under the Fourth Circuit's interpretation of *Marsh*, Forsyth County's policy might survive Establishment Clause review. In *Turner*, the court invoked *Marsh* for the proposition that "courts ought not to 'parse the content of a particular prayer'" if "the prayer is not used to advance a particular religion or disparage another faith or belief."¹⁶¹ But, as *Pelphrey* acknowledged, this standard is consistent with some forms of sectarian prayer. Where, as in *Simpson* and *Pelphrey*, the government invites a wide range of clergy to offer a wide range of prayers from their respective faith perspectives, such a prayer policy "recognize[s] the rich religious heritage of our country in a fashion that was designed to include members of the community, rather than to proselytize."¹⁶²

Accordingly, the Fourth and Tenth Circuits, consistent with the Eleventh Circuit, might allow sectarian references under *Marsh*, even though these courts have viewed *Marsh* as an exception rather than as setting out a separate Establishment Clause test. But if *Marsh* now has the broader scope for which Justices Kennedy and Scalia argued in their *Allegheny* dissent, then sectarian prayer should fit more comfortably within the "spacious boundaries" of the Establishment Clause, and, as this Article argues below, *Sumnum* dictates just this result.

B. *Sumnum* and the Government Speech Doctrine—*Marsh* Makes a Comeback

To date, only two of the circuit court cases discussing legislative prayer have mentioned the government speech doctrine. Both were decided by the Fourth Circuit, and both treated the Free Speech analysis as separate and distinct from the Establishment Clause review.¹⁶³ In 2009, however, the Supreme Court decided *Sumnum v. Pleasant Grove City*,¹⁶⁴ in which the Court unanimously approved "the recently minted

160. *Id.* at *2.

161. *Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352, 356 (4th Cir. 2008) (quoting *Marsh v. Chambers*, 463 U.S. 783, 795 (1983)), *cert. denied*, 129 S. Ct. 909 (2009).

162. *Id.*

163. *See Simpson v. Chesterfield County Bd. of Sup'rs*, 404 F.3d 276, 288 (4th Cir. 2005); *Turner*, 534 F.3d at 354–55.

164. 129 S. Ct. 1125 (2009).

2011]

SECTARIAN LEGISLATIVE PRAYER

1049

government speech doctrine.”¹⁶⁵ Pursuant to this doctrine, government speech is not subject to scrutiny under the Free Speech Clause.¹⁶⁶ When speaking, the government can “say what it wants” to insure that its desired message is communicated.¹⁶⁷ And because the message is its own, it can speak without worrying about how third parties might interpret that message.

Despite being a Free Speech case, *Sumnum* directly impacts the Court’s Establishment Clause jurisprudence. Although Justice Souter claimed that “[t]he interaction between the ‘government speech doctrine’ and Establishment Clause principles has not, however, begun to be worked out,”¹⁶⁸ this position ignores *Marsh*, in which the Court approved legislative prayers—a specific form of facially religious government speech. In *Allegheny*, the Court did not consider the standard for government speech because the town simply gave preferential access to a private religious speaker instead of communicating its own message.¹⁶⁹ *Sumnum*, however, speaks directly to religious government speech and requires courts to apply *Marsh*’s intent test.

Under *Marsh*, legislative prayers are constitutional unless the government has an “impermissible motive,” i.e., the intent to “proselytize or advance any one, or to disparage any other, faith or belief.”¹⁷⁰ Given the government’s right to control its message, the constitutionality of its speech is not determined by a reasonable third party observer; rather, courts must determine whether the government’s motive was impermissibly religious. Thus, with respect to legislative prayers, courts must determine whether the invocations are government speech or private speech so that they may decide which test—impermissible religious purpose or endorsement—to apply to the legislative invocations.

165. *Id.* at 1139 (Stevens, J., concurring).

166. *Id.* at 1131 (“The Free Speech clause restricts government regulation of private speech; it does not regulate government speech.”).

167. *Id.* (quoting *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)).

168. *Id.* at 1141 (Souter, J., concurring).

169. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 601 (1989) (“On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own.”).

170. *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983).

1. *Summum* and the Control Test for Government Speech

In *Summum*, the Supreme Court considered whether Pleasant Grove City could refuse to display in a park a monument containing the Seven Aphorisms of the Summum religion when it already displayed a monument inscribed with the Ten Commandments. In holding that the city could accept some facially religious monuments while rejecting others, the Court unanimously adopted the government speech doctrine. In particular, the majority held that the government “has the right ‘to speak for itself’” and that when speaking, the government “‘is entitled to say what it wishes’” and “to select the views that it wants to express.”¹⁷¹ As a result, “the [g]overnment’s own speech . . . is exempt from First Amendment scrutiny.”¹⁷² That is, when speaking, the government can discriminate based on content and viewpoint.¹⁷³

To qualify for the protection afforded by the government speech doctrine, the government must control the message conveyed: “In this case, it is clear that the monuments in Pleasant Grove’s Pioneer Park represent government speech [because] the City has ‘effectively controlled’ the messages sent by the monuments in the Park by exercising ‘final approval authority’ over their selection.”¹⁷⁴ Thus, once the government takes on the role of speaker, the government may claim the fundamental right protected by the Speech Clause—the right to choose the content of its message: “[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.”¹⁷⁵

Thus, for legislative prayer to fall within the government speech doctrine, the government must have sufficient control over the speech to send its own message, as opposed to simply facilitating the speech of private parties.¹⁷⁶ But, under *Summum*, the government need not create

171. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

172. *Id.* (quoting *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, 553 (2005)).

173. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (stating that, if the government is speaking, “it may make content-based choices”); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 792 (4th Cir. 2004) (“[W]hen the government speaks for itself and is not regulating the speech of others, it may discriminate based on viewpoint . . .”).

174. *Summum*, 129 S. Ct. at 1128 (quoting *Johanns*, 544 U.S. at 560–61).

175. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995).

176. In *Turner*, the Fourth Circuit suggested that legislative prayers might always be government speech: “Turner has not cited a single case in which a legislative prayer was treated as individual or private speech. Indeed, the Fourth Circuit has determined that more difficult cases than this one should be classified as government speech.” *Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352, 355 (4th Cir. 2008). Luther and Caddell argue that, unless the government expressly endorses the prayers, the prayers “always should be viewed as private speech.” Luther & Caddell, *supra* note 5, at 596. Thus,

2011] *SECTARIAN LEGISLATIVE PRAYER* 1051

the invocations to qualify for the protection of the government speech doctrine; rather, the government can adopt the speech—i.e., the prayers—that third parties offer at its meetings. As in *Summum*, by choosing only “those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park . . . [t]he monuments that are accepted . . . are meant to convey and have the effect of conveying a government message.”¹⁷⁷ The same holds true for legislative prayers. By engaging third parties to give the prayers, the government might convey one or more permissible messages: “a tolerable acknowledgment of beliefs widely held among the people of this country”¹⁷⁸ or a desire to “solemniz[e] public occasions, express[] confidence in the future, and encourag[e] the recognition of what is worthy of appreciation in society.”¹⁷⁹ But if the government may convey these messages through Judeo-Christian prayers given by a Presbyterian minister, the Establishment Clause should permit the government to send the same messages through a variety of religious leaders from the local community. Moreover, provided that the government intends to send a permissible message, then the “content of the prayer is not of concern to judges.”¹⁸⁰ That is, *Marsh* and *Summum* do not allow courts to distinguish between sectarian and nonsectarian prayers when the government is speaking directly or through third parties, absent evidence of improper intent.¹⁸¹

Of course, *Summum* does not cite *Marsh*, so one might wonder whether there is a meaningful connection between the two cases. After all, *Summum* concerns a Free Speech challenge to a facially religious monument, not an Establishment Clause challenge to government prayer. But *Summum* directly impacts the scope of *Marsh* because *Marsh* also involves the intersection of the Free Speech and Establishment Clauses. Just as *Marsh* acknowledges the special status of legislative prayers under the Establishment Clause, *Summum* recognizes the special status of facially religious government speech under the Free Exercise Clause. And, unlike *Allegheny*, which sought to distinguish legislative prayers from other expressive activity and to limit

not only is the distinction important to the resolution of Establishment Clause challenges to sectarian legislative prayers, but also it is an unsettled area of Establishment Clause jurisprudence.

177. *Summum*, 129 S. Ct. at 1130.

178. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

179. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

180. *Marsh*, 463 U.S. at 794.

181. *ACLU of Tenn. v. Bredeesen*, 441 F.3d 370, 375 (6th Cir. 2006) (“*Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.”).

1052 *UNIVERSITY OF CINCINNATI LAW REVIEW* [Vol. 79]

Marsh to nonsectarian prayers in the process, *Summum* adopts a general rule that relates directly to *Marsh*. Under the control test, if the government engages in speech activity with the intent to send its desired message, then the speech is government speech: “The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park.”¹⁸²

But this is precisely what the Court did in *Marsh* in the context of the Establishment Clause; it evaluated the government’s reasons for having prayer at the start of its meetings. If the government intended “[t]o invoke Divine guidance on a public body,” such invocations are not an establishment but only “a tolerable acknowledgment of beliefs widely held among the people of this country.”¹⁸³ Thus, post-*Summum*, if the government is determining the message—whether for a legislative prayer, a holiday display, or a monument in a public park—then, as long as it does not intend to proselytize or disparage, the government may rely on history and tradition to insulate its speech from Free Speech and some Establishment Clause challenges.¹⁸⁴

Put differently, under *Marsh* and *Summum*, there is no place for a “heckler’s veto” with respect to facially religious government speech.¹⁸⁵ Under the Free Speech Clause, third parties who do not like the government’s message cannot force the government either to remain silent or to express the third parties’ desired message:

When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism. Petitioners’ assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition.¹⁸⁶

Marsh and *Summum* hold that the same is true under the Establishment Clause. When the government engages in legislative prayer, those who disagree with the message cannot force the government to be silent or to change its message, no matter how sincere their concerns: “We do not

182. *Summum*, 129 S. Ct. at 1134.

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

184. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 686–87 (2005) (plurality opinion) (stating that the Court’s permitting of the Ten Commandments monument on state grounds was “driven both by the nature of the monument and by our Nation’s history” and that “[w]e have acknowledged . . . that ‘religion has been closely identified with our history and government’ . . .”).

185. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

186. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (citation omitted).

2011] *SECTARIAN LEGISLATIVE PRAYER* 1053

doubt the sincerity of those, who like respondent, believe that to have prayer in this context risks the beginning of the establishment the Founding Fathers feared. But this concern is not well founded.”¹⁸⁷

Accordingly, despite third party objections, in *Summum*, the city could accept and display only those monuments that reflected its chosen message regarding the history of the community, and in *Marsh*, the Nebraska legislature could continue participating in the “unambiguous and unbroken history of more than 200 years” of legislative prayer.¹⁸⁸ The city, as speaker, was *not* required to accept monuments from all donors and could communicate the message that it wanted to send through the selection of its monuments, including a monument inscribed with the Ten Commandments. Similarly, legislatures or other deliberative bodies are not required to allow all invocational speakers to deliver an opening prayer and can craft a prayer policy permitting sectarian or nonsectarian prayer provided that the policy does not stem from an impermissible motive. That is, the government may engage in a broader array of government speech without violating the Establishment Clause. And, if this is correct, then *Marsh* now has the broader application for which Justices Kennedy and Scalia argued for in dissent in *Allegheny*. That is, post-*Summum*, the exception has become the rule.

2. *Marsh* and *Summum* Preclude Application of the Endorsement Test to Legislative Prayers

In his *Summum* concurrence, Justice Souter proposed a “reasonable observer” test for facially religious government speech. According to Justice Souter, this test would mirror the endorsement test to provide “coherence within Establishment Clause law”¹⁸⁹ and would require courts to determine “whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.”¹⁹⁰ Justice Souter’s reliance on the endorsement test is misplaced, however, because it focuses on the wrong person in the communicative process—the observer—instead of the speaker. Rather than analyze what is critical in the government speech context—the government’s intent—the endorsement test considers the effect of the message on a reasonable observer who is aware of the history and context.

187. *Marsh*, 463 U.S. at 795.

188. *Id.* at 792.

189. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring).

190. *Id.*

But the government's reasons for engaging in the speech (e.g., solemnizing an event or participating in the long-standing tradition of legislative prayer) may differ significantly from how others interpret that message. That is, even though the government controls the content of its speech, it cannot control how others interpret a monument or other form of government speech. After all, government speech, such as the monument in *Summum*, is not limited to "convey[ing] only one 'message.'"¹⁹¹ Those who hear the government's message may interpret that message in various ways: "[e]ven when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."¹⁹² Yet the fact that third parties might ascribe different meanings to the government's speech does not change the fact that the government intended a specific message: "[I]t frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor."¹⁹³

Contrary to Justice Souter, then, the "reasonable observer" test does not apply to facially religious government speech. Under the government speech doctrine, the government has the right to say what it wants. Under *Marsh*, the government can "want" to engage in legislative prayer provided it does not have an improper motive. Thus, as in *Marsh*, a court's Establishment Clause analysis must focus on the government's intent when dealing with facially religious government speech. In fact, if a court requires the government to convey only those messages that a reasonable observer would view as neutral towards religion, the government loses the "right to 'speak for itself.'"¹⁹⁴ Instead of "say[ing] what it wishes," the government is forced to filter its speech to account for how the reasonable observer might interpret the government's message—even though, as *Summum* suggested, such an observer may interpret the message differently from how the government intended.

Put differently, the endorsement test presupposes a premise that *Summum* and *Marsh* reject—that the government's message can be

191. *Id.* at 1135; *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010) ("But a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.").

192. *Summum*, 129 S. Ct. at 1135.

193. *Id.* at 1136.

194. *Id.* at 1131.

2011] *SECTARIAN LEGISLATIVE PRAYER* 1055

determined by the meaning that others attribute to the government, i.e., as *Allegheny* put it, the “effect of the crèche [or other religious display] on those who viewed it,”¹⁹⁵ or as the district court in *Joyner* stated, “the effect of affiliating the Government with that particular faith or belief.”¹⁹⁶ The government speech doctrine, however, is not predicated on the “effect” of the government’s speech on others regardless of the religious/secular or sectarian/nonsectarian nature of that speech. Because the government is no longer merely facilitating speech but, instead, engaging in it, the operative question shifts from who is speaking—private party or the government—to what message the government intended to convey:

If there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program’s operation.¹⁹⁷

The investigation into the “purpose and object” of facially religious government speech, however, is just an inquiry into the government’s intent in engaging in the speech. Where, as in *Marsh*, the government does not attempt to exploit the prayer opportunity, the court does not concern itself with the content of the prayer. Similarly, if the government selects invocational speakers without attempting to advance one faith, there is no Establishment Clause violation: “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.”¹⁹⁸

Thus, under *Marsh* and *Summum*, the focus is not on what a prayer or monument might mean to a third party observer, but on the government’s reasons for approving the prayer policy or monument in the first instance. And while the endorsement test is not well suited for determining the intent of the government actor, *Marsh*’s “impermissible intent” test is. Thus, when speaking, the government violates the Establishment Clause not simply by engaging in facially religious speech but by engaging in such speech for the purpose of promoting or advancing religion: “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over

195. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 599 (1989).

196. *Joyner v. Forsyth County*, No. 1:07CV243, 2009 WL 3787754, at *2 (M.D.N.C. Nov. 9, 2009).

197. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 838–39 (1995).

198. *Marsh v. Chambers*, 463 U.S. 783, 793–94 (1983).

another.”¹⁹⁹ Given the long-standing history of legislative invocations, such facially religious speech violates the Establishment Clause only when the government expressly exploits “the prayer opportunity to proselytize or advance any one, or to disparage any other, faith or belief.”²⁰⁰

Of course, to survive Establishment Clause review, the government’s proposed reason must “be sincere and not a sham.”²⁰¹ Thus, if a town council, as in *Wynne*, uses legislative prayer “to advance its own religious view in preference to all others” by excluding a member of the community from the political process and soliciting support for its specific sectarian practices from like-minded religious leaders,²⁰² the town council cannot seek refuge in *Marsh*. But, as *Marsh* expressly states, if the government does not use legislative prayer to promote or disparage any particular faith, then the Establishment Clause is not implicated, and absent a showing of impermissible intent, the courts will not “parse the content of a particular prayer.”²⁰³

Post-*Summum*, courts cannot simply rely on the facially religious nature of the speech—i.e., what “the public ‘sees and hears’”—when resolving an Establishment Clause challenge because the government’s reasons for engaging in speech (e.g., solemnizing legislative meetings in *Marsh* or celebrating local history in *Summum*) may differ significantly from the purpose that an observer ascribes to the government. But, given that *Marsh*’s impermissible intent test focuses on whether the government’s actual purpose is to proselytize or disparage a particular religion, the *Marsh* test is also consistent with the distinguishing feature of the government speech doctrine—the government’s right to determine its own message within the two hundred year history of legislative prayer.

199. *Larson v. Valente*, 456 U.S. 228, 244 (1982). Under this view, the government must be “non-preferential.” That is, although the government is allowed to favor religion over non-religion, it cannot discriminate in favor of or against particular religions. See *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting); *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., dissenting) (“[T]here is nothing unconstitutional in a State’s favoring religion generally”); *Salazar v. Buono*, 130 S. Ct. 1803, 1818–19 (2010) (“The Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society. . . . Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.”). But see Douglas Laycock, *Equal Access and Moments of Silence: The Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1 (1986).

200. *Marsh*, 463 U.S. at 794–95.

201. *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987).

202. *Wynne v. Town of Great Falls*, 376 F.3d 292, 302 (4th Cir. 2004).

203. *Marsh*, 463 U.S. at 795.

204. *Joyner v. Forsyth County*, No. 1:07CV243, 2009 WL 3787754, at *7 (M.D.N.C. Nov. 9, 2009) (quoting *Simpson v. Chesterfield County Bd. of Sup’rs*, 404 F.3d 276, 282 (2005)).

2011] SECTARIAN LEGISLATIVE PRAYER 1057

III. SECTARIAN LEGISLATIVE PRAYER UNDER *MARSH* AND *SUMMUM*

Although *Marsh* holds that the Founders did not “intend[] the Establishment Clause of the [First] Amendment to forbid” legislative prayers,²⁰⁵ it does not expressly reference sectarian invocations. Thus, even if Nebraska’s prayer policy is wholly consistent with “the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged,”²⁰⁶ a policy that allows sectarian references may not be similarly consistent. But, given that *Marsh* does not permit courts to focus initially on the content of the prayer, it might permit some form of sectarian prayer. That is, under *Marsh* and *Summum*, the sectarian or nonsectarian nature of the prayer is initially irrelevant to the Establishment Clause analysis unless there is evidence that the government had an impermissible motive: “[t]he content of the prayer is not of concern to judges where, as here, there is no indication” that the government intended to exploit the prayer opportunity.²⁰⁷

Of course, if the same Presbyterian minister made sectarian references to the same Presbyterian deity for sixteen years, the Supreme Court’s analysis might have been different. Such continuing reliance on one religious leader from one denomination to make sectarian references to one deity might provide evidence that the Nebraska legislature was discriminating in its selection procedure, proselytizing, or attempting to advance that particular Christian sect. But the *Marsh* Court did not preclude any and all sectarian references because to do so would have been inconsistent with the long-standing history and tradition upon which to Court relied.²⁰⁸ As the Court stated in *Van Orden v. Perry*:

205. *Marsh*, 463 U.S. at 790.

206. *Id.* at 791.

207. *Id.* at 794. Luther and Caddell rely on the same language from *Marsh* but do not believe this language is compatible with the government speech doctrine. Luther & Caddell, *supra* note 5, at 596–97 (“[T]his [government speech] doctrine must be reconsidered or else other manifestations of speech, including but not limited to religious speech, are likely to become strangers to the public square.”). There are at least two reasons that their argument is not persuasive. First, subsequent to their article, the Court decided *Summum*, in which the Court provided its most detailed analysis of the government speech doctrine and which alters the Establishment Clause analysis. Second, Luther and Caddell’s claim that “the prayer itself . . . always should be viewed as private speech protected by the Free Exercise and Free Speech Clauses” seems inconsistent with *Marsh* and *Summum*. *Id.* at 596. Given that the minister in *Marsh* was employed and paid by the Nebraska, there is good reason to view his legislative prayers as government speech, which the Court held to be constitutional. Moreover, other prayer practices might be government speech even if *Marsh* is not and, provided they do not proselytize or disparage, could survive Establishment Clause review.

208. *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (“As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from

1058 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

“Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”²⁰⁹ Yet if *Marsh* and *Sumnum* allow for sectarian legislative prayer in certain circumstances, it is important to consider when such sectarian references are constitutional. The remainder of this Article focuses on that consideration.

A. A Model Prayer Policy

As with most Establishment Clause claims, the constitutionality of a particular sectarian invocation is fact dependent: “Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts.”²¹⁰ Given the myriad of ways that federal, state, and local governments might engage in legislative prayer—from formal policies to spontaneous prayers at the beginning of some meetings—there is no way to evaluate all possible variations of sectarian invocations. Thus, to begin analyzing the constitutionality of sectarian legislative prayer under *Marsh* and *Sumnum*, this subpart proposes a model policy, some form of which has been used by legislatures and other deliberative bodies across the country.²¹¹ Drawing on Supreme Court precedent, the model policy incorporates the general features of legislative prayer that courts have

pursuing legitimate secular ends through nondiscriminatory sectarian means.”); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) (“[T]he mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause. Rather, what is prohibited by the clause is a more aggressive form of advancement, i.e., proselytization.”) (citing *Marsh*, 463 U.S. at 794–95).

209. *Van Orden v. Perry*, 545 U.S. 677, 690 (2005); see also *id.* at 690 n.8 (2005) (Rehnquist, C.J., plurality) (“In *Marsh*, the prayers were often explicitly Christian”); *Marsh*, 463 U.S. at 818 n.38 (Brennan, J., dissenting) (noting that several state legislatures engaged in overtly sectarian legislative prayers); *Newdow v. Bush*, 355 F. Supp. 2d 265, 285 n.23 (D.D.C. 2005) (recognizing that “the legislative prayers at the U.S. Congress are overtly sectarian”); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (“The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. . . . Prayers in our legislative halls . . . and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment.”).

210. *Glassroth v. Moore*, 335 F.3d 1282, 1288 (11th Cir. 2003); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (“[T]he inquiry calls for line-drawing; no fixed, *per se* rule can be framed.”).

211. The policy set forth is similar to the Forsyth County, North Carolina policy that currently is pending before the Fourth Circuit Court of Appeals. Thus, this Part considers the Establishment Clause question in the context of an ongoing controversy. It also embodies some general features that the Court and some commentators have taken to be important for sectarian legislative prayer under the Establishment Clause—even though they might have applied the improper test. See, e.g., *Delahunty, supra* note 5, at 565 (“The bedrock claim here is that by giving expression to the diversity of the state population’s religious views by means of some such selection procedure, the legislature can insure that no unconstitutional preference or endorsement arises.”).

2011] *SECTARIAN LEGISLATIVE PRAYER* 1059

previously upheld to determine whether sectarian references under such a policy would survive Establishment Clause review. Consider the following model policy:

1. The purpose of this policy is to solemnize the proceedings of the government entity by allowing an invocation or prayer to be offered at the start of its meetings.²¹²
2. No person in attendance at any such meeting shall be required to participate in any invocation or prayer that is offered.²¹³
3. The invocation or prayer shall be given by a volunteer who is a religious leader or clergy member of a religious group with an established presence in the local community.²¹⁴
 - a. The government entity shall compile a list of the religious institutions with an established presence in the local community from: (i) the annual Yellow Pages phone book entries for “churches,” “congregations,” or “other religious assemblies;” and (ii) requests from specific religious groups asking to be included in the list. The government entity shall update the list on or about November 1 of each calendar year.²¹⁵
 - b. On or about December 1 of each calendar year, the government entity shall mail an invitation to the “religious leader” of each congregation or religious group on the government entity’s list, referenced in paragraph 3(a) above.²¹⁶
 - c. Individuals responding to the invitation shall be scheduled on a first-come, first-serve basis to give an invocation or prayer at a meeting during the next calendar year.²¹⁷

212. *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring) (“Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.”).

213. *Marsh*, 463 U.S. at 792 (“Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to ‘religious indoctrination,’ . . . or peer pressure . . .”).

214. *Id.* at 792 (“To invoke divine guidance on a public body . . . is not, in these circumstances, and ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”). The “established presence” requirement tracks the Court’s analysis in ballot access cases, where candidates must have a “significant modicum of support.” See, e.g., *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Am. Party of Tex. v. White*, 415 U.S. 767, 782–83 (1974). Moreover, this requirement recognizes that there should be no Establishment Clause problem if the government does not invite an individual who claims to represent a religion of one because such an idiosyncratic religious belief would not be a part of “beliefs widely held among the people of this country.” *Id.*

215. *Pelphrey v. Cobb County*, 547 F.3d 1263, 1278, 1282 (11th Cir. 2008).

216. There is nothing magical about the specific dates given in the model policy. The key is that the government adheres to a set schedule to promote uniformity and to insure a consistent application of the policy.

217. *Simpson v. Chesterfield County Bd. of Sup’rs*, 404 F.3d 276, 285 (4th Cir. 2005) (“Indeed,

4. No person who gives an invocation or prayer shall be compensated for his or her service.²¹⁸
5. The government entity shall take reasonable steps to ensure that a variety of eligible invocational speakers are given the opportunity to provide the invocation or prayer at the government entity's meetings, but no invocational speaker shall be scheduled to give the prayer or invocation at consecutive meetings or at more than two meetings during any calendar year.²¹⁹
6. The government entity shall not engage in any prior review of or inquiry about the content of the prayer that any invocational speaker might offer.
7. Prior to the start of the meeting, someone from the government entity shall introduce the invocational speaker and invite those who wish to do so to stand for the invocation or prayer.²²⁰
8. By opening the prayer opportunity to all religious groups in the community, the government entity intends to acknowledge and express its respect for the diversity of religious denominations and faiths represented and practiced among the members of the local community.²²¹

Under this model policy, sectarian prayer is not only possible but also probable. Because the government does not review the content of the prayer before the meeting, invocational speakers may make specific

the selection aspect of the practice here is in many ways more inclusive than that approved by the *Marsh* Court. . . . In contrast to *Marsh's* single Presbyterian clergyman, the County welcomes rabbis, imams, priests, pastors, and ministers. Chesterfield not only sought but achieved diversity. Its first-come, first-serve system led to prayers being given by a wide cross-section of the County's religious leaders.").

218. If there is no Establishment Clause violation when the government pays a chaplain, as in *Marsh*, there should not be a violation when the religious leaders are not compensated for giving the invocation. *Marsh*, 463 U.S. at 794 ("Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature's chaplaincy; remuneration is grounded in historic practice . . ."); *Simpson*, 404 F.3d at 285 ("Indeed, the selection aspect of the practice here is in many ways more inclusive than that approved by the *Marsh* Court. Ministers in Chesterfield, unlike in *Marsh*, are not paid with public funds.").

219. If the same chaplain could give the invocation for sixteen consecutive years, there should be no Establishment Clause violation when the same clergy member gives an invocation twice during the same year. *Marsh*, 463 U.S. at 793-94 ("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.").

220. *Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*. The *Marsh* majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there.").

221. *Simpson*, 404 F.3d at 286 ("Chesterfield has likewise made plain that it was not affiliated with any one specific faith by opening its doors to a very wide pool of clergy."); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1277 (11th Cir. 2008) ("This diversity of speakers, in contrast with the chaplain of one denomination allowed in *Marsh*, supports the finding that the County did not exploit the prayers to advance any one religion.").

2011] *SECTARIAN LEGISLATIVE PRAYER* 1061

references to their specific deities, thereby giving rise to sectarian legislative prayer. The model policy does not, by itself, determine the difficult question of who is speaking—the government or the invocational speaker: “[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.”²²² But, under *Sumnum*, this is a threshold question given that the nature of the speaker dictates the appropriate Establishment Clause test. Accordingly, the next subpart attempts to do just this—consider who is speaking under the model policy and decide whether sectarian invocations by each type of speaker would survive Establishment Clause review.

B. Applying the Model Policy—Government Speech v. Private Speech

Because different Establishment Clause rules apply to different types of speakers, courts must determine who is speaking before evaluating the government’s prayer policy. If the government is speaking, then *Marsh’s* intent test governs, but if the government has created a forum for private invocations, then the endorsement test applies. But which is it? Under the model policy, the government invites the leaders of all religious organizations in the community but imposes no restrictions (except perhaps precluding any proselytizing or disparaging references to other religions) on the prayers that the speakers can give. Does this constitute government speech? Is the government sending a message through each prayer or through the policy as a whole? Has the government simply adopted the speech of others to convey a message about the diversity of religious traditions in the community while solemnizing its meetings? Or has the government created a forum for legislative prayer? If the latter, can the government exclude certain speakers or certain types of prayers? If so, under what circumstances? To begin answering these difficult Free Speech Clause and Establishment Clause questions, it is useful to consider: (1) what features of the model policy suggest government or private speech; and (2) how the respective Establishment Clause tests apply to sectarian prayers given by each type of speaker.

1. Sectarian Legislative Prayer as Government Speech

The government speech doctrine seems to create two immediate Establishment Clause problems when applied to sectarian legislative

222. *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1132 (2009).

1062 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

prayers. First, if the government has effective control over speech that contains sectarian references, then the government seems to be endorsing one religion or sect over others in violation of the Establishment Clause. By invoking the guidance or blessings of “Jesus,” “Yahweh,” or “Allah” as part of its opening prayer, the government suggests to others that it favors a specific religion.²²³ Second, government sectarian prayer might contravene the Establishment Clause principle set out in *Lee*: “[i]t 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.’”²²⁴ Thus, at first glance, it might appear that the government speech doctrine makes the Establishment Clause problems worse, not better.

But, as *Marsh* demonstrates, legislative prayers—whether sectarian or nonsectarian—do not automatically violate the Establishment Clause. Courts can determine the type of prayer only by looking at the language used in a specific prayer. Yet, under *Marsh*, courts cannot inquire about the content of the prayers unless the government has exploited the prayer opportunity. Thus, the constitutionality of legislative prayer cannot hinge on an a priori classification of the prayers as sectarian or nonsectarian. That is, because *Marsh* prohibits courts from parsing the language of invocations, the government as speaker can permit sectarian invocations provided it does not have an impermissible motive. If, as under the model policy, the government’s intent is to solemnize its meetings and to acknowledge the diverse religious traditions in the community, then there is no basis for the courts to look into or parse the content of the prayers. Under these circumstances, the distinction between sectarian and nonsectarian prayers falls away.

Furthermore, if the government is speaking, legislative prayer does not implicate the threat the Court identifies in *Lee* because the government is not composing an official prayer for others to recite. Instead, the government is either giving the prayer itself or “enlist[ing] private entities to convey its own message.”²²⁵ If the former, then the repeated use of the same sectarian references could, as in *Wynne*, give rise to an Establishment Clause violation. Having government officials give the same prayers from the same faith perspective could demonstrate the government’s intent to proselytize or advance a particular faith. But even this does not give rise to an automatic Establishment Clause

223. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 859 (2005).

224. *Lee*, 505 U.S. at 588 (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

225. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

2011]

SECTARIAN LEGISLATIVE PRAYER

1063

violation. After all, Nebraska retained the same Presbyterian minister, who gave the same type of sectarian and Judeo-Christian prayers over a sixteen year period, without violating the Establishment Clause.

Moreover, if the government adopts the speech of others as its own, legislative prayers given by third parties still could be government speech: “Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.”²²⁶ Under *Sumnum* and *Hurley*, the government can assemble various religious leaders to convey its message through the opening prayers: “But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.”²²⁷ And this is true regardless of how third parties interpret the prayer policy: “Indeed, this general rule[’s] . . . point is simply the point of all speech protection, which is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.”²²⁸ By adopting a formal prayer policy, the government entity controls both the types of prayer permitted as well as the speakers who are eligible to deliver them. By allowing established religious groups in the area to offer prayers from their specific faith traditions, the government controls the legislative prayers and combines the “multifarious [religious] voices” to convey its desired message.²²⁹

Furthermore, if the government is speaking, it presumably could request or even require invocational speakers to avoid proselytizing or disparaging other religions. Such a request would be consistent with the government having control over the speech:

Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce

226. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995). In *Hurley*, the parade organizers did not create or dictate the specific content of each group marching in the parade. *Id.* at 569. Yet the organizers did not lose the protection of the First Amendment simply because they assembled various groups that, when combined, did not convey only one specific message. *Id.* at 569–70. In fact, the First Amendment expressly protected their right to determine which groups would be allowed to march in the parade. *Id.* at 574 (“Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day.”).

227. *Id.* at 569–70.

228. *Id.* at 573–74.

229. *Simpson v. Chesterfield County Bd. of Sup’rs*, 404 F.3d 276, 288 (4th Cir. 2005) (“The context, and to a degree, the content of the invocation segment is governed by established guidelines by which the Board may regulate the content of what is or is not expressed when it ‘enlists private entities to convey its own message.’” (quoting *Simpson v. Chesterfield County Bd. of Sup’rs*, 292 F. Supp. 2d 805, 819 (E.D. Va. 2003))).

a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration [T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.²³⁰

As a speaker, the government has the right to exclude messages it does not like, such as "proselytization" or "disparagement," especially when *Marsh* expressly precludes the government from exploiting the prayer opportunity for these purposes. In requesting that speakers avoid such invocations, the government would be demonstrating that its intent conforms to Establishment Clause requirements: "[t]he *Marsh* Court's focus was—as ours should be—not on the content of the prayer but on the practices and motivations behind the prayer opportunity."²³¹ As a result, by requiring speakers to conform with *Marsh*, the government would be conforming its message to the Establishment Clause, not violating it.

In addition, the fact that the government might adopt the prayer policy to convey a particular message while a particular invocational speaker might give the prayer to promote her particular faith does not by itself violate the Establishment Clause:

[A] painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same "message."²³²

Under *Sumnum*, the government can allow a religious leader to refer to "Jesus," "Yahweh," "Allah," or some other deity without intending to adopt or promote that leader's particular faith. Under *Marsh*, *Sumnum*, and *Salazar*, the fact that the public "sees and hears" facially religious speech²³³—be it legislative prayers, a monument inscribed with the Ten Commandments, or a solitary Roman cross on Sunrise Rock—is not

230. *Hurley*, 515 U.S. at 574.

231. *Doe v. Tangipahoa Parish Sch. Bd. (Doe I)*, 473 F.3d 188, 212 (5th Cir. 2006) (Clement, J., dissenting). See also *Stein v. Plainwell Cmty. Sch.*, 822 F.2d 1406, 1416 n.9 (6th Cir. 1987) (Wellford, J., dissenting) ("That these [congressional sectarian] invocations pass constitutional muster according to *Marsh* indicates, it seems to me, a critical flaw in the majority's analysis. The mention of the Deity, even in the Christian context, in the invocation and benediction at issue, are not of critical import as indicated in the constitutional practices of the Senate chaplain.").

232. *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1136 n.5 (2009).

233. See, e.g., *Joyner v. Forsyth County*, No. 1:07CV243, 2009 WL 3787754, at *8 (M.D.N.C. Nov. 9, 2009) ("Critically, it is the prayers themselves that the public 'sees and hears,' not the selection policy.").

2011]

SECTARIAN LEGISLATIVE PRAYER

1065

dispositive. Instead of analyzing how third parties might interpret the government's message, courts must consider the government's intent. Thus, because the government's intended message is controlling,²³⁴ the model policy can permit sectarian references by religious leaders of different faiths without contravening Establishment Clause principles.

Under the government speech doctrine, then, the government can claim the speech of third parties as its own, even if it sets only the general parameters of the policy and not the specific content of the prayers. For example, in *Marsh*, the Nebraska legislature did not control the specific content of the minister's prayers, which remained "Judeo-Christian" even after the minister removed specific references to "Christ."²³⁵ But the legislative prayers still were government speech and still did not violate the Establishment Clause. Similarly, under *Marsh* and *Sumnum*, government officials can allow religious leaders from diverse faiths to make sectarian references in the invocation to convey their desired message:

Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.²³⁶

There are two important corollaries to the government's right to select religious speakers. First, given the government's control over its message, it also must have the right to exclude other would-be speakers, such as atheists and agnostics, without infringing the Establishment Clause. That is, because *Marsh* permits the government to advance religion over nonreligion by allowing prayer at the beginning of its meetings,²³⁷ the government must be able to exclude nonreligious or anti-religious speakers under the model policy.²³⁸ Otherwise, a third party could demand the right to speak at the opening of a meeting,

234. *Sumnum*, 129 S. Ct. at 1136 ("Contrary to respondent's apparent belief, it frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.")

235. See *Marsh v. Chambers*, 463 U.S. 783, 793 n.14 (1983).

236. *Sumnum*, 129 S. Ct. at 1134.

237. See, e.g., *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 673 (1989) (Kennedy, J., dissenting) ("If the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation.")

238. See *Pelphrey v. Cobb County*, 547 F.3d 1263, 1281 (11th Cir. 2008) ("The 'impermissible motive' standard does not require that all faiths be allowed the opportunity to pray. The standard instead prohibits purposeful discrimination.")

1066 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

forcing the government as speaker to relinquish the protection afforded by the First Amendment: “Under this approach any contingent of protected individuals with a message would have the right to participate in [the organizers’] speech [which would] violate[] the fundamental rule of protection under the First Amendment that a speaker has the autonomy to choose the content of his own message.”²³⁹ Thus, *Marsh* and *Sumnum* permit the government to limit the prayer policy to religious groups with an established presence in the community.

Second, the model policy is not unconstitutional simply because representatives from one faith repeatedly give the invocation. Under the model policy, a particular leader from a specific congregation can give an invocation at most twice during the year, but there is no limit on how many times individuals who are Methodist, Jewish, Muslim, Catholic, or some other faith can lead the prayers. The policy depends on volunteers who sign-up on a first-come, first-serve basis. If one faith constitutes the largest denomination in a community and many religious leaders of that same denomination volunteer, it is unremarkable that the majority of speakers would be from that one faith. But, as *Zelman v. Simmons-Harris* explains in the context of school vouchers, the religious make-up of the community does not automatically violate Establishment Clause principles:

It is true that 82% of Cleveland’s participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. To attribute constitutional significance to this figure, moreover, would lead to the absurd result that . . . an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools.²⁴⁰

Unlike the school choice program in *Zelman*, which was “entirely neutral with respect to religion,”²⁴¹ a legislative prayer policy is not. But *Marsh* established that the lack of “neutrality” between religion and nonreligion with respect to legislative invocations is wholly consistent with the Establishment Clause, i.e., that the Founders did not intend the Establishment Clause to preclude legislative prayer. Hence, provided that the selection process is neutral, any disparity in the percentages of particular faiths that participate in the prayer policy violates the Establishment Clause only if the “reappointment stemmed from an

239. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

240. *Zelman v. Simmons-Harris*, 536 U.S. 639, 657 (2002).

241. *Id.* at 662.

2011] *SECTARIAN LEGISLATIVE PRAYER* 1067

impermissible motive.”²⁴²

Under the model prayer policy, however, there is no basis to ascribe an impermissible intent to the government. The policy is designed to show the government’s “commitment to participation by persons of all faiths in public life.”²⁴³ Even though the government’s speech might contain sectarian references, the model policy is open to all faiths on equal terms and, as a result, it is more inclusive than the policy upheld in *Marsh*²⁴⁴ and it avoids the problem of having the government analyze the terms of each prayer to determine whether it is “too sectarian,” i.e., it enables the government to stay out of the business of regulating and approving the content of the legislative prayers. Accordingly, if the legislative invocations are government speech, then, absent evidence of the government’s exploiting the prayer opportunity to proselytize or disparage, sectarian and nonsectarian prayers should pass Establishment Clause review.

2. Sectarian Legislative Prayers as Private Speech

If the government is not speaking through the opening prayers, then the invocation givers must be the speakers for First Amendment purposes. That is, if the government lacks the requisite control over the prayers, then it must have created a “prayer forum” at the start of its meetings by opening the prayer opportunity to the leaders of the various religions in the community.²⁴⁵ As a result, given that legislative prayers implicate both the Free Speech and Establishment Clauses, the government must satisfy both the forum rules imposed by the Free

242. *Marsh v. Chambers*, 463 U.S. 783, 793–94 (1983). Just as the Cleveland officials did not create the disparity in parochial and secular private schools in *Zelman*, government officials do not control the religious demographics of the community. By opening the prayer opportunity to all faiths in the community, the government shows respect for all religions and allows for “a wide cross-section of the County’s religious leaders” to participate. *Simpson v. Chesterfield County Bd. of Sup’rs*, 404 F.3d 276, 285 (4th Cir. 2005). The fact that some religious groups may not want to participate or that some denominations provide the prayer on more than one occasion does not change the analysis.

243. *Simpson*, 404 F.3d at 283.

244. See, e.g., *Pelphrey*, 547 F.3d at 1274 (“The taxpayers would have us parse legislative prayers for sectarian references even when the practice of legislative prayers has been far more inclusive than the practice upheld in *Marsh*. We decline this role of ‘ecclesiastical arbiter,’ . . . for it ‘would achieve a particularly perverse result . . .’” (internal citations omitted)).

245. In *Sumnum*, the Court recognized that the same could happen in relation to permanent monuments:

To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument—for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message.

Pleasant Grove City v. Sumnum, 129 S. Ct. 1125, 1138 (2009).

Speech Clause and the anti-establishment concerns protected by the Establishment Clause. The government's ability to preclude particular speakers depends on the specific type of forum created—designated open, designated limited, or nonpublic.²⁴⁶ No longer having effective control over the message to qualify for protection under the government speech doctrine, the government loses its ability to make content-based and viewpoint-based distinctions. Instead, at a minimum, the government restrictions on the forum must be reasonable and viewpoint neutral.²⁴⁷ Moreover, under the Establishment Clause, because the government opened its meetings to third party speech, the government must remain neutral between and among the speakers who use the forum, which is a hallmark of the endorsement test.²⁴⁸ That is, if the government is not speaking, then the government cannot regulate in a way that sends a message that a reasonable observer would interpret as favoring one religious sect over another.

With respect to the free speech analysis, the government's permitting legislative invocations appears reasonable in light of *Marsh's* approving the two hundred year history of such prayers. Furthermore, legislative prayers may, as Justice O'Connor acknowledged, serve the secular purposes of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."²⁴⁹ Such purposes are served by prayers that the government controls as well as by those that third parties offer in a forum created by the government. Thus, given the long-standing history and the secular justifications for such practices, it is reasonable for the government to permit legislative prayer. But could the government limit the speakers or the types of prayers in such a forum? If the government opens up the forum at all, "must [it] relinquish its power to exclude

246. Legislative prayers at the start of government meetings are not a traditional open forum because such meetings are not "streets and parks[,] which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

247. *Id.* at 46 ("Public property which is not by tradition or designation a forum for public communication is governed by different standards. . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."); *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 806 (1985) (stating that restrictions imposed on access to a nonpublic forum must be "reasonable in light of the purpose served by the forum and [be] viewpoint neutral").

248. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.").

249. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

2011] *SECTARIAN LEGISLATIVE PRAYER* 1069

those prayers that proselytize or disparage”²⁵⁰

In general, the government has greater authority to control who speaks and on what topics when the speech occurs in a nonpublic forum. Because the forum is not generally open to the public, the government can preserve the forum for its intended purposes: “Implicit in the concept of the nonpublic forum is the right [of the government] to make distinctions in access on the basis of subject matter and speaker identity.”²⁵¹ Similarly, if the government creates a designated limited forum, it may restrict the forum “for a limited purpose such as use by certain groups . . . or for the discussion of certain subject.”²⁵² Although the government must remain viewpoint neutral under both types of forum, the proposed model policy does not favor any religious viewpoint over any other. By inviting all established religions to participate, the government opens the prayer opportunity to all. This may privilege religion over nonreligion because atheists and agnostics are not invited, but *Marsh*, in allowing legislative prayer generally, held that the Establishment Clause permits this type of “discrimination” in favor of legislative prayers.

Thus, given the unique history of invocations under the First Amendment, the government can create a legislative prayer forum with the same Establishment Clause limitations that *Marsh* imposes on the government when it is the speaker—no proselytizing or disparaging any one religion. By allowing a variety of religious viewpoints and prohibiting proselytizing and disparaging prayers, the government insures neutrality between and among religions: “[T]he [Establishment Clause’s] guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”²⁵³ And, as *Marsh* recognizes, allowing legislative prayers is a “tolerable acknowledgment of beliefs widely held among the people of the country” or the local community.²⁵⁴ Of course, the government cannot interject itself into the forum in such a way that it favors particular religious speakers or particular religious viewpoints, but the Establishment Clause does not prevent the government from restricting the start of its meetings to the intended purpose: “[t]o invoke Divine guidance on a public body

250. *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1240 (10th Cir. 1998) (Lucero, J., concurring).

251. *Perry*, 460 U.S. at 49.

252. *Id.* at 46.

253. *Rosenberger*, 515 U.S. at 839.

254. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

1070 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

entrusted with making the laws.”²⁵⁵

In a designated limited or nonpublic forum, then, the government can preclude certain types of speakers or prayers, as in *Turner* and *Snyder*, provided that the proffered prayer falls outside the viewpoint neutral parameters that the government set in creating the forum. Prayers that either disparage the religious beliefs of others or proselytize in relation to a particular faith go beyond the historical context that supported legislative prayer in the first instance.²⁵⁶ As *Marsh* instructs, legislative prayer by itself neither is “a proselytizing activity” nor does it “symbolically plac[e] the government’s ‘official seal of approval on one religious view.’”²⁵⁷ Instead, “it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”²⁵⁸

But even if legislative prayer does not encroach on free speech principles, it still must pass Establishment Clause review. When the government opens a forum and permits religious groups to use that forum,²⁵⁹ the Court has applied the endorsement test, and as evidenced by *Allegheny*, is apt to do so with respect to legislative prayer. To determine whether there is an unconstitutional endorsement, courts evaluate the message the government conveys to a reasonable observer who is aware of the history and context of the government activity.²⁶⁰ But to understand the government’s message under the model policy, one cannot consider a single prayer in isolation. While a Presbyterian minister might give a prayer one week, an imam might provide the invocation at the next meeting. Thus, a court must consider the entire prayer policy, not just individual prayers in isolation:

Although the religious and indeed sectarian significance of the crèche . . . is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a

255. *Id.*

256. There is a threat that, in determining whether a proposed prayer proselytized or disparaged, the government would be reviewing the content of prayers and, therefore, would become “entangled” with religion. But to the extent this is a problem, it is one that *Marsh* considered and resolved in favor of legislative prayer. Recall that in rejecting the dissent’s argument, the *Marsh* majority noted that “[t]he unbroken practice [of legislative prayer] for two centuries in the National Congress . . . gives abundant assurance that there is no real threat ‘while this Court sits.’” *Id.* at 795 (quoting *Panhandle Oil Co. v. Miss. ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)).

257. *Id.* at 792.

258. *Id.*

259. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 838–40 (1995).

260. *See Salazar v. Buono*, 130 S. Ct. 1803, 1819–20 (2010) (The endorsement “test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement.”).

2011] *SECTARIAN LEGISLATIVE PRAYER* 1071

religious painting, negates any message of endorsement of that content.²⁶¹

As in the museum context, the reasonable observer must consider individual prayers within the context of the model policy itself and the long-standing tradition of legislative prayer. A reasonable observer who is aware of the history and context of the model policy would know that: (1) the government invites religious leaders from all religious groups with an established presence in the community on a first-come, first-serve basis; (2) no religious leader is permitted to offer a prayer at consecutive meetings or more than twice in a calendar year; (3) the government neither reviews nor edits the prayers; and (4) the model policy is intended to acknowledge and express the government's respect for the diversity of religious denominations and faiths represented and practiced among its citizens.

Although the policy does not neutralize the religious import of a particular sectarian invocation, the overall policy necessarily alters the observer's understanding of the purpose of the policy. Given the diversity of the religions represented, the reasonable observer cannot simply add up the various allegedly sectarian references and attribute them to the government. Rather, the breadth of the model policy demonstrates the government's respect for all faiths and religions in the community without making any person's religious views relevant to that person's standing in the political community.²⁶² That is, because the prayer opportunity is open to all established religions in the community, the model policy does not "send[] a message to non-adherents 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."²⁶³

Instead of excluding or disparaging certain religions, the policy "recognize[s] the rich religious heritage of our country in a fashion that was designed to include members of the community, rather than to proselytize."²⁶⁴ Consistent with *Simpson*, the model policy promotes the

261. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

262. *See, e.g., County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) ("Under the endorsement test, the 'history and ubiquity' of a practice is relevant not because it creates an 'artificial exception' from that test. On the contrary, the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.").

263. *Id.* at 595 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). *See also Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring) ("The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the [government], significantly diminishes the danger that the message of any one publication is perceived as endorsed by the [government].").

264. *Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352, 356 (4th Cir. 2008).

1072 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

“participation by persons of all faiths in public life.”²⁶⁵ That the opportunity is not open to the nonreligious does not contravene the Establishment Clause because, as *Marsh* notes, “the delegates did not consider opening prayers as a proselytizing activity of symbolically placing the government’s ‘official seal of approval on one religious view.’”²⁶⁶ Thus, even though legislative prayer might allow for special accommodation of religion, its “unique history” poses “no real threat to the Establishment Clause.”²⁶⁷

Of course, if the government creates a designated open forum in which any member of the community (selected on a neutral basis, e.g., selected at random or on a first-come, first-serve basis) could speak at the start of each meeting,²⁶⁸ then the threat of an Establishment Clause problem disappears. The government does not endorse religion over non-religion or one sect over another by opening the forum to everyone. In fact, if the forum is truly open to all speakers, the Establishment Clause prohibits the government’s excluding religious speakers because to do so would show hostility to religion: “[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.”²⁶⁹ Put differently, by creating a designated open forum, the government would relinquish its ability to designate part of the meeting for legislative prayer. *Marsh*, therefore, would have no application. Some speakers might give sectarian invocations, others nonsectarian, and still others political or non-religious statements—none of which would violate the Establishment Clause because a reasonable observer who is aware of the history and context would know that the government had opened the forum to all speakers. Thus, absent some other constitutional problem with the speech, such as obscenity or fighting words, the legislative invocations would be beyond the control or censorship of the government.

265. *Simpson v. Chesterfield County Bd. of Sup’rs*, 404 F.3d 276, 283 (4th Cir. 2005).

266. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

267. *Id.* at 791.

268. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 802 (1985) (“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.”).

269. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 248 (1990); *Widmar v. Vincent*, 454 U.S. 263, 272–75 (1981) (noting that if a state-created forum is “generally” and “equally” open to religious and non-religious groups, then permitting religious groups to have access to the forum does not have a primary effect of advancing religion).

2011]

SECTARIAN LEGISLATIVE PRAYER

1073

CONCLUSION

The mention of legislative prayer, whether sectarian or nonsectarian, tends to strike an emotional chord with people. Such public prayer, for better or worse, takes that which is highly personal for some and displays it in a public setting that is created and controlled by the government. In addition to its emotional impact, legislative prayer raises complex constitutional issues at the intersection of the Free Speech and Establishment Clauses. Although *Marsh* began exploring this intersection, the Supreme Court's increasing reliance on the endorsement test relegated *Marsh* to the status of an exception to the Court's traditional Establishment Clause rules. But *Summum* now requires courts to reconsider this established interpretation of *Marsh*. In light of the Court's unanimous adoption of the government speech doctrine, *Marsh* takes on new and broader significance as a majority of the Court is poised to expand the government's ability to accommodate religion in the public sphere. In particular, the current "conservative" majority of the Court appears ready to follow Justice Kennedy's dissent in *Allegheny*, recognizing that:

Marsh stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.²⁷⁰

After *Summum*, the appropriate test for facially religious speech is *Marsh*'s impermissible intent test, not the endorsement test. To determine whether the government is speaking, courts must look at the level of control that the government has over the speech. If the government has "final approval authority" and exercises "effective[] control," then the message is the government's.²⁷¹ That is, when speaking, the government has the right to convey the message that it "view[s] as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture."²⁷² And, under *Marsh*, this is also true for facially religious government speech, such as legislative prayers. The "unique history" of legislative invocations demonstrates that such prayers are consistent with the

270. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., dissenting).

271. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2010).

272. *Id.*

1074 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

Founders' understanding of the Establishment Clause.²⁷³ As a result, courts are not to parse the content of the prayer—i.e., to look at the specific sectarian or nonsectarian language used—absent evidence that the government intended to exploit the prayer opportunity to proselytize or promote one religion over another.²⁷⁴ That is, if the government simply intends to participate in the long-standing tradition of legislative prayer, “it is not for [courts] to embark on a sensitive evaluation or to parse the content of a particular prayer.”²⁷⁵

Moreover, if a Presbyterian minister's delivering of Judeo-Christian prayers is “simply a tolerable acknowledgment of beliefs widely held among the people of this country,”²⁷⁶ then so too are prayers—even sectarian ones—given by diverse religious leaders from the community. By allowing all religious leaders to pray consistently with their respective faith traditions, the government celebrates all such faiths and allows each to express its rich religious tradition through the opening prayer. And the government's desire to respect all the faiths in any given community is consistent with the requirements of the Establishment Clause as interpreted by *Marsh*,²⁷⁷ *Salazar*,²⁷⁸ *Pelphrey*,²⁷⁹ *Turner*,²⁸⁰ and *Simpson*.²⁸¹

Thus, in light of *Sumnum*, *Marsh* is no longer an outlier but instead stands as a cornerstone in the Court's Establishment Clause

273. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

274. In fact, if *Marsh* precluded any and all sectarian references, then many of the prayers that the United States Senate chaplain gives would be unconstitutional under *Allegheny* and its progeny. The Senate chaplain's prayers have included such expressions as “We pray this in the name of our Lord and Savior, Jesus Christ,” “in Jesus' name,” and “God of Abraham, Isaac, and Israel, god of our Lord Jesus Christ.” See REVEREND RICHARD C. HALVERSON, PRAYERS OFFERED BY THE CHAPLAIN OF THE SENATE OF THE UNITED STATES, S. Doc. No. 98-43 (1984).

275. *Marsh*, 463 U.S. at 795. Justice Kennedy also expressed the same concern in his dissent in *Allegheny*: “Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as censor, issuing national decrees as to what is orthodox and what is not.” *Allegheny*, 492 U.S. at 677–78 (Kennedy, J., dissenting).

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

277. *Id.* at 786 (“From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.”).

278. *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010) (“The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society.”).

279. *Pelphrey v. Cobb County*, 547 F.3d 1263, 1281 (11th Cir. 2008) (“The ‘impermissible motive’ standard does not require that all faiths be allowed the opportunity to pray. The standard instead prohibits purposeful discrimination.”).

280. *Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352, 356 (4th Cir. 2008) (upholding legislative prayers that “recognize[] the rich religious heritage of our country in a fashion that was designed to include members of the community, rather than to proselytize”).

281. *Simpson v. Chesterfield County Bd. of Sup'rs*, 404 F.3d 276, 283 (4th Cir. 2005) (acknowledging our nation's “commitment to participation by persons of all faiths in public life”).

2011]

SECTARIAN LEGISLATIVE PRAYER

1075

jurisprudence. Federal, state, and local governmental entities may participate in “the unambiguous and unbroken practice of . . . opening legislative session with prayer” without violating the Establishment Clause, even if such prayers contain sectarian references.²⁸² That a reasonable observer may feel disaffected by a prayer policy does not show that *the government’s intended message* violates the Establishment Clause; it shows only that the message has a certain effect on that observer. But this reaction by some observers simply is not sufficient to create an Establishment Clause violation: “We do not doubt the sincerity of those, who like respondent, believe that to have prayer in this context risks the beginning of the establishment the Founding Fathers feared. But this concern is not well founded.”²⁸³ If a reasonable observer dislikes the practice, the observer can exercise, what *Summum* takes to be, a primary check on government speech—the right to vote for new officials who will change or discontinue the prayer policy.²⁸⁴ Subject to this electoral check, though, *Marsh* leaves the decision whether to have legislative prayer—be it sectarian or nonsectarian—to the government speaker. And because *Marsh* is no longer an exception, the government is also free to adopt other “policies of accommodation, acknowledgment, and support for religion”²⁸⁵ that are “deeply embedded in the history and tradition of this country”²⁸⁶ without violating the Establishment Clause.

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

283. *Id.* at 795.

284. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009) (“And of course, a government entity is ultimately ‘accountable to the electorate and the political process for its advocacy.’ ‘If the citizenry objects, newly elected officials later could espouse some different or contrary position.’” (quoting *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000))).

285. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989) (Kennedy, J., dissenting).

286. *Marsh*, 463 U.S. at 786.