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ARTICLES

Mired in the *Marsh*: Legislative Prayers, Moments of Silence, and the Establishment Clause

ERIC J. SEGALL†

In numerous communities throughout the United States, the American people are fighting over legislative prayer, and the circuit courts of appeals are struggling over how to handle the problem. For example, in the Fourth Circuit, the Town Council of Great Falls, South Carolina used to regularly begin its meetings with Christian prayers, which led to a lawsuit and a decision invalidating the practice.¹ The very next year, however, the same Fourth Circuit allowed the Chesterfield Board of Commissioners to allow rotating clergy to present prayers at their meetings, even though a Wiccan was denied the same opportunity because of her unconventional religious beliefs.² In the Seventh Circuit, after an invited member of the clergy sang the song “Just a Little Talk with Jesus” in the Indiana legislature, lawsuits were filed, appeals were taken, and eventually the whole controversy ended in a controversial appellate decision denying standing to the plaintiffs.³ The Fifth Circuit also had to review a school-board prayer practice that was overtly Christian but, at the end of long and expensive litigation, also decided the plaintiffs had no standing.⁴ In a Tenth Circuit case, a citizen wanted to offer a “prayer” that disparaged the practice of legislative prayer and was denied that opportunity.⁵ And, here in the Eleventh Circuit, Cobb County, Georgia began its county commission hearings with sectarian prayers, usually Christian, and was allowed to continue the practice primarily because of the Eleventh Circuit’s unwillingness to try to distinguish between secta-

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1. *Wynne v. Town of Great Falls*, 376 F.3d 292, 294 (4th Cir. 2004).

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

3. *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584, 585–86 (7th Cir. 2007).

4. *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (en banc).

5. *See Snyder v. Murray City Corp.*, 159 F.3d 1227, 1228–29, 1236 (10th Cir. 1998) (en banc).

rian and nonsectarian prayer.⁶ Although reasonable people can debate the constitutional validity of legislative prayers, no one can deny that this issue has caused religious and political strife throughout the country.⁷

Part of the reason there has been so much litigation over the validity of legislative prayer is the incomplete treatment the Supreme Court gave this issue in *Marsh v. Chambers*.⁸ In *Marsh*, the Court upheld Nebraska's long-time use of a legislative chaplain to deliver prayers before conducting official business.⁹ Applying no doctrinal test, the Supreme Court simply said that the Founding Fathers began their meetings with legislative prayers, there have been such prayers ever since, and therefore the Court would not rule them unconstitutional.¹⁰ This purely historical test was not reflective of Establishment Clause doctrine at the time, and is still not today. The Court in *Marsh* failed to articulate any nonhistorical legal principle supporting its decision and also failed to lay down specific rules distinguishing constitutional from unconstitutional legislative prayers.¹¹ Thus, it has been up to the lower federal courts to devise guidelines to govern the constitutionality of legislative prayer. The result has been, in a word, chaos.

Twenty-six years after *Marsh*, it is now clear that the Supreme Court should revisit this issue. The circuits are struggling over whether legislative prayers must be sectarian or nonsectarian, and there are many different procedures used by state legislatures and local commissions to choose their clergy, some of which seem constitutionally problematic. Unless the Supreme Court provides clearer guidance, there will continue to be significant, expensive, and divisive litigation on these questions in the lower courts throughout the United States.

Part I of this Article reviews the Eleventh Circuit's recent decision in *Pelphrey v. Cobb County*,¹² which upheld sectarian legislative prayer. Part II discusses one of the difficult issues left unanswered by *Marsh*—whether legislative prayer has to be nonsectarian to be constitutional. Part III argues that the Court should overturn *Marsh*; otherwise numerous core Establishment Clause values will be infringed by state and local

6. See *Pelphrey v. Cobb County*, 547 F.3d 1263, 1266, 1271–72 (11th Cir. 2008). For a larger summary of the numerous disputes surrounding the issue of legislative prayer across the Country, see Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements* (Miss. Coll. Sch. of Law, Research Paper No. 2009-03, 2009), available at <http://ssrn.com/abstract=1335910>.

7. See Lund, *supra* note 6, at 4–5.

8. 463 U.S. 783 (1983).

9. *Id.* at 794–95.

10. See discussion *infra* Part III.A.

11. See discussion *infra* Part III.A.

12. 547 F.3d 1263 (11th Cir. 2008).

governments favoring religion over nonreligion and some religion (almost always Christianity) over other religions. Instead of prayers, legislatures could constitutionally start their sessions with moments of silence allowing those who wish to pray that opportunity without restriction and without offending those members of the public and governmental bodies who do not wish to appeal to divine guidance before they conduct official governmental business.

I. *PELPHREY V. COBB COUNTY*

A. *Background*

The Cobb County Commission and the Cobb County Planning Commission (Commissions) “have a long tradition of opening their meetings with” prayers offered by clergy invited by the county on a rotating basis.¹³ Although the procedures have changed over the years, now a paid staff member chooses the clergy from a random list of different congregations.¹⁴ Although the speakers are supposed to represent different faiths, the plaintiffs¹⁵ compiled data showing that 96.6% of the speakers providing the invocation at Commission meetings between 1998 and 2005, “to the extent their faith was discernable, were Christian.”¹⁶ During that period of time, Jewish, Unitarian, and Muslim religious leaders also occasionally offered opening prayers.¹⁷ Over the past decade, approximately seventy percent of the invocations contained some sectarian, “Christian references,” although the trial court noted that these references typically consisted “merely of the closing, ‘in Jesus’ name we pray’ (albeit, on . . . occasion, with some additional embellishment).”¹⁸

Prior to filing suit, some of the plaintiffs complained to the Commissions about the invocation practice, and further provided some of the commissioners with a list of proposed speakers, but the list was not given to the person responsible for selecting the clergy.¹⁹ The American Civil Liberties Union also wrote to Cobb County asking that it remove sectarian references from the invocations.²⁰ When Cobb County refused

13. *Id.* at 1267.

14. *Id.* at 1267–68.

15. The plaintiffs were Gary “Bats” Pelphrey, Edward Buckner, Roberto Moraes, Wesley Crowe, Jeffrey Selman, Roberta “Bobbi” Goldberg, and Marie Shockley. *Id.* at 1268. All were taxpayers of Cobb County who attended meetings of the Cobb County Commission and the Cobb County Planning Commission and witnessed the invocations. *Id.*

16. *Id.* at 1267.

17. *Id.*

18. *Pelphrey v. Cobb County*, 448 F. Supp. 2d 1357, 1369 (N.D. Ga. 2006) (alteration in original) (footnote omitted), *aff’d*, 547 F.3d 1263.

19. *Pelphrey*, 547 F.3d at 1268.

20. *Id.*

to alter its practices, the plaintiffs, represented by the ACLU, filed suit.²¹

B. *The Law*

The Eleventh Circuit framed the issue as “whether the practice of two county commissions that allow volunteer leaders of different religions, on a rotating basis, to offer invocations with a variety of religious expressions violates the Establishment Clause.”²² The panel began by discussing *Marsh v. Chambers*, where the Supreme Court declined to apply the traditional tests for Establishment Clause challenges and instead upheld the constitutional validity of legislative prayer based on an examination of historical practice.²³

In *Marsh*, the Supreme Court upheld the Nebraska State Legislature’s daily prayer conducted by a paid Presbyterian minister who had led the prayers for sixteen years.²⁴ The *Marsh* Court, according to the Eleventh Circuit, recounted the history of legislative prayer, which began with the first Congress and has continued ever since.²⁵ The Eleventh Circuit also cited *Marsh* for the proposition that “[c]learly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment.”²⁶

The Eleventh Circuit also noted that the *Marsh* Court was not troubled that the Nebraska legislature had used the same chaplain for sixteen years and “offered prayers in the ‘Judeo-Christian tradition.’”²⁷ “Absent proof that the chaplain’s reappointment stemmed from an impermissible motive,”²⁸ the chaplain’s “long tenure” did not violate the Establishment Clause.²⁹ The Eleventh Circuit also cited the *Marsh* Court for the following proposition about the nature of the prayer:

The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.³⁰

The Eleventh Circuit also found that two subsequent Supreme

21. *Id.* at 1266, 1268.

22. *Id.* at 1266.

23. 463 U.S. 783, 792–95 (1983).

24. *Id.* at 786.

25. *Pelphrey*, 547 F.3d at 1269 (citing *Marsh*, 463 U.S. at 787–88).

26. *Id.* (alteration in original) (quoting *Marsh*, 463 U.S. at 788).

27. *Id.*

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

29. *Id.* at 794.

30. *Pelphrey*, 547 F.3d at 1270 (quoting *Marsh*, 463 U.S. at 794–95).

Court cases were relevant to the constitutional validity of legislative prayer—*County of Allegheny v. ACLU*³¹ and *Lee v. Weisman*.³² *Allegheny* held that a crèche display in a county courthouse was unconstitutional because it had the effect of promoting or endorsing religion although the presence of a menorah in a different government building did not violate the Constitution.³³ The Court in *Allegheny* refused to extend *Marsh*'s purely historical analysis to other Establishment Clause issues and also said that even *Marsh* recognized that "legislative prayers that have the effect of affiliating the government with any one specific faith or belief" violate the Establishment Clause.³⁴ The *Allegheny* Court, according to the Eleventh Circuit, found that the *Marsh* prayers were constitutional at least partly because the chaplain in *Marsh* had removed all references to Christ after a Jewish legislator had complained about that practice.³⁵

In *Lee*, the Court invalidated nonsectarian prayers at high-school-graduation ceremonies.³⁶ The important part of *Lee*, according to the Eleventh Circuit, was the following statement regarding guidelines the principal gave the Rabbi for the invocation: "It is a cornerstone principle of our Establishment Clause jurisprudence that it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."³⁷ Taking *Marsh*, *Lee*, and *Allegheny* together, the Eleventh Circuit concluded that it would not review the content of Cobb County's prayers unless there was independent evidence that they had been used to advance or disparage a specific religion or affiliate the government with a particular belief.³⁸

The *Pelphrey* court also discussed a number of cases from other circuits. It began with three decisions from the Fourth Circuit, which the Eleventh Circuit interpreted to not prohibit sectarian legislative prayer.³⁹

31. 492 U.S. 573 (1989).

32. 505 U.S. 577 (1992).

33. 492 U.S. at 578–79. The difference was that the menorah was surrounded by nonreligious symbols whereas the crèche was not.

34. *Id.* at 603 (citing *Marsh*, 463 U.S. at 794–95).

35. See *Pelphrey*, 547 F.3d at 1270–71.

36. 505 U.S. at 599.

37. *Pelphrey*, 547 F.3d at 1271 (quoting *Lee*, 505 U.S. at 588) (internal quotation marks omitted).

38. See *id.* at 1271–72.

39. The court mentioned *Turner v. City Council*, which upheld a city policy that legislative prayer had to be nonsectarian, 534 F.3d 352, 356 (4th Cir. 2008) (O'Connor, J.); *Simpson v. Chesterfield County Board of Supervisors*, which upheld nonsectarian legislative prayers, 404 F.3d 276, 278 (4th Cir. 2005); and *Wynne v. Town of Great Falls*, which invalidated legislative prayers that were overtly Christian and therefore advanced the Christian Faith, 376 F.3d 292, 294 (4th Cir. 2004).

These cases will be discussed in detail in Part II. The Eleventh Circuit also discussed *Snyder v. Murray City Corp.*, which upheld a city council's decision to prohibit a particular speaker from disparaging the practice of legislative prayer.⁴⁰ The *Pelphrey* court interpreted the Tenth Circuit in *Snyder* to hold that legislative prayer is unconstitutional only when it advances or disparages a specific religious belief, which the Tenth Circuit believed the prayer at issue in *Snyder* would have done.⁴¹ The *Pelphrey* court then discussed decisions out of the Fifth and Seventh Circuits that initially invalidated legislative prayers that were obviously biased towards Christianity but ultimately dismissed the cases for lack of standing.⁴² And, finally, the *Pelphrey* court dismissed a Ninth Circuit decision invalidating the use of a prayer that referred to "Jesus" at school-board meetings mostly on the basis that the decision was unpublished and thus of no precedential value.⁴³ Summarizing its view of the law of other circuits, the *Pelphrey* court concluded that there was no consensus on the question of the constitutionality of sectarian references in legislative prayers absent a showing that the government was using the prayers to affiliate itself with or to disparage a specific religious belief.⁴⁴

C. Applying the Law to the Facts

The Eleventh Circuit divided its analysis of Cobb County's specific practices into three factors: "the identity of the invocational speakers, the selection procedures employed, and the nature of the prayers."⁴⁵ As to the identity of the speakers, the Eleventh Circuit found that Cobb County did not unconstitutionally advance the Christian faith by "using predominantly Christian speakers."⁴⁶ Although the court conceded that the majority of speakers were Christian, it said that prayers were also offered on occasion by clergy from the Jewish, Unitarian, and Moslem faiths.⁴⁷ The court compared this practice to the prayers upheld in *Marsh*, most of which were offered by a permanent chaplain of one faith, and held that "[t]his diversity of speakers . . . supports the finding that the County did not exploit the prayers to advance any one

40. 159 F.3d 1227, 1228 (10th Cir. 1998) (en banc).

41. See *Pelphrey*, 547 F.3d at 1274.

42. *Id.* The Eleventh Circuit discussed *Doe v. Tangipahoa Parish School Board*, 494 F.3d 494 (5th Cir. 2007) (en banc); and *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*, 506 F.3d 584 (7th Cir. 2007).

43. 547 F.3d at 1274. The Ninth Circuit case was *Bacus v. Palo Verde Unified School District Board of Education*, 52 F. App'x 355 (9th Cir. 2002).

44. 547 F.3d at 1272.

45. *Id.* at 1277.

46. *Id.*

47. *Id.*

religion.”⁴⁸

The Eleventh Circuit also, with one exception, found no constitutional problem with the procedures used to select the clergy to give the prayers.⁴⁹ The court found that the Commissions compiled a list of prospective speakers from a number of different sources that included a mosque and three synagogues. The person responsible for the selection testified that she did not exclude any speaker based on his or her beliefs and, in fact, was often unfamiliar with the beliefs of the chosen speakers.⁵⁰ And, the court found no constitutional issue with the failure on the part of two commissioners to forward the plaintiffs’ list of potential speakers to the person making the selections because it was “not the practice of the commissioners to make suggestions about the faiths represented on the list of potential speakers Nothing in the record suggest[ed] any improper motive on the part of the commissioners.”⁵¹

Finally, the *Pelphrey* court held that the Cobb County prayers did not violate the Establishment Clause because they at times contained references to specific deities. The court said that such references were often short, usually at the end of the prayers, and reflected the beliefs of diverse faiths.⁵² In fact, the Eleventh Circuit refused to evaluate the specific content of the prayers because of its finding that the prayers were not used to exploit or advance one faith or belief.⁵³ According to the Eleventh Circuit, “The federal judiciary has no business in compos[ing] official prayers for any group of the American people to recite as a part of a religious program carried on by the government.”⁵⁴

II. SECTARIAN V. NONSECTARIAN

The central basis of the Eleventh Circuit’s decision in *Pelphrey* was that federal courts should not parse legislative prayers absent an improper motive to favor or disfavor a particular faith. Apparently, occasional references to specific religious figures such as Jesus or Abraham did not meet this standard. Therefore, the Eleventh Circuit concluded that, as long as the selection process included clergy of different faiths, sectarian legislative prayers did not violate the Establishment Clause.

48. *Id.*

49. *Id.* at 1278.

50. *Id.*

51. *Id.* The court did find that, for a limited time during 2003 and 2004, the Planning Commission unconstitutionally excluded certain faiths from being eligible to offer the prayers and awarded nominal damages to the plaintiffs for that violation. *See id.* at 1281–82.

52. *Id.* at 1277–78.

53. *See id.* at 1278.

54. *Id.* (alteration in original) (quoting *Lee v. Weisman*, 505 U.S. 577, 588 (1992)) (internal quotation marks omitted).

Despite what the *Pelphrey* court said, the Eleventh Circuit and the Fourth Circuit are now divided over whether the Establishment Clause requires that legislative prayers be nonsectarian.⁵⁵ For present purposes, I will assume that the difference between the two is judicially ascertainable.⁵⁶ In *Wynne v. Town of Great Falls*, a Fourth Circuit case, the town council repeatedly referred to “Jesus Christ” in its prayers, and town leaders made it clear that they wanted their prayers to be devoted to Christian worship.⁵⁷ The Fourth Circuit invalidated that practice under *Marsh* and, in a later decision, *Simpson v. Chesterfield County Board of Supervisors*, explained in more detail its rationale:

[The] repeated invocation of the tenets of a single faith undermined our commitment to participation by persons of all faiths in public life. . . . Advancing one specific creed at the outset of each public meeting runs counter to the credo of American pluralism and discourages the diverse views on which our democracy depends.⁵⁸

Although the facts of *Wynne* reflected an obvious bias towards Christianity, the Fourth Circuit’s decision in *Simpson* strongly implied that the legislative prayer practice in *that case* was upheld primarily because the town council required that each “invocation must be non-sectarian with elements of the American civil religion and must not be used to proselytize or advance any one faith or belief.”⁵⁹

The Eleventh Circuit in *Pelphrey* suggested that *Simpson* upheld sectarian prayers because the invocations in that case occasionally referenced terms such as “‘Lord God, our creator,’ ‘giver and sustainer of life,’ . . . ‘the God of Abraham, of Moses, Jesus, and Mohammad,’ ‘Heavenly Father,’” and other similar terms.⁶⁰ Although such references were apparently used occasionally in *Simpson*, the Fourth Circuit nevertheless stated that the town had “aspired to non-sectarianism and requested that invocations refrain from using Christ’s name or, for that matter, any denominational appeal.”⁶¹ In addition, throughout its opinion the Fourth Circuit strongly suggested that *Marsh* only permitted nondenominational prayers. For example, the court said that “*Marsh* concluded that *non-sectarian* legislative prayer generally does not vio-

55. In addition, the Ninth Circuit held in an unpublished opinion that legislative prayers have to be nonsectarian. See *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App’x 355, 356–57 (9th Cir. 2002).

56. For a discussion of whether this distinction is actually tenable, see discussion *infra* Part III.B.

57. 376 F.3d 292, 295 (4th Cir. 2004).

58. 404 F.3d 276, 283 (4th Cir. 2005).

59. *Id.* at 278.

60. *Pelphrey v. Cobb County*, 547 F.3d 1263, 1273 (11th Cir. 2008).

61. 404 F.3d at 284.

late the Establishment Clause.”⁶² The Fourth Circuit also recognized that the Court in *Marsh* emphasized that the chaplain there had “removed all references to Christ.”⁶³ Finally, in one of its closing paragraphs clearly implying that legislative prayer has to be nonsectarian, the Fourth Circuit stated the following:

Marsh requires that a divine appeal be wide-ranging, tying its legitimacy to common religious ground. Invocations across our country have been capable of transcending denominational boundaries and appealing broadly to the aspirations of all citizens. As *Marsh* and other cases recognize, appropriately ecumenical invocations can be “solemnizing occasions” that highlight “beliefs widely held.”

. . . When we gather as Americans, we do not abandon all expressions of religious faith. Instead, our expressions evoke common and inclusive themes and forswear, as Chesterfield has done, the forbidding character of sectarian invocations.⁶⁴

Whether the best reading of *Marsh* is that it requires legislative prayers to be nonsectarian is difficult to determine. As noted earlier, in *Marsh* the Supreme Court upheld Nebraska’s use of a paid legislative chaplain (a Presbyterian minister) who had been leading the prayers for sixteen years.⁶⁵ The Court rejected the idea that using one minister of a particular faith for a long period of time violated the Establishment Clause. The Court said the following:

We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that Palmer [the chaplain] was reappointed because his performance and personal qualities were acceptable to the body appointing him. Palmer was not the only clergyman heard by the legislature; guest chaplains have officiated at the request of various legislators and as substitutes during Palmer’s absences. 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.⁶⁶

As to the content of the prayers, in a footnote the Court said that

62. *Id.* at 282 (emphasis added) (citing *Marsh v. Chambers*, 463 U.S. 783, 793–95 (1983)).

63. *Id.* at 286 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989)).

64. *Id.* at 287 (citations omitted). In *Turner v. City Council*, the Fourth Circuit upheld the decision by a local legislative body to require its prayers to be nonsectarian and explicitly said that it did not have to address whether such a policy was required by the Establishment Clause. 534 F.3d 352, 356 (4th Cir. 2008) (O’Connor, J.). Justice O’Connor wrote the opinion as a visiting Justice and wisely decided no more than was necessary to resolve the case. The best reading of *Simpson*, however, is that the Fourth Circuit has already decided that the Establishment Clause requires legislative prayers to be nonsectarian.

65. 463 U.S. at 786.

66. *Id.* at 793–94 (footnotes omitted) (citation omitted).

Palmer characterized his prayers as “‘nonsectarian,’ ‘Judeo Christian,’ and with ‘elements of the American civil religion.’ Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.”⁶⁷ The Court also stated, in reference to the substance of the prayers, that “[t]he content of the prayer [was] not of concern to judges where . . . there [was] no indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it [was] not for [the Court] to embark on a sensitive evaluation or to parse the content of a particular prayer.”⁶⁸ Based on these three statements by the Court in *Marsh*, it appears that using one minister for a long period of time to deliver legislative prayers is not unconstitutional unless his appointment stems from an improper motive; federal courts should not “parse” the prayers unless they “proselytize” or “advance” one faith or “disparage” other faiths; and it was at least somewhat relevant to the Court that the chaplain in *Marsh* had agreed to remove all reference to Jesus after a complaint by a Jewish legislator. How relevant that agreement was to the validity of the prayer in *Marsh* is unclear.⁶⁹

The central question raised by *Marsh* is whether isolated references in legislative prayers to Gods of particular faiths render the prayers impermissible or whether more significant evidence of religious favoritism is required. The Eleventh Circuit in *Pelphrey* held that it was more important to refrain from policing the content of legislative prayer than to make sure the prayers were nonsectarian. In fact, the Eleventh Circuit decided that it would violate the teachings of *Marsh* and *Lee* were it to examine the Cobb County prayers for sectarian references. As long as there is no evidence, apart from isolated references to specific deities, that the government is advancing a particular faith or disparaging a specific faith, the Eleventh Circuit said it would allow sectarian prayers.⁷⁰

Even assuming that the Eleventh Circuit’s interpretations of *Marsh* and *Allegheny* are correct, it is arguable that the panel misapplied the

67. *Id.* at 793 n.14 (citation omitted).

68. *Id.* at 794–95.

69. As noted by the Eleventh Circuit in *Pelphrey*, the Supreme Court discussed *Marsh* in dicta in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). In *Allegheny*, the Supreme Court said the following about the prayers upheld in *Marsh*:

[I]n *Marsh* itself, the Court recognized that not even the “unique history” of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had “removed all references to Christ.”

Id. at 603 (citations omitted).

70. See *Pelphrey v. Cobb County*, 547 F.3d 1263, 1271–72 (11th Cir. 2008).

nonproselytizing standard to the facts of *Pelphrey*. Between 1998 and 2005, over ninety-six percent of the clergy who gave the prayers were Christian, and approximately seventy percent of the prayers contained Christian references.⁷¹ To non-Christians who work in the Commissions, or to those members of the public who attended commission hearings, it is hard to believe they would not feel that Cobb County preferred Christianity to other faiths.

In any event, as I will discuss in the next Part, the distinction between sectarian and nonsectarian prayer is impossible to maintain, and all legislative prayers that refer to God or a Supreme Being advance religion over nonreligion. Moreover, the Court's rationale in *Marsh* is unpersuasive and leads to a variety of Establishment Clause problems. Therefore, the Eleventh Circuit should have read *Marsh* narrowly and limited it to its specific facts, and, more importantly, the Supreme Court should overturn *Marsh* and hold that all legislative prayers, like all teacher- or clergy-led school prayers, violate the Establishment Clause.

III. LEGISLATIVE PRAYER VIOLATES THE ESTABLISHMENT CLAUSE

A. *The Problems with Marsh*

The Supreme Court's decision in *Marsh* lasted less than ten pages and can be summarized as follows: "The founders did it. Everyone since them has done it. No one is abusing it. Therefore it is constitutional."⁷² Even Judge Michael McConnell, a nationally known religion-clause expert, and someone normally in favor of a narrow reading of the Establishment Clause, found significant problems with *Marsh*'s purely historical analysis. He said the following:

The interesting thing about the opinion is that it is based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause. . . .

. . . What is the significance of this? The Supreme Court, and those who contend that the meaning of the Constitution is fixed by the framers' opinion about its application to specific cases, treat this history as dispositive. If James Madison and the boys thought legislative chaplains were okay, who are we to disagree?

I dissent. I believe that *Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some *principle* that explains *why* legislative chaplains might not violate the establishment clause, and demonstrate that that principle

71. *Id.* at 1267.

72. Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293, 338 (1993).

continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause.⁷³

If state and federal practices that have long been unbroken were automatically constitutional solely because of their historical pedigree, many pernicious laws that have been held unconstitutional by the Supreme Court should have instead been upheld. A short but representative list of such practices would include prayers in public schools,⁷⁴ bans on interracial marriage,⁷⁵ prohibitions on women embarking on professional careers such as law,⁷⁶ and, of course, state-required segregation of public schools.⁷⁷ The fact is that the Court has almost never upheld a contested practice solely based on its historical acceptability because times and values change.⁷⁸ Therefore, legislative prayer should have been upheld only if it could have been justified under some Establishment Clause principle that courts could apply with integrity to other cases. The problem, as discussed below, is that no such principle exists.

There is currently a great deal of confusion among scholars, the lower courts, and the Justices of the Supreme Court over appropriate Establishment Clause principles. The highly discredited but often used *Lemon* test asks whether the government's action has a secular legislative purpose; whether the government's action has the primary effect of either advancing or inhibiting religion; and whether the government's action results in excessive governmental entanglement with religion.⁷⁹ The problem is that no one really knows whether the *Lemon* test is still good law. One scholar recently summed up the current status of the test as follows:

Just as previously attempted Grand Unified Theories had to ignore phenomena they could not explain, the Supreme Court has similarly

73. Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988).

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

75. See *Loving v. Virginia*, 388 U.S. 1 (1967).

76. But see *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

77. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

78. Criticizing *Marsh*, one commentator said the following:

One of the most significant changes in the United States since its origins is the incredible diversity of its religious population; it is now the most religiously pluralistic nation in the world. Ironically, the years at issue in *Marsh*, from 1965 to 1983, witnessed extensive immigration of new citizens of non-Christian and non-European backgrounds. Basing the rules about religion on the practice of the Founders excludes a wide swath of religions and philosophies from constitutional protection.

Leslie C. Griffin, *No Law Respecting the Practice of Religion*, 85 U. DET. MERCY L. REV. 475, 479 (2008) (footnote omitted).

79. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

found cases in which *Lemon* was less than useful. In such cases, the Court occasionally simply refuses to acknowledge it. Of course, there are Justices who openly loathe *Lemon* and consistently call for its explicit rejection. Perhaps more puzzling to the observer are those Justices who remain content to use *Lemon* as the appropriate test in some cases but utterly ignore it in others. Perhaps this inconsistent application best explains the appearance in the last quarter-century of other analytical models to replace, augment, or explain *Lemon*.⁸⁰

Another oft-used approach is to ask whether the challenged governmental activity has the effect of endorsing a particular religion such that nonadherents would feel like political outsiders.⁸¹ At times, the endorsement test has been incorporated into the *Lemon* test, creating even more confusion.⁸² It is fair to say that, at the moment, a clear majority of the Supreme Court has not embraced any particular test for Establishment Clause challenges.

Regardless of which test is used, however, the decision in *Marsh* should not stand. Allowing legislatures to start their sessions with prayers violates all three prongs of the *Lemon* test. The practice obviously has the purpose of advancing religion; otherwise, why have the prayer? The prayers also advance religion by making references to God and other religious terminology part of the government's official business. And, as the opening of this Article demonstrated, legislators and citizens will inevitably fight over the content of the prayers and who is allowed to recite them. As Justice Brennan said in his dissenting opinion in *Marsh*, "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."⁸³

Legislative prayer, especially as it has been implemented since *Marsh*, also violates Justice O'Connor's endorsement test. A few examples make this point rather vividly. In *Simpson v. Chesterfield County Board of Supervisors*, the Chesterfield County Board of Supervisors began its nightly meetings with a "non-sectarian invocation," and the Pledge of Allegiance.⁸⁴ The county used rotating clergy chosen by a clerk from addresses taken from a phone book. The clerk invited a cross

80. John M. Bickers, *Of Non-Horses, Quantum Mechanics, and the Establishment Clause*, 57 U. KAN. L. REV. 371, 375–76 (2009).

81. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

82. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring) ("The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.").

83. *Marsh v. Chambers*, 463 U.S. 783, 800–01 (1983) (Brennan, J., dissenting).

84. 404 F.3d 276, 279 (4th Cir. 2005).

section of religious leaders who were accepted on a "first-come, first-serve basis."⁸⁵ The 2003 list included 235 congregations, including an Islamic Center, a Spanish-speaking Protestant church, Jewish synagogues, and numerous other denominations. In August 2002, Cynthia Simpson asked to be added to the list.⁸⁶ Ms. Simpson is a member of the Reclaiming Tradition of Wicca who claims that she believes in "gods and goddesses such as Kore, Diana, Hecate, and Pan," and that she is a "spiritual leader" of this group.⁸⁷ Her request was forwarded to the county attorney, who denied it on the grounds that "Chesterfield's non-sectarian invocations are traditionally made to a divinity that is consistent with the Judeo-Christian tradition," and that Ms. Simpson did not fall within that tradition.⁸⁸ Ms. Simpson then filed suit arguing that Chesterfield's policy violated the United States Constitution.⁸⁹

In analyzing Ms. Simpson's claims, the Fourth Circuit recognized that *Marsh* allowed legislative prayers but only when "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."⁹⁰ This test is similar to the Court's endorsement test, which asks whether the challenged practice endorses or favors a particular religion such that nonadherents are made to feel like political outsiders and less valuable members of the community.⁹¹ Incredibly, the Fourth Circuit upheld the decision to exclude Ms. Simpson primarily on the basis that Chesterfield's policy was broader than the policy upheld in *Marsh* that used the same minister for sixteen years and because, "if *Marsh* means anything, it is that the Establishment Clause does not scrutinize legislative invocations with the same rigor that it appraises other religious activities."⁹² The Fourth Circuit reached this decision despite the fact that one board member stated in the press that Simpson's religion "is a mockery. It is not any religion I would subscribe to,"⁹³ and a second board member said, "I hope she's a good witch like Glenda," and that "[t]here is always Halloween."⁹⁴

The Supreme Court said in *Larson v. Valente* that "[t]he clearest command of the Establishment Clause is that one religious denomina-

85. *Id.*

86. *Id.*

87. *Id.* at 280.

88. *Id.*

89. *Id.*

90. *Id.* at 283 (quoting *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983)).

91. See *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

92. *Simpson*, 404 F.3d at 287.

93. *Id.* at 285 n.4.

94. *Id.* at 286 n.4.

tion cannot be officially preferred over another.”⁹⁵ The Fourth Circuit strongly implied that, had this case not been about legislative prayer, *Larson* might well have required a different result.⁹⁶ But why the bare fact that the case involved legislative prayer would allow overt religious discrimination is mystifying. There can be no question that Ms. Simpson was treated as an outsider and disfavored member of the community on the basis of her religious beliefs, and, under a proper application of either the endorsement test or the *Lemon* test, she should have been allowed to give an invocation. For that matter, even under the standards set forth in *Marsh*, she should have won the case because Chesterfield’s policy clearly disparaged her particular faith. Yet, a unanimous panel of the Fourth Circuit denied her claim.

Other circuit courts around the United States have allowed similar denominational discrimination. For example, on April 5, 2005, the Indiana House Legislature began its proceedings with the following prayer delivered by a Christian minister:

Now let us have a little talk with Jesus
Let us tell Him about our troubles
He will hear our faintest cry
He will answer by and by
Now when you feel a little prayer wheel turning
And you know a little fire is burning
You will find a little talk with Jesus makes it right.⁹⁷

Following the prayer, the cleric led a “rousing sing-along” of the song “Just a Little Talk with Jesus.”⁹⁸ Some members stood and sang while others walked out in protest.⁹⁹ After protracted litigation, the overtly Christian nature of Indiana’s legislative prayers became clear. During the 2005 Session, out of fifty-three invocations, forty-one were delivered by Christian clergy, nine by representatives of the Indiana House, one by a Rabbi, and one by an Imam. Of the forty-five prayers that were transcribed, twenty-nine were demonstrably Christian.¹⁰⁰ There can be no debate that, at least during 2005, the Indiana House of Representatives endorsed, favored, and clearly preferred Christian prayers to those of other religions.

95. 456 U.S. 228, 244 (1982).

96. See *Simpson*, 404 F.3d at 287–88.

97. Anne Abrell, Note, *Just a Little Talk with Jesus: Reaching the Limits of the Legislative Prayer Exception*, 42 VAL. U. L. REV. 145, 145 (2007); see also *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005) (adjudicating suit arising from prayer), *rev’d sub nom.* *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007). For a discussion of the *Bosma* case, see Lund, *supra* note 6, at 6, 18.

98. *Hinrichs v. Bosma*, 440 F.3d 393, 395 (2006).

99. *Id.*

100. *Id.*

Although the plaintiffs initially won the case in both the district court and the court of appeals, eventually the Seventh Circuit dismissed the case on the grounds that the plaintiffs lacked standing under the Supreme Court's decision in *Hein v. Freedom from Religion Foundation, Inc.*¹⁰¹ A similar case in the Fifth Circuit, *Doe v. Tangipahoa Parish School Board*, which again involved overtly Christian prayers, was also eventually dismissed on standing grounds.¹⁰² These complex and highly controversial standing decisions are beyond the scope of this paper other than to suggest that, were the Court to reverse *Marsh* and hold that all legislative prayer is unconstitutional under either the *Lemon* test, the endorsement test, or both, it is likely that the courts of appeals would not be able to dodge these difficult issues by relying on the Court's much criticized standing doctrine.¹⁰³

As long as *Marsh* remains good law, Christian-dominated legislatures will continue to favor Christian prayer while occasionally including other faiths as a method to avoid losing in federal court. That is essentially what happened in *Pelphrey*, although at least the Eleventh Circuit reached the merits of the case. Some courts and commentators have suggested that limiting legislative prayer to nonsectarian prayer would be consistent with *Marsh* and could even solve the constitutional problems under traditional doctrinal tests such as the *Lemon* test and the endorsement test.¹⁰⁴ The argument is that allowing legislatures to begin their sessions with appeals to a generic God or to religious but non-denominational values would simply recognize the role religion has traditionally played in this country without endorsing or advancing any one faith. The next Part of this Article demonstrates that such a solution is both constitutionally unsound and virtually impossible to implement in practice.

B. Sectarian v. Nonsectarian

Any reference to God in a legislative prayer inevitably advances some religions over others and religion over nonreligion.¹⁰⁵ Professor Delahunty has persuasively argued that every prayer reflects specific views about religion and "necessarily incorporates a particular theologi-

101. 127 S. Ct. 2553 (2007). For a critique of this case, see Eric J. Segall, *The Taxing Law of Taxpayer Standing*, 43 TULSA L. REV. 673 (2008).

102. 494 F.3d 494, 499 (5th Cir. 2007) (en banc). For a discussion of the Christian nature of the prayers, see *id.* at 502–04 (Barksdale, J., dissenting).

103. For a discussion of that criticism, see Segall, *supra* note 101.

104. See, e.g., *Turner v. City Council*, 534 F.3d 352, 356 (4th Cir. 2008) (O'Connor, J.); Lund, *supra* note 6, at 7–8.

105. See Robert J. Delahunty, "Varied Carols": *Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517, 522 (2007) ("[T]he purported distinction between 'sectarian' and 'non-sectarian' prayer is illusory.").

cal viewpoint or belief.”¹⁰⁶ Although Professor Delahunty offers this argument to demonstrate that the sectarian-nonsectarian distinction should be abandoned as a constitutional requirement for legislative prayer in favor of a requirement of speaker diversity,¹⁰⁷ I will demonstrate that the incoherence of the sectarian-nonsectarian distinction should lead to the conclusion that *Marsh* should be overturned and moments of silence should be substituted for legislative prayer.

Because Professor Delahunty has summarized the arguments as to why all prayers are sectarian so persuasively and there is little that can be added, the following is a summary of his fine arguments. There are over fifty different religious sects in the United States, each with its own particular ideas of God and faith.¹⁰⁸ Among these religions, there are “profound and intractable differences” over the “nature and characteristics” of the Supreme Being.¹⁰⁹ When prayers are offered within the three leading monotheistic faiths—Judaism, Christianity, and Islam—people of different faiths, or, of course, atheists, are marginalized. Moreover, any prayer based on the idea of one God inevitably rejects

pantheistic or immanentist conceptions of divinity, such as those found in some forms of Buddhism or Hinduism. Prayers addressed to a personal God who hears human petitions and who intervenes in human affairs will “exclude” the followers of faith traditions that take ultimate reality to be impersonal, or that believe petitionary prayer to be useless.¹¹⁰

Professor Delahunty also argues that even among the three major religions in the United States there are intractable differences that make generic appeals to all three difficult if not impossible. For example, orthodox “Jewish and Moslem conceptions of God’s oneness” are inconsistent with “Christian trinitarianism.”¹¹¹ Moreover, Christian ideas of a God who is a Father who brings redemption through his Son Jesus are inconsistent with basic tenets of the Jewish and Moslem faiths.¹¹² And, of course, this country is made up of far more faiths than the “big three,” many of whom are offended by traditional prayers that may to some degree appeal to the major religious traditions, not to mention people who are not religious at all.

There are numerous other problems with the sectarian-nonsectarian distinction. First, the very effort to provide prayers that will offend no

106. *Id.*

107. *See id.* at 565–68.

108. *Id.* at 523.

109. *Id.*

110. *Id.*

111. *Id.* at 524.

112. *Id.*

one may in the end offend the truly religious. Some spiritual leaders, when given the choice between offering a nondenominational, nonsectarian prayer or no prayer at all, will certainly choose the latter. This choice therefore discriminates against those clergy who want to offer sectarian prayers and those legislators who want to hear them.¹¹³

Moreover, exactly what is and what isn't nonsectarian is a difficult question that entangles judges in religious questions in a way that threatens Establishment Clause values.¹¹⁴ Do we really want judges parsing specific prayers to make sure that they are nonsectarian? This was exactly the point made by the court in *Pelphrey*, and the judges' reluctance to review and possibly censor the prayers offered by clergy at the legislative sessions is understandable but also inevitably leads to the result that most prayer will end up being Christian in nature—a result also at odds with the Establishment Clause.

There are those scholars and judges who believe that it is possible to distinguish between prayers that incorporate civic religion or "ceremonial deism," and prayers that are religious in nature. The idea is that generic references to a superior being without more specificity can solemnize governmental occasions by recognizing our religious past without offending nonbelievers.¹¹⁵ The most significant problem with this theory, of course, is that it tells atheists that their beliefs don't count and aren't worthy of being expressed at governmental occasions. The government simply shouldn't be in the business of endorsing the belief that there is a God, even a generic one. Moreover, by requiring that the government only recognize a generic God (even assuming that can be done), judges again have to parse prayers and make difficult and arguably unconstitutional decisions. Finally, the whole idea of civic religion or ceremonial deism is inconsistent with other religious traditions, and favoring one over the other "would therefore be an impermissible religious preference."¹¹⁶

C. *The Failure of the Diversity-of-Speakers Approach*

Several courts and commentators, aware of the intractable problems with the sectarian-nonsectarian distinction, have decided that a better way to accommodate Establishment Clause values is to rely on an approach that relies on a diversity of speakers to reflect our political

113. *Id.* at 526–27.

114. *See id.* at 528.

115. *See id.* at 528–30.

116. *Id.* at 532; *see also* Lund, *supra* note 6, at 35–36 (noting that excluding sectarian references in legislative prayers is difficult to justify on moral grounds because it results in governmental discrimination against speakers based on their religious beliefs).

community, rather than on judicial review of the prayers themselves.¹¹⁷ This approach has the benefit of relieving judges of the difficult obligation of distinguishing between sectarian and nonsectarian prayers, and it also provides invited clergy the autonomy they need to worship as they wish. There are, however, three major problems with this approach.

First, as demonstrated below, this practice inevitably leads to legislatures giving Christian speakers the opportunity to give Christian prayers far more often than other denominations. Second, this approach sends a message to atheists that they are not an important part of the political community. Third, and perhaps most importantly, the only constitutionally permissible way to implement this diversity of speakers approach is to have judges decide how much diversity is tolerable, which will end up being just as divisive, maybe even more so, as judges parsing legislative prayers for sectarian references. Each of these problems is discussed below.

The Court in *Marsh* made it clear that legislatures cannot select the clergy to give their prayers based on an impermissible motive.¹¹⁸ In *Allegheny*, the Supreme Court said that “not even the ‘unique history’ of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government” with one specific religion.¹¹⁹ Lower courts have understood these standards to mean that the prayer givers cannot be chosen based on their religious beliefs, and that it is unconstitutional to discriminate against potential speakers based on their spiritual values.¹²⁰ In other words, the prayer opportunity cannot be used by legislatures to exploit, advance, or disparage a specific faith.¹²¹ As the Fourth Circuit said in *Simpson*:

[R]epeated invocation of the tenets of a single faith undermined our commitment to participation by persons of all faiths in public life. For ours is a diverse nation not only in matters of secular viewpoint but also in matters of religious adherence. Advancing one specific creed at the outset of each public meeting runs counter to the credo of American pluralism and discourages the diverse views on which our democracy depends.¹²²

Federal judges are rarely called upon to resolve a claim by a Christian that a state or local legislature is discriminating against Christianity

117. See, e.g., *Pelphrey v. Cobb County*, 547 F.3d 1263, 1277–78 (11th Cir. 2008); Delahunty, *supra* note 105, at 566–68.

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

119. *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (citation omitted) (quoting *Marsh*, 463 U.S. at 791).

120. See, e.g., *Pelphrey*, 547 F.3d at 1281.

121. *Id.* at 1271.

122. *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 283 (4th Cir. 2005).

through its process of selecting guest prayer givers. The reason for this is obvious: We live in a country where the vast majority of people who are religious are Christian, and state and local legislatures reflect that fact. On the other hand, there are many examples of legislatures using the prayer opportunity to give Christianity a preferred position. The Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits have all heard cases where the facts gave rise to a strong inference that the legislatures in question favored Christianity over other religions.¹²³ We don't need social-science reports to expect that, if legislative prayers are allowed, they will most often be given by Christian speakers if for no other reason than state and local legislatures across this country are dominated by people of the Christian faith.

Applying the "impermissible motive" standard of *Marsh* and the rule articulated in *Allegheny* that legislative prayer cannot be used to affiliate the government with a particular belief thus becomes a difficult and divisive task. Two recent cases demonstrate this point. The undisputed evidence in *Pelphrey* showed that between 1998 and 2005, to the extent that their faith was discernible, 96.6% of the clergy who delivered the prayers in Cobb County were Christian.¹²⁴ Moreover, the evidence showed that over the past ten years, approximately seventy percent of the prayers before the commissions contained Christian references.¹²⁵ Despite this evidence, the Eleventh Circuit approved the selection process because it found no evidence that Cobb County acted with an improper motive.¹²⁶ One has to wonder what proof, other than an overt discriminatory motive uttered by a legislator, would lead the Eleventh Circuit to conclude that Cobb County was affiliating itself with the Christian religion. If all a legislature has to do to satisfy the *Marsh* and *Allegheny* tests is occasionally have a non-Christian offer a prayer, then the rule that the government cannot identify itself with a particular faith is a sham.

The evidence in *Pelphrey* did indicate that, with the exception of a few years where intentional discrimination was obviously practiced by the person selecting the speaker,¹²⁷ Cobb County did not intentionally

123. See *Pelphrey*, 547 F.3d at 1267; *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584, 588 (7th Cir. 2007); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 502-04 (5th Cir. 2007) (Barksdale, J., dissenting); *Wynne v. Town of Great Falls*, 376 F.3d 292, 294 (4th Cir. 2004); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355, 357 (9th Cir. 2002).

124. *Pelphrey*, 547 F.3d at 1267.

125. *Id.*

126. *Id.* at 1278.

127. In 2003 and 2004, the person selecting the clergy used a phone book to choose speakers, and the book had lines drawn through Islamic, Jewish, Jehovah's Witnesses, and Churches of

set out to strongly favor Christian clergy or to disparage other faiths.¹²⁸ But to the many non-Christians in Cobb County, the undeniable fact that the vast majority of prayers in front of their governmental bodies reflect a faith different than their own is offensive and makes them feel as if their religious beliefs are not preferred by the government, regardless of how it came to be that most of the prayers were Christian and contained Christian references. In light of the religious make up of our country, facially neutral selection processes like the one employed by Cobb County will invariably result in this kind of Christian preference. Were it not for the *Marsh* exception to the traditional Establishment Clause rules, this kind of governmental affiliation with one faith would violate the First Amendment.¹²⁹

Another example of a court failing to give the “impermissible motive” requirement of *Marsh* any teeth is *Simpson*. As discussed earlier, the Fourth Circuit upheld the exclusion of a person belonging to the Reclaiming Tradition of Wicca from those eligible to give a legislative prayer primarily on the basis that the county’s policy allowed a diverse enough array of religious leaders to lead the prayers even though it excluded those who didn’t come from “monotheistic congregations.”¹³⁰ Professor Lund has quite accurately explained why the decision in *Simpson* is so dangerous:

The Fourth Circuit’s reasoning . . . does not square with the [*Marsh*] Court’s discussion of [the] impermissible-motive requirement *Marsh* . . . took pains to explain why Palmer’s selection did not reflect any denominational discrimination—Palmer was chosen not because he was Episcopalian, but because he was the best candidate for the job. *Simpson*, by contrast, was rejected precisely because of her theological beliefs. She was the only one rejected, and the letter rejecting her specified that it was her religious denomination that was the basis for her exclusion. *Simpson* suggests that local governments have unbridled discretion to pick and choose prayergivers on all manner of religious criteria [I]t is hard to imagine a clearer case of denominational discrimination than what happened to Cynthia Simpson.¹³¹

It might be argued that the problem is not with the legislative-prayer doctrine as set forth in *Marsh*, but that the Fourth and Eleventh

Latter Day Saints congregations. *Id.* at 1282. The Eleventh Circuit found this to be a constitutional violation and awarded nominal damages to the plaintiffs. *Id.*

128. *See id.* at 1267–68.

129. *See Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 287 (4th Cir. 2005) (“[I]f *Marsh* means anything, it is that the Establishment Clause does not scrutinize legislative invocations with the same rigor that it appraises other religious activities.”).

130. *Id.* at 284.

131. Lund, *supra* note 6, at 41 (footnotes omitted).

Circuits simply applied that doctrine incorrectly and that *Pelphrey* and *Simpson* should have been decided differently. The problem is that, if we are going to rely on the diversity-of-speaker approach to safeguard Establishment Clause values like governmental neutrality because the sectarian-nonsectarian distinction can't do the job, federal judges are going to have to make extremely difficult decisions about how much diversity is required and what lines legislatures can draw when deciding who to invite and who to exclude. The Eleventh Circuit was not troubled by the fact that, as far as the record reflected, almost ninety-seven percent of the invited clergy were Christian and over seventy percent of the prayers contained Christian references.¹³² Even assuming that the court was incorrect, what would be the right decision if only seventy-five percent of those invited were Christian, or fifty percent? Does it depend on the demographics of the community or on the process of selection? There are no good answers to these questions, and, although judges have to draw difficult lines all the time, we should not inject Judges into these kinds of religious disputes.

The Fourth Circuit decided that Ms. Simpson could be excluded from giving the prayers in large part because her religious beliefs were outside the mainstream of the community. As Professor Lund discussed, this kind of holding is a grave threat to the most important Establishment Clause value the Court has articulated—the policy of nondenominational discrimination.¹³³ There are those who might argue that Ms. Simpson's beliefs in witchcraft were not religious enough or that the Fourth Circuit was simply incorrect and should have required the county to allow her to give the prayer. But the same problem will inevitably arise with minority faiths of all kinds and courts will have to decide which faiths count and which do not and whether all faiths have to be accommodated, which might present serious problems in heavily populated areas. There is simply no way to implement the diversity-of-speaker approach and stay consistent with Establishment Clause values. Inevitably, courts will have to become involved in religious strife, and equally inevitably they will favor majority religions.

Even if judges and legislatures could implement the diversity-of-speaker approach consistently with the Establishment Clause, the policy of allowing legislative prayers favors those who believe in religion over those who do not. The Supreme Court did not address this issue in *Marsh*, instead suggesting that the long history of legislative prayer validated the practice without consideration of core Establishment Clause

132. See *Pelphrey*, 547 F.3d at 1267.

133. See Lund, *supra* note 6, at 6–7.

values.¹³⁴ But the fact of the matter, as demonstrated by the many lawsuits that are filed, is that many people who do not believe in God are offended when the government begins its official business with a prayer. The argument may be made that the phrase “under God” in the Pledge of Allegiance, the motto “In God we Trust” on our coins, and the many religious symbols on government property all attest to the religious nature of this country without unconstitutionally offending those with no religious faith. Even assuming the constitutional validity of these religious references, there are significant differences between those governmental practices and legislative prayer that make legislative prayer more problematic.

First, as to the motto and the Pledge, there is no danger of denominational discrimination with a bare reference to God. Although this explanation will not make an atheist feel any better, at least these governmental endorsements are as vague and general a statement of religious belief as possible. Second, our political leaders today do not have to become embroiled in religious strife with the motto and the Pledge, but they do have numerous difficult and potentially divisive decisions to make about legislative prayer. They have to decide (1) whether to have the prayer in the first place; (2) when it will be said; (3) how often; (4) for how long; (5) who is eligible to say the prayer and who actually will say the prayer; and (6) the limitations on what the prayer can say.¹³⁵ Unless legislators decide not to have the prayer at all, these questions require governmental actors to make difficult choices that threaten Establishment Clause values. The same is simply not true about the “In God We Trust” motto on our coins and the inclusion of the phrase “Under God” in the Pledge of Allegiance.

Of course, similar issues do arise in the complex doctrinal arena of religious symbols on governmental property. Few scholars or judges, however, would defend the current state of Supreme Court doctrine on this question. As one circuit judge famously said, the law in this area is “more commonly associated with interior decorators than with the judiciary.”¹³⁶ Interestingly, the law regarding the placement of religious symbols on governmental property is that they are allowed only if they are surrounded by other symbols that make it clear that the government is not endorsing one religious view over another.¹³⁷ This rule cannot be easily transported into the legislative-prayer context unless we require a

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

135. See Lund, *supra* note 6, at 51.

136. *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

137. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

great breadth of speakers and viewpoints, which is unlikely to occur, very expensive, and almost impossible to define.

In sum, although the Supreme Court has held that legislative-prayer opportunities cannot be used to affiliate the government with a specific belief, or to disparage others, the reality is that legislative prayer is usually Christian in nature and minority religions are not provided the same opportunities to present the prayers. No "diversity of speakers" rule is likely to solve these problems, and, in any event, such a rule would require judges to draw religious lines that would be divisive and difficult. Moreover, any attempt to require the prayers to be nonsectarian will not only fail in practice, but discriminate against those speakers whose beliefs would require them to refer to their specific deities. And, as discussed earlier, there is no legally coherent distinction between sectarian and nonsectarian prayer.¹³⁸

Perhaps then, the argument comes down to the specific facts of *Marsh*. Maybe legislative prayer should be allowed but only when there is a permanent prayer giver who refers only to a generic God in his invocation. Although this result would be more consistent with Establishment Clause values than the current regime allowed by the courts of appeals, it would still discriminate against nonbelievers and would also be difficult to implement. Judges would still have to decide which criteria are legal for choosing the prayer giver and how prominent a role the prayer can play in governmental business. More importantly, the result of such a rule would inevitably be thousands of permanent Christian prayer givers providing the invocations at governmental meetings all across the country.¹³⁹ It would be similar to having "In Christianity We Trust" on our coins, a practice that the Court would likely rule violates the Establishment Clause. There is a better way. The same solution that has worked for school prayer can be implemented for legislative prayer—a moment of silence.¹⁴⁰

D. *Moments of Silence*

Prior to the early 1960s, there was a tradition in this country of

138. See Delahunty, *supra* note 105, at 522–26.

139. See *id.* at 563 ("It does indeed seem unlikely . . . that any state Legislature in the country would select a Jehovah's Witness or a Christian Scientist—or a Muslim or Buddhist or member of Reverend Moon's Unification Church—to be its official chaplain.")

140. Some scholars have suggested that moments of silence would be preferable to legislative prayers, though I have been unable to find anyone to make a detailed argument in support of that thesis. See, e.g., Donald E. Lively, *The Establishment Clause: Lost Soul of the First Amendment*, 50 OHIO ST. L.J. 681, 698–99 (1989); Robert A. Holland, Note, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 CAL. L. REV. 1595, 1691–92 (1992); Yehudah Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1256 (1986).

beginning the public-school day with teacher- or principal-led prayer.¹⁴¹ In two landmark and highly controversial cases, the Supreme Court held such prayers to be unconstitutional, even if they were nonsectarian, and despite their history.¹⁴² In *Engel v. Vitale*, the Court said the following:

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is "non-denominational" and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause¹⁴³

The Court went on to say:

It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.¹⁴⁴

Eventually, as the doctrine in this area developed, the Court prohibited all speaker-led prayers in public schools, even at graduation ceremonies and athletic events.¹⁴⁵ What courts have allowed, however, are moment-of-silence statutes requiring that schools begin the day with a moment of silent reflection as long as such practices do not promote or endorse prayer.¹⁴⁶ Although there are certainly differences between adult legislators and impressionable school children, there are still compelling reasons why the moment of silence solution for public schools would work as well for legislative bodies. What Justice O'Connor said about moments of silence in schools applies equally to legislatures:

A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible

141. See BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW ENGEL v. VITALE CHANGED AMERICA* 182–83 (2007).

142. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

143. 370 U.S. at 430.

144. *Id.* at 435.

145. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (athletic events); *Lee v. Weisman*, 505 U.S. 577 (1992) (school-graduation ceremonies).

146. See *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464, 1474 (11th Cir. 1997).

reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading.¹⁴⁷

A legislature starting each day with a moment of silent reflection allows each person to use that time in a way that most benefits his or her conscience without infringing on the rights of others. Moreover, unlike the case with school prayer, even if the intent behind the moment is to encourage prayer, as long as there was no direct coercion, there probably would not be a constitutional violation.¹⁴⁸

The primary objection to this moment of silence proposal might be that the whole point of having a religious prayer is to recognize and solemnize the legislative proceeding with a communal spiritual moment that brings legislators together in a common enterprise. But it is *exactly* this purpose that should make the prayer unconstitutional under a proper Establishment Clause analysis. Those members of the legislature, and the public visiting the proceedings either for personal or business reasons, who are not members of the faith endorsed by the particular prayer, usually Christian, will feel excluded from the collective religious moment sponsored by their government.¹⁴⁹ With a moment of silence, those who wish to pray to a Christian God may do so, those who wish to pray to a different God may do so, and those who don't want to pray at all don't have to but still must respect the moment and the needs of others to pray. The giving up of the communal moment seems a small price to pay for the constitutional simplicity of substituting a moment of silence for legislative prayer.

Finally, if the Court were to hold that legislative prayers are unconstitutional but moments of silence led by a legislator or nonreligious guest speaker are not, all of the difficult questions pertaining to the validity of legislative prayers would vanish. Federal judges would no longer have to worry about the content of the prayers, the identity of the prayer giver, and the selection process used to choose those who lead the

147. *Wallace v. Jaffree*, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring in the judgment).

148. *See id.*

149. *See County of Allegheny v. ACLU*, 492 U.S. 573, 673-74 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[I]t seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step with the political norm.").

prayers. There would no longer be divisive litigation all over the country, and, more importantly, infighting among legislators, and between legislators and the public, would stop. And maybe, just maybe, the religious and the nonreligious would bond together in a collective moment of serious reflection that instead of causing strife and discord would lead to unity, collective understanding, and respect.

IV. CONCLUSION

Ever since the Court upheld legislative prayers in *Marsh*, lower courts have been struggling with how to answer the many important questions left unanswered by the Court. Whether the prayers may contain sectarian references and what kinds of procedures may be used to select the prayer givers are just two of the difficult problems that have bedeviled the lower courts. The result has been politically divisive litigation and intense religious battles across the United States. It is past time for the Court to realize that it made a mistake in *Marsh* by utilizing an antitheoretical historical approach inconsistent with any principled interpretation of the Establishment Clause. Legislative prayers unlawfully endorse and advance religion and should be deemed unconstitutional. In their place, legislatures could start their days with moments of silence and peaceful reflection, which will allow everyone to pray as they wish without causing offense to those who don't wish to pray and have the potential to unite both the religious and the nonreligious in a moment of common purpose. This solution to the intractable problems raised by legislative prayer is far more consistent with our history and traditions than the spate of overtly Christian messages that have been endorsed by state and local governments ever since *Marsh* was incorrectly decided over twenty-five years ago.