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Just a Little Talk with Jesus: Reaching the Limits of the Legislative Prayer Exception

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Notes

JUST A LITTLE TALK WITH JESUS: REACHING THE LIMITS OF THE LEGISLATIVE PRAYER EXCEPTION

I. INTRODUCTION

*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 right¹*

Thus on April 5, 2005, began the legal battle over prayer offered at the opening of the Indiana House Legislative sessions.² The Speaker of the Indiana House of Representatives, Brian Bosma, was keenly aware of objections to the overtly Christian content of the prayers invoked each meeting day at the opening of the House legislative sessions.³ He nonetheless invited Reverend Brown, who had delivered the opening prayer earlier that day, back into the Speaker's stand to "bless us with a song."⁴ Reverend Brown proceeded to sing "Just a Little Talk with Jesus" while several legislators, staff, and visitors stood, clapped, and

¹ CLEVANT DERRICKS, *Just a Little Talk with Jesus*, <http://www.preciouslordtakemyhand.com/christianhymns/justalittletalk.html> (last visited Aug. 25, 2007).

² *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1107 (S.D. Ind. 2005).

³ Brief of Defendant-Appellant at 8, *Hinrichs v. Bosma*, Nos. 05-4604, 05-4781 (7th Cir. May 15, 2006) (he refuses "to actively or passively censor prayers by informing clergy and members of the House that they cannot pray in accordance with the dictates of their conscience.").

⁴ *Hinrichs*, 400 F. Supp. 2d at 1103. The remaining lyrics of the song are as follows:

Sometimes my path seems dreary without a ray of cheer
And then the cloud about me hides the light of day
The mists in me rise and hide the stormy skies
But just a little talk with Jesus clears the way
...
I may have doubts and fears, my eyes be filled with tears
But Jesus is a freind [sic.] who watches day and night
I go to Him in prayer, He knows my every care
And just a little talk with Jesus makes it right

...
You will find a little talk with Jesus makes it right
Makes everything right

DERRICKS, *supra* note 1.

sang along.⁵ Other members of the House walked out, offended by this sectarian religious display during the legislative session.⁶ With such objections apparently past the tipping point, a lawsuit ensued against the Speaker, challenging the Christian nature of most of the prayers offered during the last session.⁷

The first round of this battle over the legislative prayer content in the Indiana House of Representatives ended in favor of the plaintiffs when the Federal District Court for the Southern District of Indiana issued an injunction requiring the Speaker to advise the persons offering prayer to keep the content nonsectarian.⁸ However, Speaker Bosma refused to carry out the court's order, choosing to forego the usual opening prayer rather than comply.⁹ He preferred allowing sectarian prayers, as in the

⁵ *Hinrichs*, 400 F. Supp. 2d at 1107. See also Eddie Baeb, *Indiana's Christians to Fight Ruling*, BUFFALO NEWS (New York), Dec. 15, 2005, at A9 (asserting that this song performed by the Baptist church elder was the source of the subsequent lawsuit).

⁶ *Hinrichs*, 400 F. Supp. 2d. at 1107.

⁷ *Id.* at 1108. Like most Hoosiers, all four plaintiffs are Christians. Baeb, *supra* note 5 ("About 82 percent of Indiana identifies itself as Christian and less than 1 percent as Jewish or Muslim, an Indiana University poll in 2004 showed.").

⁸ *Hinrichs*, 400 F. Supp. 2d at 1131. See also Patricia Manson, *Lawmaker Wants Relief for Prayer*, CHI. DAILY L. BULL., Sept. 5, 2006, at 3. Explaining the order and the Speakers reaction to it:

The injunction directed the speaker to tell anyone delivering such a prayer that it must be nonsectarian and must not refer to Jesus Christ or be used to proselytize or advance any other faith or belief.

Contending that the injunction required the censorship of Christian invocations, Bosma halted the 188-year practice of opening House sessions with a prayer.

Id. (internal quotes omitted).

⁹ See Mike Smith, *Statehouse Prayer Offered – Unofficially*, FORT WAYNE NEWS SENTINEL, Jan. 5, 2006, at L1. To comply with the court order, without actually carrying out its directive to advise those invited to deliver the prayer, the Speaker has, in essence, taken his ball home rather than play by the rules. *Id.* At the start of the 2006 legislative session, Bosma gathered several members of the House in the back of the chamber for an informal, voluntary prayer session. *Id.* Representative Eric Turner offered the following prayer:

Father, we thank you for sending your son to be a model for our lives . . . Help us to be Christlike in all that we do, in our interactions with one another as we represent our constituents back home. As we walk and talk, help us to be Christlike. Father, we just pray these things in the name of our Lord and our Savior, Jesus Christ.

Id. Afterward, many members applauded. *Id.* The news report continues:

Bosma said that because the prayers preceded official business, were said in the back of the chamber and were completely voluntary, they complied with the court order. He said he still believes [the district court]'s ruling tramples on free speech and plans to appeal it to the 7th U.S. Circuit Court of Appeals. For now, he will continue the new practice.

Id.

2005 session, even though those were held to violate the First Amendment's Establishment Clause.¹⁰

The embattled Indiana Legislature is not alone. The Tangipahoa Parish School Board is currently facing its third Establishment Clause lawsuit in the past decade.¹¹ For the past thirty years, the Board, which meets twice a month at the Parish School System Central Offices, has

"We are a nation of laws, even laws that we disagree with," Bosma said. *Id.* Speaker Bosma seems confused about the nature of the speech in question: the voluntary prayers in the back of the chamber that preceded the official business of the House were not state invocations. *Id.* The legal director of Indiana's ACLU, Kenneth Falk, who represents the plaintiffs, said of the prayer, "I don't see this as legislative prayer. This appears to be the private prayers of legislators, which they certainly have a right to do." *Id.* See also Manson, *supra* note 8. Falk is again quoted on the difference between the prayers:

The prayers being delivered to initiate sessions of the Indiana House of Representatives are delivered with the authorization of the speaker by invited officiants to give the prayers as part of the official agenda of the House of Representatives . . . These prayers represent government speech subject to the establishment clause, not private speech protected by the free speech and free exercise clauses of the First Amendment.

Id.

¹⁰ Smith, *supra* note 9. Speaker Bosma was vocal about his discontent with the federal judge's ruling. *Id.* See also Cory Havens, *Prayer Returns to House*, SOUTH BEND TRIB., Jan. 9, 2007, at A1:

Speaker of the House B. Patrick Bauer, D-South Bend, began Monday's opening session of the Indiana House of Representatives for 2007 with a prayer.

...

Before leading the House in prayer, Bauer explained that, while awaiting the latest ruling in the suit, he would use a script he prepared in consultation with the attorney general's office to avoid violating the court's order.

...

He said it was important to return the prayer to the front of the chamber.

Id. at A1, A6. The scripted nonsectarian prayer Bauer read was as follows:

Almighty God, we come before you today humbled by the magnitude of the responsibilities of this office. May you help us to realize that those who have been given the greatest responsibility need the greatest guidance. We pray you will show us what is good, and what is required of us. We pray for your insight, your compassion, and your strength. Amen.

Id. at A1.

¹¹ Doe v. Tangipahoa Parish Sch. Bd. (*Tangipahoa Parish I*), No. Civ.A. 03-2870, 2005 WL 517341 (E.D. La. Feb. 24, 2005); Debra Lemoine, *Judge Gets Arguments on School Board Meeting Prayers*, BATON ROUGE ADVOC., Sept. 10, 2004, at 1. The School Board lost one of the lawsuits concerning a policy which directed teachers to read a disclaimer to students before teaching evolution. Lemoine, *supra*, at 1. The second lawsuit challenged lunchtime prayer meetings held by ministers on school property and was settled. *Id.*

148 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

opened each meeting with an invocation.¹² The School Board asserts its classification as a deliberative body permitted use of prayer by the same exception to the Establishment Clause allowed for state and national legislative bodies.¹³

Much like the Indiana controversy, the Federal District Court for the Eastern District of Louisiana declared the School Board's practice a violation of the Establishment Clause.¹⁴ On appeal, however, the Fifth Circuit panel split three ways, producing three separate opinions, each with its unique analysis.¹⁵ Thus, the question of how a local government body can expect any proffered prayers to be regarded in the Fifth Circuit remains unanswered.¹⁶

Federal courts across the country are embroiled in disputes involving the use of prayer to open sessions for deliberative legislative and administrative bodies at all levels of government, local to national.¹⁷ This growing body of case law relies almost exclusively on a 1983 Supreme Court decision, *Marsh v. Chambers*, which addressed state legislative prayer.¹⁸ This Note proposes a judicial doctrine which would give clear guidance to judges regarding the use of prayer by deliberative bodies. First, this Note provides the history of legislative prayer, the Supreme Court's decision creating a blanket exception permitting its use,

¹² Doe v. Tangipahoa Parish Sch. Bd. (*Tangipahoa Parish II*), 477 F.3d 188, 192 (5th Cir. 2006).

¹³ *Id.* at 202. See also Lemoine, *supra* note 11, at 1 (describing the organization and effectiveness of the local conservative Christian churches and their members, forming the Christian Community Network). The Network's goal is "to promote Christian values in all aspects of community life, not just public schools . . ." *Id.* The Network succeeded in electing local Christian leaders, including a minister, to the nine-member School Board. *Id.* One School Board member denies pushing prayer on anyone, stating, ". . . We believe it is our freedom of religion, not freedom from religion . . ." *Id.* Notably, however, no prayers from any other faiths have ever been offered at the meetings. *Id.*

¹⁴ *Tangipahoa Parish I*, 2005 WL 517341, at *11.

¹⁵ See *Tangipahoa Parish II*, 477 F.3d at 188.

¹⁶ See Laura Maggi, *Board Prayer Improper, Judges Say But Nonsectarian One May Work*, NEW ORLEANS TIMES PICAYUNE, Dec. 17, 2006, at 1. The split decision "left open questions that could lead either side to appeal or to ask for a hearing before the full 5th U.S. Circuit Court of Appeals." *Id.*

¹⁷ See *Marsh v. Chambers*, 463 U.S. 783 (1983). See also *infra* Part II.A (discussing the history of legislative prayer).

¹⁸ *Marsh*, 463 U.S. at 783. *Contra* *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999) (holding that the school board's practice of opening its meetings with a prayer is not comparable to legislative prayer). This case is the singular exception involving deliberative bodies. *Contra* *North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145 (4th Cir. 1991) (holding that a state court judge's practice of beginning court sessions with a prayer violated the Establishment Clause).

and the evolution of lower court cases such prayer has generated.¹⁹ Second, this Note identifies the trend to test the limits of the Court's single legislative prayer holding, notes the ambiguities in its application, and highlights the need for the exception to be readdressed.²⁰ Third, this Note proposes a judicial doctrine that provides clear limits for legislative prayer by requiring the content to remain nonsectarian and forbidding the blanket application to all levels of government.²¹ This simple, proposed doctrine would save communities time and money currently spent on these controversies, as well as avoid the attending divisiveness such religious disagreements produce.

II. LEGISLATIVE PRAYER: ITS HISTORY, JURISPRUDENCE, AND CURRENT STATUS

The unique balance that the First Amendment creates between the Religion Clauses has resulted in an array of doctrines and tests that apply to the many situations where church and state collide.²² When government is the speaker and its speech includes prayer, three schools of thought exist with regard to content and location: strict separation, neutrality, and accommodation.²³ The limited guidance regarding what prayer content is acceptable by whom may cause confusion and, perhaps, leave religious minorities unprotected.²⁴ First, this Part offers a history of legislative prayer from its beginning in the First Congress through the Supreme Court's sole decision on this subject.²⁵ Second, this Part discusses lower courts' subsequent applications of the Supreme

¹⁹ See *infra* Part II.

²⁰ See *infra* Part III.

²¹ See *infra* Part IV.

²² See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 12.2.1 (2d ed. 2002). The First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

²³ CHEMERINSKY, *supra* note 22, at § 12.2.1. The theory of strict separation posits that government should be entirely secular, with religion entirely a private aspect of society. *Id.* at 1149. The theory of neutrality suggests that government remain neutral toward religion, without favoring either religion over non-religion or one religion over others. *Id.* at 1151. The accommodation theory interprets the Establishment Clause to forbid government from literally establishing a church, coercing religious participation, or favoring one religion over others. *Id.* at 1153. In addition, because government is the speaker, legislative prayer poses no conflict with the Free Exercise clause, which protects an individual right, and the question in all cases discussing legislative prayer turns on whether the government is advancing religion or entangled with religion. *Id.* at § 12.2.6.

²⁴ See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (describing how easy it is for the religious majority to fail to notice the coercive effects of practices which reflect their own religious traditions).

²⁵ See *infra* Part II.A.

Court's holding.²⁶ Finally, this Part explores two current conflicts involving legislative prayer.²⁷

A. *History of Legislative Prayer*

Legislative prayer has a long history in America.²⁸ Just three days after the First Congress authorized appointment of paid chaplains for the House and Senate, it approved the Bill of Rights, including the Establishment Clause of the First Amendment which succinctly forbade government establishment of religion.²⁹ In deciding Religion Clause cases, courts often consider the decisions and communications at the time these constitutional provisions were adopted in an effort to ascertain the Founders' intent.³⁰ Historians interpret the Founders'

²⁶ See *infra* Part II.B.

²⁷ See *infra* Part II.C.

²⁸ *Marsh v. Chambers*, 463 U.S. 783, 787 (1983). In 1774, the Continental Congress began the tradition of opening sessions with a prayer. *Id.* After the Constitutional Convention, the First Congress began the policy of selecting a chaplain for the opening prayer. *Id.*

²⁹ *Id.* at 788 ("Clearly the men who wrote the First Amendment Religion Clauses 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."). But history is not without its dissenters. See NOAH FELDMAN, *DIVIDED BY GOD* 247 (2005) ("Madison himself understood that paying the chaplains of the House and Senate out of public funds was a constitutional anomaly, and he wisely suggested that the Congress ought to pay for their services from their own pockets."). As President, Madison recommended at least four days of national prayer and thanksgiving and oversaw federal funding for both congressional and military chaplains and missionaries charged with converting the Indians to Christianity. Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 20 (2005).

³⁰ DARIEN A. MCWHIRTER, *THE SEPARATION OF CHURCH AND STATE* 6 (1994). The handling of church and state issues soon after the Bill of Rights was adopted into the Constitution is also telling of what the authors had in mind. *Id.* Two of the Founders' actions and words are most heavily relied upon: James Madison and Thomas Jefferson. *Id.* at 4. Madison proposed the set of twelve amendments at the first session of the first Congress, which were modified by the House and Senate and passed as the ten amendments of the Bill of Rights. *Id.* Shortly following the Bill of Rights' adoption, Jefferson wrote what may be the most quoted statement concerning the meaning of the religion clauses of the First Amendment:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments

intent using available records, attempting to reconcile the contradiction of the Establishment Clause with the paid chaplains.³¹ Federalism was an important issue for the First Congress, and several states at the time recognized and used taxes to support established churches.³² The Fourteenth Amendment, which makes the Establishment Clause applicable to the states, did not exist when the Bill of Rights was originally approved.³³ Thus, historical context, while limited in its

which tend to restore man to all of his natural rights, convinced he has no natural right in opposition to his social duties.

Id. at 4. See also Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069 (1998).

³¹ See, e.g., MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 15-16 (1978). The author sums up the hopes of the Founders:

What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. All of them also thought religion was useful, perhaps even necessary, for teaching morality. They all thought a free republic needed citizens who had a moral education. They all thought the primary responsibility for this education lay with the states. And they all agreed that Article I gave Congress no direct power to deal with the subject. The disagreement was over what Congress should be allowed to do pursuant to some other delegated power.

Id. at 17.

³² MARK DOUGLAS MCGARVIE, ONE NATION UNDER LAW: AMERICA'S EARLY NATIONAL STRUGGLES TO SEPARATE CHURCH AND STATE 13 (2004).

³³ U.S. CONST. amend. XIV. *But see* *Zelman v. Simmons-Harris*, 536 U.S. 639, 678-79 (2002) (Thomas, J., concurring). Justice Thomas stated:

When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty.

Consequently, in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government . . . Thus, while the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other.

Id. Justice Thomas reiterates his position as to incorporation of the Establishment Clause even more clearly in *Elk Grove Village Unified Sch. Dist. v. Newdow* two years later. 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (citation omitted.), two years later. He stated:

I accept that the Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment. . . But the Establishment Clause is another matter. The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering

modern applicability, reveals that the Founding Fathers saw no real threat to the Establishment Clause through the use of legislative prayer.³⁴

Only once has the Supreme Court addressed this issue squarely, recognizing a special exception to the usual Establishment Clause doctrines for legislative prayer in *Marsh v. Chambers*.³⁵ The Court examined the Nebraska legislature's 100-year-old practice of employing a chaplain to open the daily legislative session with a prayer.³⁶ The long-

with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause.

Id.

³⁴ See *Marsh*, 463 U.S. at 790-91. However, there have been colossal changes in the country since the adoption of the First Amendment. See *Sch. Dist. Of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 240 (1963) (Brennan, J., concurring) ("[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.")

³⁵ *Marsh*, 463 U.S. at 783. The Court chose not to apply other Establishment Clause doctrines available at the time. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing the *Lemon* test in finding that state aid to nonpublic schools did not have a secular purpose, a primary effect which neither advances nor inhibits religion, nor did it foster excessive government entanglement with religion); see also *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor concurrence) (establishing the endorsement test analyzing a city's display of a nativity scene and finding that the city did not symbolically endorse a particular religion through the display). Since the decision in *Marsh*, other possible doctrines have emerged. See, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (establishing the neutrality test through the government's similar treatment of religious and secular groups); *Lee v. Weisman*, 505 U.S. 577 (1992) (establishing the coercion test through the finding that prayers at public school graduations are inherently coercive because there is great pressure on students to attend their graduation ceremonies and to not leave during the prayer).

³⁶ *Marsh*, 463 U.S. at 784. Robert E. Palmer, a Presbyterian minister, served as the chaplain since 1965, sixteen years before the time the case was heard by the Court, at a salary of \$319.75 per month for each month that the legislature was in session. *Id.* at 785. The chaplain's prayers included explicitly Christian references for the first fifteen years of his tenure. *Id.* at 824 n.2 (Stevens dissent). An example of such prayer is the following, given by Palmer on March 20, 1978:

Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified.

The days of his life-giving death and glorious resurrection are approaching. This is the hour when he triumphed over Satan's pride; the time when we celebrate the great event of our redemption. We are reminded of the price he paid when we pray with the Psalmist:

My God, my God, why have you forsaken me, far from my prayer, from the words of my cry? O my God, I cry out by day, and you

term use of a single Christian minister was acceptable absent proof of impermissible motive.³⁷ Paying the chaplain from state funds did not violate the Establishment Clause in view of the historical tradition of paid legislative chaplains.³⁸ The question concerning the content of the prayers in the Judeo-Christian tradition, which becomes more relevant in subsequent disputes, was not of concern because there was “no indication that the prayer opportunity has been exploited to proselytize or advance any one, or disparage any other, faith or belief.”³⁹ Indeed, the Court expressed a reluctance to dissect particular prayers in an effort to assess their constitutionality.⁴⁰

answer not; by night, and there is no relief for me. Yet you are enthroned in the Holy Place, O glory of Israel? In you our fathers trusted; they trusted, and you delivered them. To you they cried, and they escaped; in you they trusted, and they were not put to shame. But I am a worm, not a man; the scorn of men, despised by the people. All who see me scoff at me; they mock me with parted lips, they wag their heads: He relied on the Lord; let Him deliver him, let Him rescue him, if He loves him. Amen.

Id. A previous complaint from a Jewish legislator in 1980 led Palmer to remove all references to Christ. *Id.* at 793 n.14.

³⁷ *Id.* at 793-94. No impermissible motive was found because Palmer’s reappointment was related to the acceptability of his performance and personal qualities. *Id.* at 793. In addition, guest chaplains substituted for Palmer during absences or at the request of legislators. *Id.*

³⁸ *Marsh*, 463 U.S. at 794. More recently the Court has relied heavily on history and tradition in deciding other Establishment Clause cases. In *Van Orden v. Perry*, Justice Breyer’s swing vote held that a granite monument bearing the Ten Commandments on the grounds of the Texas Statehouse could remain due to its almost fifty-year, unchallenged residency in that location. *Van Orden v. Perry*, 545 U.S. 677 (2005) (Breyer, J., concurring). *But see* *McCreary County v. ACLU*, 545 U.S. 844 (2005) (finding more recent placement of Ten Commandments and attempting to add historical relevance to display fails to satisfy reliance on history and tradition). These tandem cases concerning display of the Ten Commandments reflect similar reasoning as was applied in *Marsh* to the long-term service of the legislative chaplain with no impermissible motive discernable. *Marsh*, 463 U.S. at 793-94.

³⁹ *Marsh*, 463 U.S. at 794-95. Another relevant factor in legislative prayer cases was the maturity of the audience. *See* *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring):

The saying of invitational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause. Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect.

Id. at 299-300 (footnote omitted). Justice Brennan, however, had a change of heart regarding legislative prayer twenty years later in *Marsh*. *See generally* *Marsh*, 463 U.S. at 795-96 (Brennan, J., dissenting).

⁴⁰ *Marsh*, 463 U.S. at 795.

Members of the Court commented on the *Marsh* analysis and shed more light on the evaluation of particular prayers used in legislative settings in *County of Allegheny v. American Civil Liberties Union*.⁴¹ While *Allegheny* dealt with the holiday display of a crèche in a county courthouse, the display was analogized with the legislative prayer in *Marsh*.⁴² The majority noted that although the Founding Fathers authorized the use of legislative prayer at the time of the passage of the Bill of Rights, such history “cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.”⁴³ This

⁴¹ E.g. *County of Allegheny v. ACLU*, 492 U.S. 573, 662-63 (1989) (O’Connor, J., concurrence):

[I]n *Marsh v. Chambers*, we found that Nebraska’s practice of employing a legislative chaplain did not violate the Establishment Clause, because legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations. Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.

Id. (citation omitted).

⁴² *Id.* See also *Lynch v. Donnelly*, 464 U.S. 668 (1984) (O’Connor, J., concurring):

These features combine to make the government’s display of the crèche in this particular physical setting no more an endorsement of religion than such governmental “acknowledgments” of religion as legislative prayers of the type approved of in *Marsh*, government declaration of Thanksgiving as a public holiday, printing of “In God We Trust” on coins, and opening court sessions with “God save the United States and this honorable court.” 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.

Id. (citation omitted).

⁴³ *Allegheny*, 492 U.S. at 603. The Court continues:

Indeed, in *Marsh* itself, the Court recognized that not even the “unique history” of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had “removed all references to Christ.” Thus, *Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today. Nor can *Marsh*, given its facts and its reasoning, compel the conclusion that the display of the crèche involved in this lawsuit is constitutional

discussion from *Allegheny* is usually considered in addition to the holding from *Marsh* when courts evaluate the allowable content of particular prayer in challenges to legislative prayer.⁴⁴ An appraisal of this fusion of *Marsh* and *Allegheny*, often followed by the lower courts, concludes that while the government cannot align itself with a particular faith, legislative bodies may provide an invocation before engaging in public business.⁴⁵ This summation of *Marsh* and *Allegheny* decisions will be referred to throughout this Note as the *Marsh/Allegheny* doctrine.⁴⁶

B. *The Ensuing Evaluation of Legislative Prayer*

The Supreme Court's application of the Establishment Clause to government prayer activities has two main branches – legislative prayer and school prayer.⁴⁷ While government prayer in public schools is uniformly banned in primary and secondary schools, once a student leaves his high school graduation ceremony, the only Establishment Clause protection offered by the Court to address adult exposure to government prayer is in the legislative prayer context.⁴⁸ This Part

... The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically Whatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).

Id. at 603-05. (Internal cites omitted).

⁴⁴ See, e.g., *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1117 (S.D. Ind. 2005) (holding that the emphasis of Christian doctrine, including the resurrection and divinity of Jesus of Nazareth, overstepped the bounds of nonsectarian prayer allowed by *Marsh*).

⁴⁵ *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 (4th Cir. 2004). Specifically, this court noted that *Marsh* and *Allegheny* can be read together to:

... teach that, in view of our Nation's long and unique history, a legislative body generally may, without violating the Establishment Clause, invoke Divine guidance for itself before engaging in its public business. But *Marsh* and *Allegheny* also teach that a legislative body cannot, consistent with the Establishment Clause, exploit this prayer opportunity to affiliate the Government with one specific faith or belief in preference to others.

Id. (internal quotes omitted).

⁴⁶ See *infra* Parts II.B, III.

⁴⁷ See generally CHEMERINSKY, *supra* note 22, at § 12.2.

⁴⁸ See *Marsh v. Chambers*, 463 U.S. 783 (1983); see also Elizabeth B. Halligan, Note, *Coercing Adults?: The Fourth Circuit and the Acceptability of Religious Expression in Government Settings*, 57 S.C. L. REV. 923, 925 (2005-2006) (recognizing that the Supreme Court has addressed various public school prayer cases but has only addressed adult prayer in the legislative prayer setting). But see *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (holding that supper prayer at the Virginia Military Institute violated the Establishment Clause due to the coercive elements unique to the military college).

elucidates the application of the Supreme Court's decisions regarding legislative prayer and other prayer in adult situations.⁴⁹

1. *Marsh/Allegheny* Applied: Limits on Content

Since *Marsh* and *Allegheny*, lower courts have attempted to define the constitutionality of legislative prayer content.⁵⁰ The Tenth Circuit, for example, examined a specific prayer to be given at the opening of a city council meeting in *Snyder v. Murray City Corporation*.⁵¹ Ignoring the

⁴⁹ See *infra* Parts II.B.1, II.B.2.

⁵⁰ See *infra* Part II.B. The *Marsh* decision was announced after the D.C. Circuit heard oral arguments in the case of *Murray v. Buchanan*, in which the payment of salaries and expenses for Chaplains of the U.S. House of Representatives and Senate were challenged, but was dismissed by the district court. *Murray v. Buchanan*, 720 F.2d. 689, 690 (D.C. Cir. 1983) (per curiam) (en banc). The D.C. Circuit dismissed the appeal. *Id.*

⁵¹ *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998). The plaintiff, unhappy with the resumption of legislative prayers in Utah, drafted the following prayer proposal to be given at a Murray City council meeting:

Our Mother, who art in heaven (if, indeed there is a heaven and if there is a god that takes a woman's form) hallowed be thy name, we ask for thy blessing for and guidance of those that will participate in this meeting and for those mortals that govern the state of Utah; We fervently ask that you guide the leaders of this city, Salt Lake County and the state of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions;

We pray that you prevent self-righteous politicians from 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;

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

We ask that the people of the state of Utah will some day learn the wisdom of the separation of church and state; we ask that you will teach the people of Utah that government should not participate in religion; we pray that you smite those government officials that would attempt to censor or control prayers made by anyone to you or to any other of our gods;

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

motive of the prayer-giver, whose goal was to completely thwart all city government prayer, the court applied the *Marsh/Allegheny* analysis.⁵² As such, the prayer was rejected because the content of the prayer both proselytized for a specific brand of religion and disparaged other divergent religious views.⁵³

The Ninth Circuit succinctly held that allowing prayers “in the name of Jesus” at school board meetings violated the Establishment Clause, in *Bacus v. Palo Verde Unified School District Board of Education*.⁵⁴ The references to Christ advanced a single faith.⁵⁵ While not disparaging

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

Id. at 1229 n.3. The Tenth Circuit pondered whether this was religious speech or “political harangue[.]”

Although Snyder’s putative prayer is unusual and iconoclastic, because this case was decided on summary judgment we will assume without deciding that it is an invocational prayer [T]he Establishment Clause speaks only to the religious aspect of Snyder’s prayer, which we presume for purposes of this appeal, and as a result, we are not called in this case to evaluate the prayer’s political overtones. By assuming the religious content of Snyder’s prayer, we expressly reserve for another day the very difficult issue of attempting to discern the line between prayer and secular speech masquerading as prayer.

Id. at 1228-29.

⁵² *Id.* at 1232-36. The Tenth Circuit opinion discusses *Marsh’s* acceptance of prayers offered within a tolerable range of common beliefs and selection of the person reciting the prayer. *Id.* at 1233-34. Snyder’s prayer fails in both comparisons. *Id.* at 1236.

⁵³ *Id.* at 1236. The court stated that “Snyder’s claim must fail as a matter of law because his proposed prayer falls well outside the genre of legislative prayers that the Supreme Court approved in *Marsh*” and his prayer “aggressively proselytizes for his particular religious views and strongly disparages other religious views[.]” . . . “clearly draws on the tenets of his belief . . . that prayer should only be conducted in private[.]” . . . “seeks to convert his audience to his belief in the sacrilegious nature of governmental prayer[.]” all of which make the prayer proselytizing and outside the allowable boundaries of *Marsh* analysis. *Id.* at 1235.

⁵⁴ 52 F. App’x 355 (9th Cir. 2002). The opinion is precise and concise in its rejection of the board meeting prayers and contains a memorandum deeming it inappropriate for publication or citing to by the courts of the circuit. *Id.* at 356. Despite this, the case has been cited to in subsequent legislative prayer decisions. *E.g.*, *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005); *Pelphrey v. Cobb County, Ga.*, 410 F. Supp. 2d. 1324, 1335 (2006).

⁵⁵ *Bacus*, 52 F. App’x at 356. The court sidesteps the issue of whether the particular prayer in question here at a school board meeting is more like legislative prayer or prayers in school rooms. *Id.* However, the opinion states that if it were school prayer, then “plainly these regular prayers ‘in the Name of Jesus’ would be unconstitutional,” and proceeds to apply the *Marsh* analysis. *Id.* at 356-57. *But see* *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999) (holding that prayer at a school board meeting is

other faiths or proselytizing, the prayers “advanced one faith, Christianity, providing it with a special endorsed and privileged status in the school board.”⁵⁶

The Fourth Circuit recently addressed legislative prayer in *Wynne v. Town of Great Falls, South Carolina*.⁵⁷ In *Wynne*, a regular attendee of the town council meetings objected to references to Jesus Christ and asked the council, on more than one occasion, to use an alternative prayer with limited references to “God.”⁵⁸ By applying the *Marsh/Allegheny* analysis,

analogous to the school prayer cases and following that line of precedent, as opposed to the *Marsh* analysis, because the school board meetings were “conducted on school property by school officials, and are attended by students who actively and regularly participate in the discussions of school-related matters . . . [T]he logic behind the school prayer line of cases is more applicable to the school board’s meetings than is the logic behind the legislative-prayer exception in *Marsh*.”) *Id.* at 381.

⁵⁶ *Bacus*, 52 F. App’x at 357. The court continues to explain that because the plaintiffs here were seeking to participate in their political community, their standing to bring suit was satisfied. *Id.* The plaintiffs were teachers in the community who certainly had reason to attend the school board meetings. *Id.* at 356. Because the prayers were unconstitutional, the teachers demonstrated standing through their injury in fact, the affront at each meeting, which was traceable to the challenged conduct, the opening prayer. *Id.*

⁵⁷ *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292, 295 (4th Cir. 2004). The Fourth Circuit also addressed legislative prayer in *Simpson v. Chesterfield County Board of Supervisors*. 404 F.3d 276, 279 (4th Cir. 2005). Curiously, both of these Fourth Circuit cases were brought by Wiccans. *Wynne*, 376 F.3d at 295; *Simpson*, 404 F.3d at 279. Wicca is based on a pagan religion, but has evolved in the United States into what is best described as modern feminine witchcraft. BELIEF BEYOND BOUNDARIES: WICCA, CELTIC SPIRITUALITY AND THE NEW AGE 44-45, 137 (Joanne Pearson ed., The Open University 2002). *Simpson* challenged her exclusion from the list of religious leaders providing nonsectarian invocations prior to the public sessions of the county board of supervisors. *Simpson*, 404 F.3d at 279-80. Here, the content of the prayer was not an issue per se, rather the selection process for the prayer-givers was challenged. *Id.* at 284. Therefore, further discussion of this case is not included in this note because the content issue is not implicated. Interestingly, Wicca is non-proselytizing, a tradition grown from the history of witch hunts, and thus, also involves a great deal of secrecy, intimacy, and a high level of trust among its members. BELIEF BEYOND BOUNDARIES, *supra*, at 136. While it may seem an anomaly to have two recent federal appellate level prayer cases brought by Wiccans, perhaps the Wiccan dissatisfaction with legislative prayer should be viewed as originating in a similar manner as other nontraditional minority religions in constitutional case history. See, e.g., *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Lovell v. City of Griffin, Georgia*, 303 U.S. 444 (1938) (discussing freedom of expression suits brought by Jehovah’s Witnesses); *U.S. v. Lee*, 455 U.S. 252 (1982) (discussing Free Exercise Clause suits brought Amish litigants); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (same).

⁵⁸ *Wynne*, 376 F.3d at 295. Not only did the mayor refuse to change the content of the opening prayer, but subsequently several Christian ministers drafted resolutions and petitions supporting the continuance of the prayer practice which referred to Wynne as a “professed ‘witch.’” *Id.* When Wynne declined to stand during the prayer, she was chastised and threatened. *Id.* When she attempted to avoid the controversy by arriving at the meeting after the prayer was invoked, she was denied the right to speak at the meeting

the court determined that the practice “clearly advance[d] one faith, Christianity, in preference to others.”⁵⁹ The public officials were held free to continue the invocations prior to the town council meetings but not to advance a single religious view.⁶⁰

Likewise, in *Rubin v. City of Burbank*, a California appellate court followed this line of analysis in holding that a city council’s intermittent invocation of the name of Jesus Christ violated the Establishment Clause.⁶¹ The court interpreted *Marsh/Allegheny* “to mean that *any* legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause.”⁶²

Most courts adhere to the *Marsh/Allegheny* analysis when evaluating prayers in city and county government meetings across the United States.⁶³ The decisions applying *Marsh/Allegheny* predictably held that legislative prayer across the board is constitutionally acceptable, while sectarian content, even just invoking Jesus Christ, is unconstitutional. Recently, however, some courts have chosen to ignore this distinction.⁶⁴

because the opportunity to sign up on the agenda was only offered before the prayer. *Id.* Wiccan beliefs predate Christianity. Robyn Monaghan, *Wiccans Dispel Stereotypes*, THE TIMES, Oct. 31, 2006, at A7. The Wiccan philosophy has no concept of “ultimate evil” and does not include a belief in, and therefore couldn’t worship, Satan. *Id.* at A1. Wiccans also do not practice any form of animal sacrifice; they are, in fact, animal lovers, often vegetarians. *Id.*

⁵⁹ *Wynne*, 376 F.3d at 301 (internal citations omitted). The Town Council argued that it was not “advancing” Christianity in its single invocation at each meeting, in that it was not trying to convert any attendees of other faiths. *Id.* at 300. However, the court refused to give the same meaning to the words “proselytize” and “advance” from *Marsh*, and held that the prayers here “embody the precise kind of advancement of one particular religion that *Marsh* cautioned against.” *Id.* at 302 (internal quotes omitted); *cf.* *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) (en banc) (noting that “all prayers ‘advance’ a particular faith or belief in one way or another” and, therefore, only the “more aggressive form of advancement, i.e., proselytization” may be prohibited). The *Wynne* court rejects this interpretation of “proselytize or advance” from *Marsh*, because “nonsectarian prayers, by definition, do not advance a particular sect or faith.” *Wynne*, 376 F.3d at 301 n.6.

⁶⁰ *Wynne*, 376 F.3d at 302. This phrasing mirrors the *Lemon* test language, whereby government’s “principal or primary effect must be one that neither advances nor inhibits religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

⁶¹ *Rubin v. City of Burbank*, 124 Cal. Rptr. 2d at 873.

⁶² *Id.*

⁶³ See *Pelphrey v. Cobb County*, 410 F. Supp. 2d 1324 (N.D. Ga. 2006); *Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867 (Cal. Ct. App. 2003).

⁶⁴ See, e.g., Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 515-16

In *Pelphrey v. Cobb County, Georgia*, a Federal District Court ruled that prayers at County Commission meetings which include explicit references to the Christian faith were not proselytization or favoritism.⁶⁵ While the actual prayer content involved in *Pelphrey* was analogous to

(2006). Discussing the Rehnquist Court and its current ramifications, religion is highlighted as an element of the “deeper agenda of the Bush Administration[:]”

... [W]e believe that the Bush Administration’s commitment to changing the constitutional boundaries between church and state is especially important. Moreover, previous Republican appointments have already borne considerable fruit. The changes in constitutional doctrines involving religion have come closer than any others in the last fifteen years to deserving the name “revolutionary.”

There has been a distinct and genuine move from the Warren and early Burger Court’s general hostility to government support of religion to a new theory of “neutrality” The Court now places relatively few barriers in the way of state or federal funds goint to religious schools or other religious organizations so long as the purpose is not a naked preference for religious versus secular organizations. Some advocates believed – some with horror, some with joy – that this portended a full 180 degree turn, in which the Supreme Court would define “neutrality” as requiring support for religious education so long as nonreligious education received support. . . .

... [I]t is impossible to estimate the shelf life of the Court’s twin – and many would say incoherent – decisions in *McCreary County v. ACLU* and *Van Orden v. Perry* regarding government-supported displays of religion in the public square. In these two cases, the Court struck down a publicly supported display of the Ten Commandments in Kentucky, but upheld one in Texas. Justice Kennedy was a dissent in *McCreary County*, and in the plurality in *Van Orden*. Given that he is the new swing Justice, this means that *Van Orden*, which gave local governments far greater leeway to place religious iconography in public places, probably represents the wave of the future.

Id.

⁶⁵ *Pelphrey*, 410 F. Supp. 2d at 1324. The record from *Pelphrey* lacks specific details concerning who offers the prayers at the County Commission meetings and the exact content of the prayers, but the district court seemed unconcerned about such particulars because the prayers “typically last less than one minute.” *Id.* at 1325. The decision describes the complainants’ focus as follows:

Plaintiffs, focusing on meetings that took place during an eighteen month period prior to commencement of this lawsuit, have identified thirty prayers including references to “Jesus,” “Christ,” or “Jesus Christ” given at County Commission meetings, and point to twelve such references during Planning Commission meetings. Typically, these references were made at the conclusion of the prayer, and consisted of language such as, “in Christ’s name” or “in Jesus’ name we pray.”

Id. at 1326. The decision explains in a footnote that “assuming the eighteen month period selected by Plaintiffs presents a fairly representative sample, it would appear that a reference to Christ is made during approximately 75% of the invocations offered in the meetings of the County Commissions.” *Id.* at 1326 n.3. The decision also notes that not all of the references to Christ were “isolated or laconic.” *Id.* at 1326 n.4.

the previous decisions disallowing overtly Christian content, the district court in *Pelphrey* departed from the holdings of the Fourth, Ninth, and Tenth Circuits.⁶⁶ The lack of both “impermissible motive” to show a preference for Christianity and exploitation of the opportunity to proselytize convinced the court that no violation occurred.⁶⁷ In this twist on the standard *Marsh/Allegheny* analysis, the court strictly followed the *Marsh* edict of declining to parse the prayers in its review and focused instead on the “cumulative effect of the legislative prayer practice, rather than on the speech constituting an individual prayer.”⁶⁸ Noting the national rise of the Christian Conservative movement and the recent accommodation of religion in the context of government displays and school vouchers, *Pelphrey* introduces a similar policy shift in the allowable content of legislative prayer.⁶⁹

⁶⁶ *Id.* at 1338. The court of the Northern District of Georgia specifically declines to follow the interpretation and application of *Marsh* from several of the cases examined above:

After carefully considering the matter, the Court cannot accept the latter courts’ reading of *Marsh* and its progeny. Such a *per se* proscription on any reference to a deity acknowledged by one faith, or any belief unique to that faith, would force courts into precisely the position the Supreme Court cautioned against in *Marsh* . . . requiring them to assume the role of regulators and censors of legislative prayer.

Id. at 1339.

⁶⁷ *Id.* at 1348. The district court asserts:

[T]here is insufficient evidence before the Court to suggest an effort by the Cobb County Commissions to exploit the legislative prayer opportunity to proselytize or advance any one, or to disparage any other, faith or belief. The prayers at issue did not invariably contain sectarian Christian references, and indeed, were on a number of occasions given by non-Christian . . . clergy . . . Further, while the percentage of prayers that included *some* reference to “Jesus” or “Christ,” in the subset selected by Plaintiffs, is indeed substantial, this Court is disinclined . . . to condemn a practice of legislative prayer based on numbers alone.

Id. at 1346-47 (internal quotations and citations omitted).

⁶⁸ *Id.* at 1338. *Cf.* *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292 (4th Cir. 2004) (holding that plaintiff’s request to limit prayer references to “God” reasonable, and references to “Jesus Christ” advance a particular religion).

⁶⁹ *See, e.g.*, NOAH FELDMAN, *DIVIDED BY GOD* 199-219 (Farrar, Straus and Giroux 2005). Since the *Marsh* decision, there has been a rising of values-based evangelicalism, beginning with the Christian Conservative movement which successfully pressed for the re-election of Ronald Reagan in 1984 to ensure control over the changing Supreme Court. *Id.* at 199-200. At this time, recent legal history demonstrated protection of religious minorities, like Jews and Jehovah’s Witnesses, from the religious will of the majority. *Id.* at 206. In a tactical response, the Christian evangelicals began depicting themselves as the minorities, refused equal treatment and protection by their government. *Id.* Their strategy has been successful, especially in areas involving economics. *Id.* at 216. But the evangelicals have not yet been as successful in the courts, losing hard-fought clashes over public displays of

162 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

2. Adult Prayer in Non-Legislative Situations: Alternatives to the Marsh/Allegheny Analysis

Cases regarding adult-environment prayer are unique, but are consistently evaluated like the other branch of government prayer cases, those involving school prayer.⁷⁰ The first adult prayer case, *Tanford v. Brand*,⁷¹ involved a challenge to the invocation and benediction practice during the Indiana University commencement ceremony.⁷² The plaintiffs argued that they felt coerced to attend the ceremony, during which the government sponsored prayer was thrust upon them against

religion, creationism, and prayer in schools. See *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that a nondenominational prayer at a school graduation violates the Constitution); see also *County of Allegheny*, 492 U.S. 573 (1989) (holding that the display of a creche and menorah violates the Establishment Clause); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that the teaching of “creation science” is an unconstitutional attempt to teach religion in schools). But see *Van Orden, v. Perry*, 125 S. Ct. 2854 (2005) (holding that granite display of the Ten Commandments on the Texas Statehouse grounds is constitutional); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that government provision of school tuition vouchers to be used at religious schools is constitutional).

⁷⁰ See *supra* notes 47-48 and accompanying text. See generally Deanna N. Pihos, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 CORNELL L. REV. 1349 (2005); Henry J. Reske, *And May God Bless*, 78 A.B.A. J. 46 (Feb. 1992) (discussing the subtle coercion of *Lee v. Weisman*). In school prayer/adult prayer cases, the test in *Lemon* with coercion is most often applied. The endorsement test requires that the government minimize the extent to which it encourages or discourages religious belief or disbelief, practice or non-practice, observance or nonobservance. See *Lynch v. Donnelly*, 464 U.S. 668, 694 (1984) (“Every Government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.”); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990). The neutrality test dictates that the government acts with neutrality when, following neutral criteria and evenhanded policies, it “extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Rosenberger v. University of Virginia*, 515 U.S. 819, 839 (1995). See generally Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1 (2005) (discussing the Supreme Court’s acceptance of the neutrality doctrine, especially in grants of aid to education); Arnold H. Loewy, *The Positive Reality and Normative Virtues of a “Neutral” Establishment Clause*, 41 BRANDEIS L.J. 533 (2003) (discussing and encouraging neutrality jurisprudence). But see E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1187-1202 (1994) (discussing the “myth” of neutrality in government speech). Due to its particular applicability to funding programs, the neutrality test has not been applied to legislative prayer cases. See *Hinrichs*, 400 F. Supp. 2d at 1115 n.11. While tax dollars are spent on legislative prayer in most state legislature cases, either on the chaplain’s salary or the process of inviting and thanking visiting prayer-givers, the test is not applicable in the way it was developed in *Rosenberger*. *Id.*

⁷¹ *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997).

⁷² *Id.* A law professor, two law students, and an undergraduate student at Indiana University brought suit to enjoin the prayers. *Id.* Indiana University’s practice of having an invocation and benediction at its commencements was a 155 year tradition. *Id.* at 986.

their will.⁷³ The prayer offered at the ceremony was non-sectarian in nature, and accommodations were offered to make exit and re-entry “an easy matter” for those wishing to avoid the prayer entirely.⁷⁴ While prayer at middle school and high school graduations is unconstitutional, the court determined that the students attending the University are older, less impressionable, and could avoid the prayer altogether if desired.⁷⁵

Chaudhuri v. State of Tennessee followed *Tanford*, expanding on its groundwork.⁷⁶ Dr. Chaudhuri, a practicing Hindu, challenged the University’s use of prayer and moments of silence at a variety of school functions.⁷⁷ The Sixth Circuit followed similar reasoning to the *Tanford* decision, holding that attendance at the University events where prayer was offered was not mandatory.⁷⁸ While Chaudhuri argued that the “university service” component of his professional evaluations was affected by attendance and participation in University events, the court

⁷³ *Id.* at 984-85.

⁷⁴ *Id.* at 983-84. The prayer offered at the May 1995 benediction read as follows:
Let us pray. Gracious God we have gathered as dreamers. People who believe deep inside that things can be better. We have been called into being by you to make a difference. We like giving. Be with us as we endeavor to reach out to those who feel distance from the joy and the challenge of truth. We pray that we might touch with our learning those who feel that there is no hope, no reason to believe in life and love, and the possibility itself. Strengthen us for the journeys of mind, of heart, of spirit, of body, so that we might be right in truth for one another, and for our world. We ask this in the name of our common god. Amen.

Id. at 983 n.1.

⁷⁵ *Id.* at 985-86. The students could forego the ceremony altogether and receive their diplomas through alternate means or they were free to exit and re-enter the ceremony at will. *Id.* The law professor was under no obligation to attend the ceremony either and, like the students, was free to come and go at will. *Id.*

⁷⁶ *Chaudhuri v. State of Tennessee*, 130 F.3d 232 (6th Cir. 1997). The plaintiff was a tenured professor at Tennessee State University who, over the years, lodged several complaints against the University challenging prayer practice. *Id.* at 233-35. Plaintiff’s complaints began as early as 1988, when his dissatisfaction with University prayer practice compelled the University to adopt the use of non-sectarian prayers. *Id.* at 234. Dr. Chaudhuri also filed suit for an alleged Civil Rights violation due to religious discrimination. *Id.* at 234. The district court granted the school summary judgment. *Id.* at 234 n.1.

⁷⁷ *Id.* at 233. Chaudhuri was not satisfied by the adoption of non-sectarian prayer practice at the University because the prayers still strongly suggested a monotheistic religious view. *Id.* at 236. He was also dissatisfied with the use of moments of silence because he felt the intent was still to allow prayer. *Id.* at 233.

⁷⁸ *Id.* at 238.

found that his maturity and his freedom to refrain from both the events and the prayers made him less vulnerable to religious indoctrination.⁷⁹

The Sixth Circuit addressed adult prayer again by examining the prayer practice at school board meetings in *Coles v. Cleveland Board of Education*.⁸⁰ The challenged prayer was initially held to be a constitutionally permissible legislative prayer under *Marsh* due to the “adult atmosphere” and the fact that the school board was an elected body.⁸¹ However, the Sixth Circuit rejected both notions, deciding instead that the board meetings were an “integral part of the public school system” whose activities set it apart from the normal definition of legislative bodies exempted by *Marsh*.⁸² The school board’s prayers failed the *Lemon* test and were declared an unconstitutional government prayer practice that endorsed Christianity.⁸³

The final adult prayer case, in which the supper prayer practice at the Virginia Military Institute (VMI) was challenged, is *Mellen v. Bunting*.⁸⁴ Like *Tanford* and *Chaudhuri*, *Mellen* involves prayer in a college atmosphere.⁸⁵ Referring often to the holdings of *Tanford* and *Chaudhuri*, the court questioned the amount of coercion present in the

⁷⁹ *Id.* at 239. One judge dissented as to the content of the prayers, compelling the bench to be cautious and vigilant in protecting non-Christians from prayers offered often in our nation with a strong Christian tradition. *Id.* at 240-41 (Jones, J., concurring and dissenting).

⁸⁰ *Mellen v. Bunting*, 171 F.3d 369 (6th Cir. 1999). The prayers offered were clearly sectarian, with repeated references to Jesus and the Bible, usually delivered by the school board president, who was also a Christian minister. *Id.* at 385.

⁸¹ *Coles v. Cleveland Board of Edu.*, 950 F. Supp. 1337, 1345-47 (N.D. Ohio 1996). See generally Paul Ryneski, *The Constitutionality of Praying at Government Events*, 1996 DET. C.L. REV. 603 (1996) (discussing prayer at a variety of events, from school graduation ceremonies to city council meetings).

⁸² *Coles*, 171 F.3d at 381. The court notes that the “constituency” of the board includes students, who cannot vote, and therefore have no say in who represents them at the board meetings, and who, due to their age, are more likely to be influenced by the clearly sectarian prayers offered. *Id.*

⁸³ *Id.* at 386. Though the court refers to the possibility of coercion as in *Lee*, the *Lemon* test was applied and the prayer practice failed all three prongs. *Id.* at 383-85. Cf. *Bacus v. Palo Verde Unified School District Board of Education*, 52 Fed.Appx. 355 (9th Cir. 2002) (applying *Marsh/Allegheny* to hold similar school board prayer practice unconstitutional due to its sectarian nature).

⁸⁴ 327 F.3d 355 (4th Cir. 2003).

⁸⁵ *Id.* at 360. VMI is a state-operated military college funded by the Commonwealth of Virginia which utilizes an adversarial method of training in its preparation of students for military service and leadership. *Id.* at 361. Two former cadets sued to enjoin VMI from the prayer practice and sought damages for the violation of the Establishment Clause. *Id.* at 360. Though the district court issued declaratory and injunctive relief, that judgment was vacated because the cadets had already graduated from VMI. *Id.*

university prayer situations.⁸⁶ Unlike the practices at Indiana University and Tennessee State University, the VMI system of education was found to be “uniquely susceptible to coercion.”⁸⁷ Many of the school’s training methods involved conformity and highly encouraged participation in mandatory and ritualized activities.⁸⁸ Such pressure to attend state-sponsored prayer events failed the *Lemon* test due to the coercive environment and therefore failed to satisfy the Establishment Clause prohibition.⁸⁹

C. *Two Cases Which Highlight the Limits of the Legislative Prayer Exception*

Recent political trends have brought religion and government prayer to the forefront of legal debate.⁹⁰ Along with the recent Court’s

⁸⁶ *Id.* at 371-72.

⁸⁷ *Id.* at 371. The court explains:

Although VMI’s cadets are not children, in VMI’s educational system they are uniquely susceptible to coercion. VMI’s adversative method of education emphasizes the detailed regulation of conduct and the indoctrination of a strict moral code At VMI, even upperclassmen must submit to mandatory and ritualized activities, as obedience and conformity remain central tenets of the school’s educational philosophy.

Id.

⁸⁸ *Id.* at 372. Specifically referring to the dining service, the court explains:

The technical “voluntariness” of the supper prayer does not save it from its constitutional infirmities. At all relevant times, VMI’s upperclass cadets could avoid the mess hall in order to shield themselves from the prayer. Nevertheless, the communal dining experience, like other official activities, is undoubtedly experienced as obligatory Put simply, VMI’s supper prayer exacts an unconstitutional toll on the consciences of religious objectors.

Id. at 372.

⁸⁹ *Id.* at 376-77. See generally Alexander A. Minard, *But Could They Pray at UVA? The Fourth Circuit’s Application of the Supreme Court’s School Prayer Jurisprudence to the Virginia Military Institute’s Adult Cadets*, 13 WM. & MARY BILL RTS. J. 997 (2005).

⁹⁰ E.g. Neela Banerjee, *Proposal on Military Chaplains and Prayer Holds Up Bill*, THE N.Y. TIMES, Sept. 19, 2006, at A19 (discussing the delay in passing a bill that sets the Pentagon’s spending levels due to a provision in the bill concerning the ability of military chaplains to deliver sectarian prayers at nondenominational military events):

Chaplains can pray according to the traditions of their faith at worship services, where attendance is voluntary. But they are also called upon to offer prayers at mandatory functions, like changes of command, banquets and speeches.

. . . .

Opponents of the provision . . . say that at mandatory events, the longstanding custom has been to offer a nonsectarian prayer, for example, citing God, rather than Christ.

inclination to accommodate religion by allowing displays of religious symbols and permitting vouchers that support parochial school education, there has been a private push to expand Christian doctrine throughout American society.⁹¹ *Hinrichs v. Bosma* and *Doe v. Tangipahoa Parish School Board*, the two cases described in the Introduction, reflect this push.⁹²

1. *Hinrichs v. Bosma*:⁹³ Challenging the Content Allowed by *Marsh/Allegheny*

Indiana House Rule 10.2 calls for a prayer or invocation prior to conducting business each meeting day.⁹⁴ This practice is a long-standing tradition, occurring on each meeting day for the past 188 years.⁹⁵ The

The Defense Department, the main military chaplains association and a variety of ecumenical groups have spoken against the provision, saying that sectarian prayer would create division within the military.

"This provision could marginalize chaplains who, in exercising their conscience, generate discomfort at mandatory formations," the Pentagon said in a written statement. "Such erosion of unit cohesion is avoided by the military's present insistence on inclusive prayer at interfaith gatherings—something that the House legislation would operate against."

The provision is passionately supported, however, by many House Republicans and evangelical Christian groups, like Focus on the Family, who say that refusing chaplains, especially evangelicals, the chance to pray in Jesus' name infringes on their religious liberty.

Id. Considering the deference given to the military in the past, it may be safe to assume that the Pentagon's request to remain nonsectarian in the name of unity would be supported by courts. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting a free exercise challenge to the military denying an Orthodox Jewish doctor in the Air Force the right to wear a yarmulke on duty, in an effort to foster unity).

⁹¹ See *Zelman*, 536 U.S. 639 (2002) (holding that all school voucher programs will be sustained as long as they can show free choice of schools by parents); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (deeming constitutional the Adolescent Family Life Act, which provides for receipt of family counseling grants to religious, as well as nonreligious, organizations, but prohibits use of federal funds for family planning services, abortion counseling, or for abortions).

⁹² See *infra* Parts II.C.1, II.C.2.

⁹³ 400 F. Supp. 2d 1103 (S.D. Ind. 2005).

⁹⁴ Ind. H.R. R. 10.2 (simply listing "prayer" in the order of business of the House Conduct of Business Part of the Rules of the House of Representatives). The order of business is as follows: Calling the House to order, Prayer, Pledge of Allegiance, Roll call, Reports from committees, Introduction of resolutions and bills, Business on the Speaker's table, and Reading of the Journal. *Id.* at 10.

⁹⁵ The Speaker argues that there exists a long standing history and tradition of not just legislative prayer, but Christian legislative prayer. See Brief of Defendant-Appellant at 30, *Hinrichs v. Bosma*, Nos. 05-4604, 05-4781 (7th Cir. May 15, 2006) ("from America's earliest days to the present time, the prayers delivered by congressional chaplains have been true sacral prayers, and many of them, true Christian prayers.") (internal brackets omitted).

prayer is offered from the Speaker's stand, which, by House Rules, no one may enter without the Speaker's invitation.⁹⁶ The invocation is given by a variety of people, including religious clerics the Representatives invite to be a "Minister of the Day" or by a Representative when no cleric is present.⁹⁷

Clerics are chosen through a nomination process by the Representatives which involves completion of a simple form specifying when the cleric is available, submission of the form to the Majority Caucus Chair who schedules the cleric, and sending a confirmation letter to the cleric.⁹⁸ This letter includes a brief statement providing the cleric some guidance in prayer composition, which, if enforced, would satisfy the non-sectarian, non-proselytizing mandate of the *Marsh/Allegheny* decisions.⁹⁹ The extent of guidance given to the visiting clerics is minimal, and no guidance at all is given to Representatives who provide invocations.¹⁰⁰

In 2005, the fifty-three opening prayers for the legislative session were called into question.¹⁰¹ The vast majority of prayers offered in that year were given by clerics identified with Christian churches.¹⁰² It is the content of the prayers, however, that gave rise to claims of

⁹⁶ Ind. H.R. R. 15 ("No person shall enter upon the Speaker's stand or stand upon the steps leading thereto without an invitation from the Speaker.").

⁹⁷ *Hinrichs*, 400 F. Supp. 2d at 1105.

⁹⁸ *Id.* No clergyman nominated through the "Minister for a Day" process has ever been turned down. See Brief of Defendant-Appellant at 2, *Hinrichs v. Bosma*, Nos. 05-4604, 05-4781 (7th Cir. May 15, 2006).

⁹⁹ *Hinrichs*, 400 F. Supp. 2d at 1105. The letter states that "[t]he invocation is to be a short prayer asking for guidance and help in the matters that come before the members. We ask that you strive for an ecumenical prayer as our members, staff and constituents come from different faith backgrounds." *Id.*

¹⁰⁰ *Id.* Following delivery of the invocation, no prayer-giver has ever been admonished, corrected, or advised in any way about the religious content of the prayer that he or she delivered. *Id.* at 1108.

¹⁰¹ *Id.* at 1108. At the time of trial:

Speaker Bosma was aware of the controversy and objections to the sectarian content of most of the prayers offered in 2005. He planned to continue the practice of invocations being delivered at the start of each meeting day, and he did not expect to make any changes concerning how invocations are given, who gives the invocations, or the character of House oversight of the invocations' content.

Id.

¹⁰² *Id.* Forty-one prayers were delivered by clergy from Christian churches; nine were delivered by Representatives; one was delivered by a lay-person; one was delivered by a Muslim imam; one was delivered by a Jewish rabbi. *Id.*

unconstitutionality.¹⁰³ The majority of prayers were explicitly Christian, containing repeated reference to Jesus Christ, with some going so far as to ask for conversion to Christianity.¹⁰⁴ The April 2005 performance by

¹⁰³ *Id.* at 1125-26. In contrast to the long-term chaplain of the Nebraska legislature in *Marsh*, the Indiana House methods of prayer-giver selection are similar to methods deemed acceptable in other post-*Marsh* cases, and the plaintiffs, in fact, find the methods satisfactory and “do not seek to have the prayers eliminated altogether.” *Id.* at 1108. Hinrichs specifically objected to the sectarian content of the prayers. Editorial, *In Prayer, a House Open to All*, FORT WAYNE JOURNAL-GAZETTE (Indiana), Dec. 4, 2005, at A11.

[Hinrichs] said he had become troubled by tones reminiscent of Indiana’s Ku Klux Klan past. Unlike previous sessions, when non-sectarian prayers called on lawmakers to provide leadership, the prayers offered last spring suggested God was working through the legislators. “When people think they are acting on behalf of Jesus Christ, that’s when it gets scary,” Hinrichs said. “The Klan was a Christian fraternal organization. The John Birch Society was a Christian organization. The fact is, they were based in faith.”

Id.

¹⁰⁴ *Hinrichs*, 400 F. Supp. 2d. at 1106-08. Of the fifty-three prayers given in the 2005 session, transcripts were available for forty-five prayers; of these, twenty-nine were specifically offered with reference to Jesus Christ. *Id.* at 1106. Examples of the most explicitly Christian include:

And for those who have lost family members in the current and persistent conflicts of the world, we ask that You would tenderly embrace them with the comfort of Your spirit, heal their pain in ways that only You can, by showing them the love You expressed in the sacrifice of Your Son Jesus Christ. Now God, cause Your face to shine upon the men and women in this institution as they carry out Your call on their lives and fulfill Your will for this land. While respecting those within the sound of my voice who may adhere to a different faith, I offer this prayer in the name of Jesus Christ, my Lord and Savior.

Id. at 1106-07 (quoting ending of opening prayer offered on March 22, 2005). Continuing:

Today on behalf of every man and woman under the sound of my voice, every representative present in this house of government of the great state of Indiana, I appeal to the God and Father of Jesus Christ, the God of Abraham, Isaac and Jacob, the God of the whole earth, that He would find not only a welcome here, among those whom He has honored to allow to sit in this place of authority, but also hearing ears and perceptive and courageous hearts that would walk in the ways of righteousness, govern in the way of justice, and make right choices. . . . Let it be known today that it is required in leaders that a man be found faithful. That integrity is a requirement of a leader, and that every Representative is a leader before men and God. . . . As a minister of the gospel, I exercise my right to declare this room a hallowed place. I invite into this room, into the proceedings of the day, into the decisions that will [be] made today, to each person, the mighty Holy Spirit of God. Holy Spirit, give these here the mind of Christ . . . I ask this in the name of Jesus Christ.

Id. at 1107-08 (quoting opening prayer from April 29, 2005). Also:

Lord we ask You that whatever we do, whatever we say, whatever we write, we do it in Your glorious name. And now Lord we ask this in

Reverend Brown prompted some House members to walk out, believing that the sectarian nature of the song was inappropriate.¹⁰⁵ Subsequently, four plaintiffs brought suit against the Speaker challenging the use of prayers that violate the mandate of *Marsh*.¹⁰⁶

The federal district court held that the prayers violated the Establishment Clause because of the emphasis on Christianity.¹⁰⁷ The

Your Son's name, who is Lord of Lords, King of Kings, Jesus Christ, who gave us the most precious gift of all, to die on the cross for our sins. Thank you Lord. Bless us all. We pray in Your name. Amen.

Id. at 1107 (citing 23 *Jt. Ex.* 16). These prayers are examples of the sectarian, proselytizing prayers offered at the Indiana House of Representatives which clearly violate the spirit of *Marsh*. *Id.* at 1107. "Whatever you do in word or deed, do all in the name of the Lord Jesus, giving thanks through Him to God the Father." *Id.* at 1106.

¹⁰⁵ *Hinrichs*, 400 F. Supp. 2d at 1107. Reverend Brown's invocation delivered earlier included the following prayer:

Father we are so gracious [sic] to You for Your grace and mercy that You have allowed us to be able to have and Father I thank You for our Lord and Savior Jesus Christ, who died that we might have the right to come together in love. Father, let us love one another as he has loved us . . . I thank You in Jesus Christ's name. Amen.

Id.

¹⁰⁶ *Id.* at 1108. The four plaintiffs are all taxpayers who have standing as Indiana taxpayers who object to their taxes being used to support the current legislative prayer practices. *Id.* All four are members of Christian religions: Anthony Hinrichs is a member of the Society of Friends, Reverend Henry Gerner is a retired minister of the United Methodist Church, and Francis White Quigley and Lynette Herold are members of the Roman Catholic Church. *Id.* at 1109. Just how many Americans share the plaintiffs' opinion is a mystery. See Editorial, *Prayer in the House*, FORT WAYNE NEWS SENTINEL, Sept. 8, 2006, at A8. In reference to a recent poll conducted by the Pew Research Center for People & the Press and the Pew Forum on Religion & Public Life, the editorial presents the public opinion quandary:

Nearly half of Americans (49 percent) believe conservative Christians have gone too far in trying to impose their religious values on the country, according to the survey. At the same time, 69 percent think liberals have gone too far in trying to keep religion out of schools and government.

Id. Hinrichs has since lost his employment position due to his opposition to the legislative prayer practice. Brief of Plaintiff-Appellee at 12, *Hinrichs v. Bosma*, Nos. 05-4604, 05-4781 (7th Cir. May 15, 2006).

¹⁰⁷ *Hinrichs*, 400 F. Supp. 2d. at 1131. In reaching this conclusion, the court also held that the plaintiffs, as taxpayers, had standing to sue and that the prayers in question were government speech. *Id.* at 1114. In subsequent briefs, Speaker Bosma has contested the plaintiffs' taxpayer standing:

Plaintiffs stipulated that when a member prays, the House incurs no expenses for the invocation other than the normal expenses associated with operating the House. That stipulation is fatal to any assertion of a direct dollars-and-cents injury based on an appropriation or disbursement of public funds occasioned solely by the activities

court made a painstaking and thorough analysis using *Marsh*, while also explaining its decision to avoid the other Establishment Clause tests.¹⁰⁸ The *Great Falls*, *Chesterfield County*, *Palo Verde*, and *Burbank* opinions were

complained of. At a bare minimum, then, this Court must vacate the injunction insofar as it relates to House members . . .

Even as to the ministers' prayers, plaintiffs offer no convincing rebuttal to our arguments . . . In contrast to *Marsh*, where the legislature had appropriated funds for the chaplain's salary, the outlays here—which plaintiffs concede are a trifle—are for items that ordinarily are provided as constituent services.

Reply Brief of Defendant-Appellant at 3-4, *Hinrichs v. Bosma*, Nos. 05-4604, 05-4781 (7th Cir. July 5, 2006) (internal citations and quotations omitted).

The Speaker also claims that plaintiffs lack standing for prudential reasons. *Id.* at 6-10. In contesting that the prayers from the Speaker qualify as government speech, the Speaker argues:

The issue, then, is whether the House controls the content of the prayers, and the record is crystal clear on that point. As the district court found, no cleric or Representative has ever been admonished, corrected, or advised in any way about the religious content of the prayer that he or she delivered. Indeed, the premise of plaintiffs' case is that the Speaker exercises *insufficient* control over the prayers.

Even the invocations of House members are not fairly attributable to the state. Plaintiffs say that prayer is part of the official agenda of the House, but in fact House Rule 10.2 requires that the invocation be given *before* the opening of official business. Moreover, the Supreme Court has recognized that public officials' speech is the government's only when they speak *pursuant* to their official duties. Legislators frequently make personal comments on the House floor, and not every remark they make is pursuant to their official duties. This is especially true of prayers, which are unrelated to legislation, require no quorum or vote, and are unlikely to reflect the views of all members.

Id. at 13-14 (internal citations and quotations omitted) (emphasis in original).

¹⁰⁸ *Hinrichs*, 400 F. Supp. 2d at 1115-22. The court stated its intent and belief in application of *Marsh* as the standard:

In *Marsh v. Chambers*, the Supreme Court recognized a special exception to the usual Establishment Clause doctrines and permitted the practice of having a paid legislative chaplain offer invocations in a state legislature. *Marsh v. Chambers* establishes the principles and boundaries that guide this court's consideration of the Indiana House prayer practices.

Id. at 1115 (internal citations omitted). The court notes possible use of other tests:

The practice of any form of legislative prayer would probably not survive scrutiny under the most common Establishment Clause tests, the *Lemon* test . . . , the endorsement test . . . , or the neutrality test. The practice might survive the coercion test, though judges must keep in mind that it may be easy for members of a religious majority to overlook coercive effects of official practices that favor their own religious traditions.

Id. at 1115 n.11.

cited as consistent expressions of the *Marsh* doctrine.¹⁰⁹ In his defense, the Speaker argued that the history and tradition of expressly Christian legislative prayers buttressed his practice.¹¹⁰ In addition, he argued that all prayers are sectarian, encouraging an all-or-nothing approach to legislative prayer in the hopes that the long history of prayer would garner the blanket exception for even sectarian prayers.¹¹¹ Finally, the Speaker argued that the method used to choose the prayer-givers leaves open the possibility for all religions to participate, and he would be loathe to infringe upon their right to free speech.¹¹² The court rejected these arguments and issued a permanent injunction against the Speaker to bar him from permitting sectarian prayer during the official proceedings of the Indiana House of Representatives.¹¹³

The Speaker moved to stay the injunction pending appeal, but the district court immediately denied the stay.¹¹⁴ The Seventh Circuit also denied the stay shortly thereafter, holding that the Speaker was unable to meet his burden to show a significant probability of success on the

¹⁰⁹ *Id.* at 1121-22. *Pelphrey* was decided over a month after the district court decided *Hinrichs*, thus there were no inconsistent opinions applying *Marsh* to legislative prayer regarding the prayer content at the time of this decision. See generally *Pelphrey*, 410 F. Supp. 2d 1324 (N.D. Ga. 2006).

¹¹⁰ *Hinrichs*, 400 F. Supp. 2d at 1122. See also Brief of Defendant-Appellant at 1, *Hinrichs v. Bosma*, Nos. 05-4604, 05-4781 (7th Cir. May 15, 2006) (“[T]he issue here is whether *Marsh* invalidates sectarian legislative prayers—in particular, those referring to Jesus Christ—despite the uncontroverted historical evidence that American legislative prayers have always included such references, and despite the entanglements of religion and government that would result if civil courts were required to parse prayers to distinguish sectarian from nonsectarian invocations.”) (internal quotations omitted).

¹¹¹ *Hinrichs*, 400 F. Supp. 2d at 1123-25. However, this argument has been raised previously and dismissed because the secular purposes served by legislative prayer can be fulfilled by other means. See *Marsh*, 463 U.S. at 797-98 (Brennan, J., dissenting):

That the ‘purpose’ of legislative prayer is pre-eminently 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. Moreover, whatever secular functions legislative prayer might play—formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose—could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.

Id. (citation omitted).

¹¹² *Hinrichs*, 400 F. Supp. 2d at 1128.

¹¹³ *Id.* at 1131.

¹¹⁴ *Hinrichs v. Bosma*, 410 F. Supp. 2d 745 (S.D. Ind. 2006).

172 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

merits or irreparable harm absent a stay.¹¹⁵ While awaiting appeal, the case has drawn considerable notice, as revealed by the eleven amicus briefs filed.¹¹⁶ Oral arguments became a media event, and speculation abounded concerning the decision and any further appeal.¹¹⁷

Meanwhile, legislators supporting the House's prayer practice have reacted to the district court holding.¹¹⁸ In the Indiana House of Representatives, the members have overwhelmingly resolved to support the Speaker in his quest to broaden the Supreme Court's parameters of prayer content.¹¹⁹ In Congress, a Representative from Indiana has

¹¹⁵ *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006). Though the opinion was a stay motion opinion, it discussed the merits of the case in rather extensive detail and has been cited in subsequent opinions regarding the topic of legislative prayer. *E.g.* *Tangipahoa Parish II*, 477 F.3d 188, 216 (5th Cir. 2006); *Pelphrey*, 410 F. Supp. 2d at 1366 (N.D. Ga. 2006).

¹¹⁶ Seventh Circuit Court of Appeals Legal Brief System, <http://www.ca7.uscourts.gov/briefs.htm> (last visited Aug. 22, 2007). Nine amicus briefs were filed in support of the Appellant, Speaker Bosma, by the following advocates: the Liberty Counsel, the Foundation for Moral Law, the Alliance Defense Fund, the Becket Fund, the Indiana Family Institute, Theologians and Scholars (a group of twenty-one interested parties), the United States Department of Justice, Advance America, and the National Legal Foundation. *Id.* Two amicus briefs were filed in support of the Appellees by the Anti-Defamation League and the American Jewish Congress. *Id.*

¹¹⁷ *See, e.g.*, Mike Smith, *Court Hears Fight on House Prayer: Appeal Result Could Have Ripples*, THE JOURNAL GAZETTE (Fort Wayne, Indiana), Sept. 8, 2006, at A1:

Bosma said [Judge] Kane [sic] told attorneys Thursday that the case was 'a surrogate for prayer in Congress' and could apply to 'every state, local or national level of government that has prayer today.' . . .

. . .

. . .

Bosma said he believes the case ultimately will be decided by the U.S. Supreme Court.

Id.

¹¹⁸ *Id.* Further:

The ruling also prompted U.S. Rep. Mike Sodrel, R-Ind., to file a bill that would bar federal judges from ruling on the content of prayer in state legislatures. It is pending in a House committee, according to Sodrel's office.

A provision that would prohibit using federal funds to enforce Hamilton's ruling was amended into an appropriations bill that passed the U.S. House and is now before the Senate.

Gail Gibson, *GOP Lawmakers Take Aim at U.S. Judiciary*, BALTIMORE SUN (Maryland), July 23, 2006, at A3. Oral Arguments were heard on September 7, 2006. *Id.*

¹¹⁹ H.R. Res. 1, 114th Gen. Ass., 2d Reg. Sess. (Ind. 2006). The first Indiana House Resolution of 2006 was a reaction to the district court holding in *Hinrichs* urging the Speaker to use his authority to exhaust all possible appeals of the district court's order. Among the Resolution's declarations are support for the continuing history and tradition of the invocation prayer, accompanied by the necessity of these prayers due to the demands upon the Representatives:

Whereas, the members of the Indiana House of Representatives are subject to the unique pressures and duties of their office and of the

introduced measures in support of the Christian references by seeking to cut off the jurisdiction of federal courts to hear the matter.¹²⁰ The same

burdens of the legislative environment, which frequently requires that they be absent from their own homes, families, and religious congregations;

Whereas, the ministry of visiting clerics and the offering of invocations accommodates the spiritual needs of the members of the Indiana House of Representatives and facilitates the voluntary exercise of their faith, providing them with spiritual encouragement while they are away from their homes, families, and religious congregations;

Id. In addition, the Resolution admonishes the United States District Court for the Southern District of Indiana for its “restraint” on the “religious liberty and the freedom of conscience and, . . . purports to control the specific content of prayers” in the “intolerable order” forbidding the use of Christ’s name or communicates “the beliefs that Jesus of Nazareth was the Christ, the Messiah, the Son of God, or the Savior, or that he was resurrected, or that he will return on Judgment Day or is otherwise divine.” *Id.*

Confusingly, this plea for freedom of religious expression is followed by two assertions that to eliminate these Christian references would be “inconsistent with the settled beliefs and deepest convictions of many Hoosiers” and would, “because it attempts to control the content of prayer . . . undermine[] the rights of all Hoosiers regardless of their theological convictions.” *Id.*

Finally, the Resolution addresses the Supreme Court’s decision in *Marsh*, focusing specifically on the opinion’s allowance of legislative prayer because of its historical practice and explaining the legislature’s difficulty in accepting or applying the court order:

Whereas, as the United States Supreme Court’s decisions make clear, public officials are not competent, in our constitutional order, to make the fine theological distinctions and comparisons necessary for one to declare that a prayer is sufficiently “inclusive” or “nonsectarian” to satisfy the court’s injunction and the content of prayer is a matter solely for the religious conscience of the cleric or representative offering it.

Id. This is a puzzling assertion, since the Court’s holding in *Marsh* approved of the methods used in the Nebraska Legislature and the parameters of prayer content therein. *Marsh*, 463 U.S. at 795.

The Resolution passed by a vote of eighty-five to zero, with fifteen members either excused or abstaining. See H.R. 1, *supra*.

¹²⁰ H.R. 4776, 109th Cong. (2006). The bill introduced in the U.S. House of Representatives by U.S. Rep. Sodrel, R-Ind., seeks to strip federal jurisdiction in cases such as *Hinrichs* and is currently referred to the House Judiciary Committee. *Id.* The bill provides for an amendment to 28 U.S.C. § 1632 limiting jurisdiction as follows:

No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation or the validity, under the Constitution, of the content of speech of any member of a State legislative body or any individual invited by a State legislative body to speak before that body, when such speech occurs during the legislative session of that body.

H.R. 4776, 109th Cong. § 1 (2006). Such jurisdiction stripping legislative mechanisms have been used in the past as a way to protest court rulings without success and this attempt will likely face immediate challenge. See Gail Gibson, *GOP Lawmakers Take Aim at U.S.*

174 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42

Congressman also successfully introduced an amendment to an appropriations bill in an effort to stop the allocation of any federal funds in the enforcement of the final judgment of this case.¹²¹ With the Seventh Circuit opinion pending, the *Hinrichs* case presents an opportunity for the Supreme Court to readdress and clarify the allowable content of state legislative prayer.¹²²

2. *Doe v. Tangipahoa Parish School Board*: Extension of Marsh to the Local Level

The *Tangipahoa Parish* case involving prayer at a School Board meeting was recently decided by the Fifth Circuit.¹²³ While the lawsuit originally challenged prayer at school athletic events and prayers by students over school public-address systems, as well as those at the

Judiciary, BALTIMORE SUN (Maryland), July 23, 2006, at A3. Duke University law professor Erwin Chemerinsky, a constitutional law expert, noted that:

This has been proposed in Congress over and over again through American history . . . In the 1950s, it was proposed with regard to the loyalty oath cases. In the 1960s, it was the reapportionment cases, and then the school prayer cases. In the 1980s, it was not letting federal courts hear abortion cases or [school] busing cases. . . . I think that if the effect is to preclude all federal jurisdiction over a specific issue, that's unconstitutional, and I think courts will say so. If Congress can do this, then why couldn't they pass a statute - imagine the most blatantly unconstitutional law, persecuting a particular religious group or racial minority - and then say, 'No federal court, including the Supreme Court, can review this.' That can't be right.

Id.

¹²¹ H. Amdt. 1164 (A068), 109th Cong. (2006) (amending H.R. 5672). The sole purpose of this amendment to an appropriations bill for Science, the Department of State, Justice, and Commerce, and related agencies, is the prohibition of using the funds "for the purpose of enforcing the final judgment of the Federal District Court for the Southern District of Indiana issued in *Hinrichs v. Bosma*." *Id.*

¹²² See Balkin & Levinson, *supra* note 64, at 516. On the Bush Administration's agenda, the authors suggest:

One can . . . imagine a wide range of different possible directions for Establishment Clause and Free Exercise doctrine, depending on remaining opportunities for President Bush to make appointments before his term expires in January 2009, the results of the 2006 elections (which might shift control of the Senate or weaken the Republican majority there), and, perhaps most importantly, the winner of the 2008 presidential election. It is worth noting, however, that a Democratic appointment replacing Justice Stevens in 2009 would likely preserve the current status quo that features Kennedy as the swing Justice, while replacing Stevens with a strong conservative would have a much more significant impact on the jurisprudence of the religion clauses

....

Id.

¹²³ *Tangipahoa Parish II*, 477 F.3d 188 (5th Cir. 2006).

School Board meetings, the sole issue on appeal was the Board's practice of opening invocations.¹²⁴ In October of 2003, John Doe, an anonymous resident and taxpayer of Tangipahoa Parish and the father of two sons who attended high school in the Parish School System, filed an action for himself and his sons seeking to declare the School Board's prayer practice an Establishment Clause violation and enjoin the School Board from continuing its practice.¹²⁵

Ten months later and, obviously, with full knowledge of the Does' objections to the prayers, the Board considered the adoption of a policy which would limit the prayer-giving responsibilities to board members and require the invocations to be non-sectarian and non-proselytizing.¹²⁶ This policy, however, was unanimously rejected by the School Board.¹²⁷ The prayers are considered a local tradition, though their thirty-year history hardly compares to the 188-year-old tradition of the Indiana House of Representatives.¹²⁸ Each meeting began with a prayer,

¹²⁴ *Id.* at 192. All other prayer practices were resolved by an August 2004 judgment which enjoined the other prayer events, except for prayers given by students at graduation ceremonies. *Id.* Two contempt motions were dismissed relating to incidents where a teacher's aide and a substitute announcer at a baseball game violated the orders prohibiting the various other prayer practices. *Doe v. Tangipahoa Parish Sch. Bd. (Tangipahoa Parish III)*, 2005 WL 901127 at *1 (E.D. La. 2005). The prayers often contained specific references to "God[.]" "Heavenly Father[.]" and "Jesus[.]" *Id.* The parties stipulated to the content of four specific prayers which had been delivered at School Board meetings between February 2003 and June 2004. *Id.*

¹²⁵ *Tangipahoa Parish I*, 2005 WL 517341 at *1. The ACLU has commended the courage of the plaintiffs in Tangipahoa Parish for coming forward, albeit anonymously, to challenge the School Board's repeated attempts to promote Christianity in the public schools. Debra Lemoine, *Judge Gets Arguments on School Board Meeting Prayers*, BATON ROUGE ADVOC., Sept. 10, 2004, at 1.

¹²⁶ *Tangipahoa Parish II*, 477 F.3d at 194. The policy had been prepared and recommended to the School Board by the New Orleans law firm hired by the school's insurance company. Alan Sayre, *Tangipahoa Schools to Drop Prayers Before Ballgames*, BATON ROUGE ADVOC., Aug. 25, 2004, at 5.

¹²⁷ *Tangipahoa Parish II*, 477 F.3d at 194. The powerful influence of conservative Christians in the locality has rallied to support religious activities in the public schools. *See* Debra Lemoine, *Judge Gets Arguments on School Board Meeting Prayers*, BATON ROUGE ADVOC., at 1 (quoting the athiest plaintiff in the evolution disclaimer lawsuit, "[t]hey want to involve the church in the school . . . If they hadn't done it on a systematic basis, people like me wouldn't have said anything.").

¹²⁸ *Compare Mellen*, 327 F.3d 355, 370 (4th Cir. 2003) (declining to hold that the supper prayer at Virginia Military Institute shares the "unique history" of state legislative prayer because "public universities and military colleges, such as VMI, did not exist when the Bill of Rights was adopted"), *with Van Orden*, 545 U.S. at 667 (Breyer, J., concurring) (determining that the passage of forty years without any legal objection raised and as part of a broader moral and historical display strongly suggest that the granite Ten Commandments on the Statehouse grounds did not violate the Establishment Clause by promoting religion).

176 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

followed by recitation of the Pledge of Allegiance.¹²⁹ The prayers were offered by a variety of speakers, ranging from board members and superintendents, as well as teachers, students, and ministers.¹³⁰ Questions of constitutionality were raised concerning both the prayer content and the classification of the board meetings as a legislative body.¹³¹

Four particular prayers offered between January 2002 and August 2004 were singled out in the case's stipulations and called into question.¹³² All four prayers were overtly Christian.¹³³ The three-judge

¹²⁹ *Tangipahoa Parish II*, 477 F.3d at 192. The School Board meetings are open to the public and students are welcome to attend. *Id.* In fact, of the sampling of thirty-one prayers delivered between January 2002 and August 2004, nine were given by students or former students. *Id.*

¹³⁰ *Id.* The four prayers singled out were delivered by the School System's assistant superintendent, a Board member's son, an elementary school principal, and a Board member, respectively. *Id.*

¹³¹ See generally *Tangipahoa Parish II*, 477 F.3d 188. The first prayer from the parties' stipulations contained the following:

Heavenly Father, we thank you for the many blessings we've received. . . . [W]e thank you for the greatest gift of all - your darling son, Jesus Christ. For we all know that He was born, died, and rose again, so that we all may be forgiven for our sins. . . . These things we ask in your darling son, Jesus Christ's[,] name. Amen.

Id. at 192.

¹³² *Id.* at 192-93. The second prayer stipulated ended with the closing, "Grant our supplications, we beseech Thee, through Jesus Christ our Lord. Amen." *Id.* at 193. The third stipulated prayer opened with, "Heavenly Father, we thank you for all the blessings that you have given us," and closed with, "we ask all of these things through Your Son, Jesus Christ. Amen." *Id.* The final stipulated prayer simply began with reference to "Father." *Id.*

¹³³ *Id.* at 192-93. The prayers' references to "Jesus Christ" and God as "Heavenly Father" are all that is necessary to make the prayers nonsectarian. See G. Sidney Buchanan, *Prayer in Governmental Institutions: The Who, the What, and the At Which Level*, 74 TEMP. L. REV. 299, 351 (2001) (suggesting as a bright-line rule that "References to 'God,' 'Heavenly Father (or Mother),' 'Divine Being,' 'Ruler of the Universe,' etc. are okay, but references to Jesus Christ, Muhammad, Buddha, etc. are not okay."). The School Board's refusal to adopt the *Marsh*-appropriate policy limiting the content of the prayers to non-sectarian, non-proselytizing language was irrelevant when the case was decided by the District Court because the lower court did not find the School Board to be a legislative body, and thus applied the *Lemon* test to hold that the practice at its core violated the Establishment Clause. *Tangipahoa Parish I*, 2005 WL 517341 at *9. The district court followed *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999), in its determination of a school board as an integral part of a public school system, thus evaluating the prayer practice as those in school environments. *Tangipahoa Parish I*, 2005 WL 517341 at *6. The district court also noted that other cases outside the public school setting have been unwilling to extend *Marsh* beyond its unique legislative setting. *Id.* at *9 (citing *North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147 (4th Cir. 1991) (holding that judicial prayer at the beginning of court sessions did not fall within the *Marsh* exception)).

panel of the Circuit Court gave three inconsistent opinions regarding both the appropriateness of the prayer content, and notably, the designation of the School Board meeting as a legislative or deliberative body.¹³⁴

The three judges adopted three different analyses. One followed the *Marsh/Allegheny* doctrine, and after assuming that the School Board was a deliberative legislative body which fell under the legislative prayer exception, held that the four prayers in question were decidedly Christian in content and were impermissible.¹³⁵ The second opinion followed the district court's reasoning, refusing to classify the School Board as a legislative body and, applying *Lemon*, ruled that the prayer practice violated the Establishment Clause.¹³⁶ The third opinion

¹³⁴ See generally *Tangipahoa Parish II*, 477 F.3d 188.

¹³⁵ *Id.* at 202. The reasoning is as follows:

For the Board's prayers to fall outside those permitted by *Marsh*, we must conclude either: (1) the Board, *although stipulated to be a deliberative body*, does *not* fit within *Marsh's* description of legislative and other deliberative public bodies either because *Marsh* did *not* intend to encompass any entities beyond legislatures *or* because the prayers fit within the public-school context to which *Marsh* does *not* apply; or (2) the prayers are *not* nonsectarian and non-proselytizing, in violation of *Marsh* and subsequent guidance from the Court. Because the overtly sectarian prayers included in the stipulations fall outside *Marsh's* limited reach, we need *not* decide: (1) whether the Board fits within *Marsh's* legislative scope; and (2) thus whether other prayers *might* be constitutionally permissible. This is in keeping with the long-standing and extremely sensible rule that constitutional issues should be decided on the most narrow, limited basis.

Id. (internal quotes and citations omitted).

¹³⁶ *Id.* at 212. Adult environment prayer cases have explored both government endorsement of prayer through the *Lemon* test as well as subtle coercion. Compare *Coles*, 171 F.3d at 385-86 (concluding through use of the *Lemon* test that school board's prayer practice conveys a message of government endorsement of religion in the public school system), with *Tanford v. Brand*, 104 F.3d 982, 986 (7th Cir. 1997) (applying the *Lemon* test to university commencement prayer and holding that such non-denominational invocation does not convey a message of government endorsement of religion). Compare *Mellen*, 327 F.3d at 370-71 (applying the *Lemon* test to supper prayer practice at the Virginia Military Institute, with special consideration given to coercive principles to hold prayers violated Establishment Clause), with *Chaudhuri v. State of Tennessee*, 130 F.3d 232, 238-39 (6th Cir. 1997) (holding that a professor at a state university was not obligated to attend university events where non-sectarian prayers were delivered, thus *Lee's* subtle coercion did not apply), and *Tanford*, 104 F.3d at 985-96 (declining to find coercion in the adult university commencement environment where students and professors are free to ignore prayers).

accepted the School board as a deliberative body worthy of the *Marsh* exception, and declined to find the Christian content objectionable.¹³⁷

Like the *Hinrichs* case, the *Tangipahoa Parish* case has sparked a slew of controversy in its locality.¹³⁸ Taxpayers in Tangipahoa Parish accrued litigation costs of over \$100,000 in seeking the Fifth Circuit appeal.¹³⁹ With the litigation spanning over three years, and the possibility of a further appeal by the School Board, the discord in Tangipahoa Parish continues.¹⁴⁰ Additionally, like in Indiana, local politicians have latched onto this issue in state and national politics in an attempt to support the

¹³⁷ Compare *Tangipahoa Parish II*, 477 F.3d at 211-17 (Clement, J., concurring in part and dissenting in part) (holding that *Marsh* applies to the School Board as a deliberative body, but that even if the prayers at the meetings were uniformly Christian, the record lacks "evidence that the Board advances Christianity to the exclusion of another sect or creed"), with *Pelphrey*, 410 F. Supp. 2d at 1348 (holding that the Cobb County Commission did not show an "impermissible governmental preference for one religious perspective.").

¹³⁸ See Jenny Hurwitz, *Student-Teacher Settles Lawsuit Against SLU: She was Flunked After Objecting to Prayers*, NEW ORLEANS TIMES PICAYUNE, Oct. 5, 2006, at 1:

A student-teacher who claimed she was given a failing grade by Southeastern Louisiana University because she objected to teacher-led prayer in a Ponchatoula classroom has settled a lawsuit she filed against the university.

....

In early 2005, Thompson was assigned to the public D.C. Reeves Elementary School in Ponchatoula as part of her student-teacher training. Over the next few months, she observed teacher Pamela Sullivan lead her class in prayer and organize a Bible study group on school grounds on several occasions.

The Tangipahoa Parish School Board, which also served as defendant in the case, later investigated Sullivan, verified the allegations, and ultimately halted such practices . . .

An honor student who made the dean's list at Southeastern, Thompson alleged the university gave her a failing grade because she reported the prayer activities.

Id.

¹³⁹ David J. Mitchell, *School Board Spent \$100,900 on Prayer Fight*, BATON ROUGE ADVOC., Nov. 12, 2006, at B3. Of that amount, almost \$85,000 will not be reimbursed by the School Board's insurer and will be out of pocket expenses. *Id.*

¹⁴⁰ David J. Mitchell, *Understanding Key to Debate on Board Prayer*, BATON ROUGE ADVOC., Jan. 9, 2007, at B7 ("The board is expected to consider whether to seek a rehearing by the entire appeals court - having until Jan. 19 to file - but one wonders whether more litigation by either side would produce a much different result."); see also *Appeals Court Finds Louisiana School Board Improperly Engaged in Sectarian Prayer During Meetings*, U.S. FED. NEWS, Dec. 16, 2006 (quoting Joe Cook, Executive Director of the ACLU of Louisiana, "Because the court did not rule on the issue most central to the case, the ACLU and its clients are considering whether to request rehearing or appeal. . . . We believe the court needs to squarely face the questions presented and make a clear cut decision.").

validity of the Christian agenda.¹⁴¹ These measures concerning legislative prayer are just part of a larger national agenda addressing other Establishment Clause issues.¹⁴²

These two cases, *Hinrichs* and *Tangipahoa Parish*, exemplify the problems arising in legislative prayer doctrine.¹⁴³ Speaker Bosma is attempting to expand the *Marsh* ruling to allow the use of blatantly Christian, arguably proselytizing prayer content.¹⁴⁴ The Fifth Circuit's three-judge panel failed to agree on whether the School Board is a legislative body under *Marsh* and the sectarian nature of the prayers.¹⁴⁵ With the *Marsh* decision leaving uncertainties as to the limits of prayer content allowed and the deliberative bodies to which it applies, courts are struggling to decide the cases before them that argue for the

¹⁴¹ See *Briefing Book: News and Views from the Louisiana Capitol*, NEW ORLEANS TIMES PICAYUNE, June 17, 2005 at 4:

Siding with the Tangipahoa Parish School Board in a fight with the American Civil Liberties Union, a Senate panel approved a resolution Thursday that would express the support of the Legislature for prayer at school board meetings. House Concurrent Resolution 39 by Rep. A.G. Crowe, R-Slidell, says prayer is protected and follows the principles on which the United States was founded. It says the Legislature disapproves of a federal judge's decision that prayers are unconstitutional at school board meetings. The Senate Education Committee approved the resolution without objection or much discussion. Already approved by the House, it goes next to the full Senate for debate. If approved there, it would express the will of the Legislature. It does not go to the governor's desk for action.

Id.

¹⁴² In announcing the American Values Agenda legislative package, Speaker of the House J. Dennis Hastert (R-IL) issued the following statement:

The American Values Agenda will defend America's founding principles. Through this agenda, we will work to protect the faith of our people, the sanctity of life and freedoms outlined by our founding fathers. Radical courts have attempted to gut our religious freedom and redefine the value system on which America was built. We hope to restore some of those basic values through passing this legislative agenda and renewing our country's commitment to faith, freedom and life.

Media Release from J. Dennis Hastert, Speaker of the House, <http://speaker.house.gov/library/misc/060627americanvalues.shtml>. Included in the legislative agenda are proposed acts "protecting" the Pledge of Allegiance, the display of the American flag, public prayer, heterosexual marriage, unborn children, embryos (e.g. stem cells), and gun ownership rights. *Id.*

¹⁴³ See *supra* Part II.C (describing events surrounding the two highlighted cases).

¹⁴⁴ See *supra* Part II.C.1 (discussing the appeal of the challenge to prayers offered in the Indiana Legislature).

¹⁴⁵ See *supra* Part II.C.2 (discussing the lack of agreement in the decision from the Fifth Circuit Court of Appeals.)

application of the legislative prayer exception and legislative entities are wasting time and money arguing what could be a settled issue.¹⁴⁶

III. TESTING THE LIMITS OF MARSH

The Establishment Clause generally limits the interaction between government and religion.¹⁴⁷ In the context of legislative prayer, governmental deliberative bodies lack guidelines as to what prayers can be offered and where.¹⁴⁸ Recent cases are testing the constitutional limits of legislative prayer content and deliberative bodies to which the legislative prayer exception may be applied.¹⁴⁹ The behavior in the Indiana House of Representatives, including the refusal to continue the prayer practice rather than follow the guidelines of the court injunction, may signal a shift in the political atmosphere concerning legislative prayer.¹⁵⁰ Likewise, the refusal of the Tangipahoa Parish School Board to adopt the most commonly accepted interpretation of *Marsh* in its prayer practice indicates the School Board's belief that it fits within the legislative prayer exception and can invoke sectarian prayers to open its meetings.¹⁵¹ In the first instance, prayer-givers are challenging the allowable content or language used in legislative prayers.¹⁵² In the second, governmental entities are expanding the breadth of deliberative bodies to which the *Marsh* exception applies.¹⁵³ Ambiguities exist concerning both of these limiting factors, and these areas of uncertainty are allowing those with a religious agenda to blur the limits on prayer content and applicable deliberative bodies.¹⁵⁴

¹⁴⁶ See *infra* Part III (analyzing the Establishment Clause doctrines available and their application to legislative prayer).

¹⁴⁷ See *supra* Part II.A (discussing the history of legislative prayer, including its use by the First Congress).

¹⁴⁸ See *supra* Part II.B (discussing the application of *Marsh/Allegheny* to legislative prayer and the application of other Establishment Clause judicial doctrines in non-legislative, adult prayer situations).

¹⁴⁹ See *supra* Part II.C (discussing the two current cases which highlight the content and deliberative body parameters which this Note suggests require clarification).

¹⁵⁰ See *supra* Part II.C.1 (discussing the controversy surrounding the prayers in the Indiana Legislature).

¹⁵¹ See *supra* Part II.C.2 (discussing the controversy surrounding the prayers offered at the Tangipahoa Parish School Board meetings).

¹⁵² See *supra* Part II.C.1 (discussing *Hinrichs*).

¹⁵³ See *supra* Part II.C.2 (discussing *Tangipahoa Parish*).

¹⁵⁴ See *infra* Parts III.A, III.B (analyzing the limits of the *Marsh/Allegheny* doctrine).

A. *The Marsh/Allegheny Doctrine Does Not Permit Sectarian Prayer Content*

Because *Marsh* is the only Supreme Court decision addressing legislative prayer, a clarification of the Court's specific holdings is necessary.¹⁵⁵ First, based on the nation's history and tradition, which allow for legislative prayer, the *Marsh* opinion identifies the dominance of the Judeo-Christian tradition.¹⁵⁶ This tradition, as offered by the chaplain from Nebraska who demonstrated sensitivity toward offending any religious minorities, was acceptable.¹⁵⁷ In addition, both paying the chaplain and allowing a chaplain long-term tenure are within constitutional limits.¹⁵⁸ The Court approved of the sixteen year term of the Nebraska clergyman because his reappointment was not found to come from any "impermissible motive."¹⁵⁹ Another important conclusion of *Marsh*, the constitutionality of legislative prayer itself, is straightforward and clear.¹⁶⁰ The *Marsh* majority reached this conclusion

¹⁵⁵ See *supra* Part II (discussing the history of legislative prayer and its development in case law since *Marsh*).

¹⁵⁶ See *supra* text accompanying note 39. But see Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers that History Doesn't Provide*, 2004 B.Y.U. L. REV. 1617, 1631 (2004) (rejecting the idea that the United States is a Protestant nation, a Christian nation, or even a uniformly religious nation).

¹⁵⁷ *Marsh*, 463 U.S. at 793-94. Note again, however, that the opinion deliberately avoided dissecting the prayers' content where there is not discernible motive shown for the practice to attempt to proselytize. *Id.* at 794.

¹⁵⁸ See *supra* notes 36-37 and accompanying text.

¹⁵⁹ See *Marsh* 463 U.S. at 793-94. But see *Marsh*, 483 U.S. at 822-23 (Stevens, J., dissenting):

In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature. Regardless of the motivation of the majority that exercises the power to appoint the chaplain, it seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the First Amendment.

Id.

¹⁶⁰ *Marsh*, 463 U.S. at 792; see also note 35 and accompanying text. The nation's historical practice of legislative prayer, as well as Nebraska's own century-long tradition, weighed heavily in favor of carving out an Establishment Clause exception for the practice:

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

182 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

without applying any of the usual Establishment Clause analyses because the practice could not pass these tests.¹⁶¹ Due to this historically-based, conclusive holding, almost all subsequent legislative prayer case opinions have leapt past the question of whether an opening prayer offered at a governmental deliberative body meeting is, in and of itself, a violation of the Establishment Clause.¹⁶²

But the *Marsh* decision did not grant governments a free pass to pray indiscriminately; it provided a clear delineation of *who* could pray and acknowledged acceptable content.¹⁶³ Some constitutional limits to content have been discerned from the Court's holding.¹⁶⁴ The Court recognized that the dominance of Judeo-Christian influence greatly affects the actual content of the prayers, but no limits for this dominant theology were further defined.¹⁶⁵ The second significant observation of the Court was that prayers which do not clearly proselytize, advance, or disparage any one faith will not be dissected because such an evaluation by a court would prove difficult.¹⁶⁶ *Marsh* fails to define proselytizing, advancing, or disparaging any faith, leaving courts and responsible legislators attempting to adhere to the Court's holding in *Marsh* without a bright line rule on allowable content.¹⁶⁷

laws is not, in these 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.

Marsh, 463 U.S. at 792.

¹⁶¹ See *supra* note 35 (detailing the Supreme Court's choice not to apply the *Lemon* test or the endorsement test).

¹⁶² See *supra* Part II.B.1 (describing the decisions in legislative prayer cases since the *Marsh* decision).

¹⁶³ See *supra* note 43 and accompanying text (quoting the *Allegheny* decision's reference to the *Marsh* holding).

¹⁶⁴ See *supra* text accompanying note 39 (discussing the lack of necessity to address the content in *Marsh* because the prayers in question were not proselytizing).

¹⁶⁵ *Marsh*, 463 U.S. at 793. There is only one mention in the opinion of the Judeo-Christian tradition in which the prayers in the Nebraska Legislature are offered, but a footnote to the simple acknowledgement may give some insight: "[The chaplain] characterizes his prayers as 'nonsectarian,' 'Judeo Christian,' and with 'elements of the American civil religion. . . . Although some of his earlier prayers were often explicitly Christian, [he] removed all references to Christ after a 1980 complaint from a Jewish legislator.'" *Marsh*, 463 U.S. at 793 n.14 (citations omitted).

¹⁶⁶ See *Marsh*, 463 U.S. at 795 ("[I]t is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.").

¹⁶⁷ See, e.g., *Pelphrey*, 410 F. Supp. 2d at 1330; *Wynne*, 376 F.3d 292. But see *supra* note 116 (describing Speaker Bosma's refusal to censor prayers of prayer-givers).

B. Marsh Exception Limited to State Legislative Prayer Practice

The Supreme Court's conclusive finding that state legislative prayer is within Establishment Clause bounds due to the history and tradition of such prayer has been interpreted broadly.¹⁶⁸ Courts apply *Marsh* in case after case as a blanket exception, allowing prayer by local governmental entities.¹⁶⁹ But the *Marsh* opinion can also be narrowly read to apply only to state legislatures, thus creating the confusion apparent in *Tangipahoa Parish*.¹⁷⁰

Legislative prayer takes place in an almost exclusively adult environment which results in constitutional analysis much different than other public prayer cases.¹⁷¹ Yet the adult environment of legislative prayer does not follow the analysis of other adult-implicated Establishment Clause doctrines, otherwise the results would be vastly different.¹⁷²

Courts frequently use the *Lemon* test to decide Establishment Clause cases, including adult prayer situations.¹⁷³ Applying the test's three prongs to any legislative prayer challenge would quickly determine the prayers to be unconstitutional.¹⁷⁴ The first prong of *Lemon* requires the court to determine whether the government action has a secular purpose.¹⁷⁵ *Marsh* discussed how the practice quieted down the legislative members and signaled the opening of business, but this

¹⁶⁸ See *Marsh*, 463 U.S. 783 (describing the historical tradition of paid legislative chaplains).

¹⁶⁹ See *supra* Part II.B.1.

¹⁷⁰ See *supra* notes 135-37 (detailing the three opinions published by the three-judge panel of the Fifth Circuit).

¹⁷¹ See *Tangipahoa Parish I*, 2005 WL 517341 at *9; *Tangipahoa Parish II*, 477 F.3d at 211. But see *Lee v. Weisman*, 505 U.S. 577 (1992) (establishing the coercion test through the finding that prayers at public school graduations are inherently coercive because there is great pressure on students to attend their graduation ceremonies and to not leave during the prayer).

¹⁷² See *supra* note 35. See, e.g., Ashley M. Bell, "God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled With the Secularization of Historical Religious Expressions, 50 AM. U. L. REV. 1273, 1320 (2001) (concluding that many historical religious expressions used in government would be deemed unconstitutional under the regular Establishment Clause tests).

¹⁷³ See, e.g., *supra* note 83 and accompanying text (discussing use of *Lemon* test to evaluate adult prayer in *Coles*).

¹⁷⁴ See *Marsh*, 463 U.S. at 800-01 (Brennan, J., dissenting) ("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.").

¹⁷⁵ *Lemon*, 403 U.S. at 612-13.

184 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

notion was dismissed because there are many other available methods of calling a body to order.¹⁷⁶ Second, *Lemon* requires the court to consider whether the principal or primary effect of the government action either advances or inhibits religion.¹⁷⁷ Spending taxpayer funds in an effort to finance a regular practice, which repeatedly puts forth a Judeo-Christian belief system, clearly advances religion.¹⁷⁸ Finally, under *Lemon* the court must ascertain whether the government action causes excessive entanglement with religion.¹⁷⁹ Funding of the prayer practice as well as monitoring or overseeing the practice, for example, qualify as government entanglement with religion.¹⁸⁰ Simply put, due to the fact that legislative prayer cannot survive the *Lemon* test, another test is needed in order to control the historical prayer practice.¹⁸¹

The coercion test is a reflection of the accommodation theory of the Establishment Clause, whereby the government only violates the clause if it coerces religious participation.¹⁸² Predicting its application to legislative prayer is difficult because there is not one accepted standard for what constitutes coercion.¹⁸³ A strong contingent of accommodationists believe that coercion only exists where there is actual coercion of religious orthodoxy and of financial support by force of law and threat of penalty.¹⁸⁴ The idea of subtle coercion recognizes that feelings of isolation and discomfort in situations where there is social pressure to attend and witness prayer can constitute government

¹⁷⁶ See *supra* note 111 (Brennan, J., dissenting) (discussing the secular purposes offered for opening prayers in the Nebraska Legislature).

¹⁷⁷ *Lemon*, 403 U.S. at 612-13.

¹⁷⁸ See, e.g., *Chambers v. Marsh*, 675 F.2d 228, 234 (8th Cir. 1982) ("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. . .").

¹⁷⁹ *Lemon*, 403 U.S. at 612-13.

¹⁸⁰ *Marsh*, 483 U.S. at 798-99 (Brennan, J., dissenting).

¹⁸¹ See *supra* note 174. In fact, the first point made in *Marsh* acknowledged that the lower court had applied the *Lemon* test resulting in the prayer practice failing all three prongs. *Marsh*, 483 U.S. at 786 ("Applying the three-part test . . . the court held that the chaplaincy practice violated all three elements of the test. . .").

¹⁸² See *Weisman*, 505 U.S. at 577 (establishing the coercion test through the finding that prayers at public school graduations are inherently coercive because there is great pressure on students to attend their graduation ceremonies and to not leave during the prayer).

¹⁸³ Compare *Weisman*, 505 U.S. 577 (finding a coercive environment at public middle and high school graduation ceremonies that include prayer); with *Mellen*, 327 F.3d 355 (discussing the coercive environment at a military college with supper prayer practice).

¹⁸⁴ *Weisman*, 505 U.S. at 631 (Scalia, J., dissenting) ("[T]he Establishment Clause must be construed in light of the government policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.") (internal citation omitted).

coercion to participate in religious activity.¹⁸⁵ This Note suggests that the subtle coercion theory is applicable to local legislative and deliberative bodies' prayer practices.¹⁸⁶

While not a singular Establishment Clause doctrine, the huge deference to history and tradition is an important consideration in attempting to clarify the outcome of legislative prayer cases.¹⁸⁷ Some argue that allowing government to accommodate religion due to tradition inevitably leads to subtle favoritism for religious majorities and, unfortunately, subtle disapproval towards religious minorities.¹⁸⁸ Despite such concerns, a heavy reliance on deference to history and tradition begs the question: How long must a practice exist to be deemed traditional?¹⁸⁹ Surely the 188-year tradition of an opening invocation at the Indiana House of Representatives is long enough to sway a judge.¹⁹⁰ But what of the Tangipahoa Parish School Board's thirty-three year old practice?

Legislative bodies would be better able to solemnize appropriate occasions with prayer while avoiding conflict with a clarification of the current legislative prayer doctrine.¹⁹¹ The *Marsh* holding fails to give consistent guidance, as demonstrated by the recent ambiguities that have arisen in recent lower court cases.¹⁹² Taking advantage of these ambiguities, some political groups are pushing to expand the mix of Christian beliefs into governmental functions.¹⁹³ Part IV of this Note proposes a refining of the legislative prayer doctrine of *Marsh*, suggesting a clearer directive regarding the allowable content of

¹⁸⁵ See *id.*

¹⁸⁶ See *infra* Part IV (suggesting a two-pronged judicial doctrine mandating all prayer content be nonsectarian and a narrowing of the *Marsh/Allegheny* application to only large, impersonal legislative sessions).

¹⁸⁷ See *Marsh*, 463 U.S. at 783.

¹⁸⁸ See *id.*

¹⁸⁹ See *supra* note 38 (discussing the recent Supreme Court decision in *Van Orden v. Perry* swinging on Justice Brennan's heavy reliance tradition in allowing the continuous and unchallenged display of the Ten Commandments outside of the Texas Statehouse for over forty years to remain).

¹⁹⁰ See, e.g., *Marsh*, 463 U.S. at 784.

¹⁹¹ See generally *supra* Part III (discussing the limits of the application of *Marsh*).

¹⁹² See, e.g., *supra* notes 135-37 and accompanying text (discussing the Fifth Circuit's decision in *Tangipahoa Parish*, which generated three opinions from the three-judge panel).

¹⁹³ See *supra* notes 118-22 and accompanying text (discussing the legislative reaction to *Hinrichs*); see also *supra* notes 141-42 and accompanying text (discussing the legislative reaction to *Tangipahoa Parish* and the announcement of the American Values Agenda).

government prayers and restricting the application of *Marsh* to state legislative bodies.¹⁹⁴

IV. CLEAR LIMITS FOR LEGISLATIVE PRAYER

It is necessary to resolve the uncertainties in the application of *Marsh* to deliberative body prayer practices for several basic policy reasons. First, the cases that arise from the ambiguity waste time and money.¹⁹⁵ Second, these cases are simply divisive.¹⁹⁶ Those in the minority are made to feel excluded, and worse, often harassed when challenging the majority.¹⁹⁷ Hinrichs, a lobbyist, lost his job as a result of pursuing his case against the Indiana prayer practice.¹⁹⁸ In the aftermath of the Does' complaint, a student teacher in the Tangipahoa Parish School system who reported prayer activities in the school was given a failing grade.¹⁹⁹ Such discord resulting from religious diversity is exactly what the Establishment Clause was meant to avoid.²⁰⁰

With the presidential and legislative political trends of the past decade, the agenda of the conservative, religious electorate has been brought to the forefront of government policy.²⁰¹ These aspirations have a natural consequence of bringing about a spate of cases involving the Religion Clauses.²⁰² Since *Marsh*, all of the challenges brought regarding legislative prayer, until *Hinrichs*, have arisen from local government actions.²⁰³ These challenges were decided using *Marsh* as the model.²⁰⁴ With *Hinrichs*, the limited holding in *Marsh* resulted in confusion and controversy with state-level legislative prayer content.²⁰⁵ *Tangipahoa Parish* underscores the question of the breadth of the legislative prayer

¹⁹⁴ See *infra* Part IV.A.

¹⁹⁵ See, e.g., *supra* notes 118-121 (discussing legislative reactions to *Hinrichs*); *supra* notes 139-40 (discussing costs of the legal battle in *Tangipahoa Parish*).

¹⁹⁶ See, e.g., *supra* notes 125-27 (discussing the ongoing controversies for the past decade over prayer in Tangipahoa Parish).

¹⁹⁷ See *Engel*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

¹⁹⁸ See *supra* note 106.

¹⁹⁹ See *supra* note 138.

²⁰⁰ See *supra* Part II.A (discussing the Establishment Clause's adoption by the First Congress).

²⁰¹ See Balkin & Levinson, *supra* note 64, at 515-16.

²⁰² See *id.* at 516.

²⁰³ See *supra* Part II.B.1 (discussing legislative prayer decisions).

²⁰⁴ See *supra* Part II.B.1 (discussing application of the *Marsh/Allegheny* doctrine).

²⁰⁵ See *supra* Part II.C.1 (discussing the *Hinrichs* case).

exception, whether it includes deliberative bodies other than a state legislature.²⁰⁶ *Hinrichs* and *Tangipahoa Parish* signal that the jurisprudence of *Marsh* has reached its practical limits.²⁰⁷

A. *Model Judicial Reasoning for Legislative Prayer*

The first prong of this proposed legislative prayer doctrine would simply regard any sectarian prayers to be unconstitutional. A case by case determination of whether prayer content qualifies as proselytizing is too difficult when dealing with a written record rather than actually witnessing the invocation's delivery.²⁰⁸ Moreover, all subjectivity would be eliminated as to when content crosses the line into proselytizing by simply concentrating on the sectarian notion. No threat of proselytization exists if prayers remain completely non-sectarian.²⁰⁹

The second prong of this proposed legislative prayer doctrine is that the state legislative model should not be extended to apply to lower level legislative bodies. The decision in *Marsh* was specific to a state legislature, and this proposal would limit its application accordingly. *Marsh* is based on the specific facts of the prayer practice in the Nebraska legislature, including: the unique history of prayer in state legislative bodies; the large size of such groups; and the allowance of individuals coming and going throughout the session.²¹⁰ Local government entities and deliberative bodies, therefore, should receive a different analysis.²¹¹ The tests applied to other adult prayer situations, the *Lemon* test and the theory of subtle coercion, would be more appropriately applied to prayer offered at local legislative meetings akin to school board, town hall, or county council meetings.²¹²

B. *Commentary on the Application of Proposed Limits to Legislative Prayer*

Application of the first prong, strictly limiting prayer to nonsectarian content, is simple and straightforward. Invocations to a divine being,

²⁰⁶ See *supra* Part II.C.2 (discussing the *Tangipahoa Parish* case).

²⁰⁷ See *supra* Parts II.C.1, II.C.2 (discussing the *Hinrichs* and *Tangipahoa Parish* cases).

²⁰⁸ See *supra* Part II.B.1 (discussing cases decided using *Marsh/Allegheny* content analysis and their subsequent inconsistencies).

²⁰⁹ See *supra* Part III.A (discussing content limitations of *Marsh/Allegheny* doctrine).

²¹⁰ See *supra* notes 35-40 and accompanying text (discussing *Marsh* holding).

²¹¹ See *supra* Part II.B.2 (discussing the constitutional evaluation of adult prayer situations).

²¹² See *supra* Part II.B.2 (discussing the constitutional evaluation of adult prayer situations).

without reference to a specific religion, would be permitted.²¹³ In most situations, courts deciding controversies and, usually, the legislative bodies themselves, are already following the spirit of *Marsh/Allegheny* by avoiding even specifically Christian references.²¹⁴ Rare are the renegades who focus in on the dicta of *Marsh* which suggests an aversion to parsing the language of prayers and attempt to impose sectarian prayers when government is the speaker.²¹⁵ However, a Supreme Court decision elevating the spirit of nonsectarian prayer from *Marsh* into a clear constitutional command would relieve our legislatures, and subsequently, our courtrooms, of the debate over content.²¹⁶

While the *Lemon* test is the standard Establishment Clause judicial doctrine, it is often difficult to apply to legislative prayer and would almost uniformly reject such practice as unconstitutional.²¹⁷ The consideration of historical tradition is reasonable, but no clear parameters exist defining just how long a time period justifies a prayer practice.²¹⁸ However, the theory of subtle coercion can be applied to legislative prayer situations involving local legislative bodies.²¹⁹ Although the citizens attending such meetings are generally adults as opposed to the primary and secondary students involved in the doctrine's inception, the role of citizens attending local government meetings differs greatly from the usual adult prayer case contexts.²²⁰ Unlike attendance at a public university graduation, where all attendees are unified in celebration, the reality of attendance at a local government meeting usually includes the existence of an adversarial or supplicant

²¹³ See *supra* text accompanying notes 54-56 (giving a summation of how references to Christ advance one particular faith).

²¹⁴ See *supra* Part II.B.1 (discussing the application of *Marsh/Allegheny* in legislative prayer cases).

²¹⁵ See, e.g., *supra* notes 65-69 and accompanying text (discussing *Pelphrey*); Part II.C.1 (discussing the facts of *Hinrichs*).

²¹⁶ Currently the Seventh Circuit decision in *Hinrichs* is pending, while the School Board of *Tangipahoa Parish* is seeking further appeal. See *supra* Part II.C.

²¹⁷ See *supra* notes 173-81 and accompanying text (analyzing application of the *Lemon* test to legislative prayer).

²¹⁸ See *supra* notes 187-90 and accompanying text (discussing consideration of history and tradition in Establishment Clause decisions).

²¹⁹ See *supra* notes 84-89 and accompanying text (discussing application of subtle coercion in *Mellen*); see also *supra* notes 182-86 and accompanying text (analyzing use of coercion test and recognizing the feelings of discomfort, isolation, and social pressure to participate in certain government prayer activities).

²²⁰ See, e.g., *supra* note 80-83 and accompanying text (discussing the use of prayer at a school board meeting); *supra* notes 129-30 and accompanying text (discussing the attendance at the *Tangipahoa Parish* school board meetings).

relationship.²²¹ Furthermore, unlike at the state or national legislative levels where the average citizen is only present for an opening invocation in a singular or sporadic observance of his government or as a function of employment, at the local level a citizen is usually present at a government meeting to accomplish a goal.²²² This difference in purpose creates a difference in the effect of the prayer on those attending, magnifying feelings of isolation and discouraging participation from a citizen who is a religious minority.²²³ Simply narrowing the *Marsh* legislative prayer exception to apply only to state legislatures, and not to lower government deliberative bodies, would spare those who practice faiths outside the Christian majority from remaining religiously segregated and allow those citizens to feel fully involved in their local government.²²⁴

V. CONCLUSION

*We look forward to the day when all nations and all people of the earth will have the opportunity to hear and respond to messages of love of the Almighty God who has revealed Himself in the saving power of Jesus Christ.*²²⁵

A Supreme Court decision in either *Hinrichs* or *Tangipahoa Parish* would clarify the boundaries of permissible legislative prayer. In fact, the two cases decided in tandem could solve both of the ambiguities of the *Marsh* doctrine identified in this Note. The judicial reasoning proposed in Part IV provides a method by which a court may resolve both cases in a just manner.

²²¹ Compare *supra* notes 70-71 and accompanying text (discussing prayer at university functions in *Tanford* and *Chaudhuri*); with *supra* notes 80-83 and accompanying text (discussing prayer at local school board meeting in *Coles*).

²²² Compare *supra* Part II.A (discussing the history of legislative prayer up to and including the *Marsh/Allegheny* decisions); with *supra* Part II.B.2 (discussing adult prayer in non-legislative situations).

²²³ See *supra* Part III.B (discussing the evaluation of adult prayer through alternative methods, including the coercion test).

²²⁴ See *supra* Part III.B (discussing the evaluation of adult prayer through alternative methods, including the coercion test).

²²⁵ *Hinrichs*, 400 F. Supp. 2d at 1107 (quoting opening prayer asking for worldwide conversion to Christianity from March 28, 2005). While arguably proselytizing as delivered, this prayer would be acceptable in the Indiana House of Representatives with only the reference to "Almighty God," but fails the suggested test due to the phrase which follows this supreme deity reference, which makes the prayer clearly Christian and sectarian.

190 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42

By applying the bright-line rule of allowing only non-sectarian prayer, the District Court decision in *Hinrichs v. Bosma* would be affirmed. Any and all references to Christianity would remain forbidden, just as the current injunction dictates. The Speaker would be forced to carry on with the business of legislating for the state, rather than spending time and money to assert Christian religious beliefs that the vast majority of Hoosiers adhere to already.

Recognizing that the *Marsh* prayer exception was intended to apply narrowly to state legislatures and that the dynamic is drastically different at local government levels, the District Court decision in *Doe v. Tangipahoa Parish School Board* would also be affirmed. Whether through application of the *Lemon* test or the theory that subtle coercion exists at local government meetings, the thirty-three years of government prayer at the School Board meetings would come to a permanent halt. The residents of Tangipahoa Parish would be able to put their tax dollars to work educating their children, rather than defending the religious practice that they are free to carry out in private.

Future disputes involving legislative prayer would simply pass Establishment Clause muster if the legislative body is at the state or national level, and the prayer's content is non-sectarian. Just as Justice Brennan's dissent in *Marsh* mused that any law student would find legislative prayer to fail the *Lemon* test, this two-pronged test would easily identify allowable legislative prayer. Such a clear test would eliminate the bounty of cases and controversies arising in this branch of constitutional jurisprudence. The Christian majority needs this clarification; that what it deems "just a little talk with Jesus" is a violation of the First Amendment whenever government is the speaker.

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