

# LOCAL GOVERNMENT LAW

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## DO LEGISLATIVE INVOCATIONS HAVE A PRAYER? THE CONSTITUTIONALITY OF LEGISLATIVE INVOCATIONS

■ Chad Ford

A local city council has a long history of beginning each of its meetings with an invocation. The council has no set method of selecting who should give the prayer. Sometimes they invite a local clergy member to offer it; other times citizens are allowed to volunteer to pray. On a few occasions, city council members deliver the invocation themselves. Several citizens object to the prayers, claiming that the Constitution requires the separation of church and state. By infusing prayer into public meetings, have local government bodies violated the Establishment Clause of the First Amendment of the Constitution? Are some of the scenarios just described more “constitutional” than others? This bulletin describes the constitutionality of legislative invocations and offers an analysis of the application of the law in different local government situations.

### Brief History of the Establishment Clause

The Establishment Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion.”<sup>1</sup> The Fourteenth Amendment has extended the First Amendment to state and local governments. Although the Establishment Clause is “seemingly straightforward,” there has been no consistent lens that can be used to determine when a law “establishes” a religion.<sup>2</sup> Instead, Establishment Clause jurisprudence is little

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1. U.S. CONST., amend. I.

2. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 376 (6th Cir. 1999).

more than a “blurred, indistinct and variable barrier”<sup>3</sup> whose application depends on sifting through the facts of each individual case.<sup>4</sup>

Establishment Clause questions have created confusion since the adoption of the Bill of Rights, and they continue to be quite controversial. Despite this ongoing debate and the specific issues and questions it raises, the Supreme Court has developed, in *Lemon v. Kurtzman*, a three-part test to determine when a government-sponsored activity offends the Establishment Clause.<sup>5</sup>

Under *Lemon*, a government-sponsored activity will not violate the Establishment Clause if (1) it has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not create an excessive entanglement of the government with religion.<sup>6</sup> If the challenged practice fails any part of the *Lemon* test, it violates the Establishment Clause.<sup>7</sup> The first prong of the *Lemon* test focuses on the intentions of the government; namely, did “the government intend to convey a message of endorsement or disapproval of religion.”<sup>8</sup> The second prong asks whether, “irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”<sup>9</sup> The last prong looks to “the character and purpose of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.”<sup>10</sup> The key to the third prong is “excessive entanglement.” Not every interaction between a government and religious authority would be a violation of the Establishment Clause; the court has “always tolerated some level of involvement between the two.”<sup>11</sup>

3. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

4. *Compare Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (holding that a Nativity scene in a town square did *not* violate the Establishment Clause because it was also surrounded with secular Christmas decorations such as Santa Claus and Christmas trees) with *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 601–02 (1989) (holding that a Nativity scene in a town square *did* violate the Establishment Clause because it stood apart from the other more secular decorations on display in the square).

5. *Lemon*, 403 U.S. at 612–13.

6. *Id.*

7. *See Stone v. Graham*, 449 U.S. 39, 40–41 (1980).

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

9. *Lynch*, 465 U.S. at 690.

10. *Lemon*, 403 U.S. at 614.

11. *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997).

## *Marsh v. Chambers*

The only clear departure from the *Lemon* test came in 1983, in *Marsh v. Chambers*. In *Marsh* the Supreme Court held that a state legislature’s practice of opening each day’s session with a prayer delivered by a state-paid chaplain did not violate the Establishment Clause of the First Amendment.<sup>12</sup> The Court began its analysis by comparing Nebraska’s practice with the “unique history” of the United States Congress, noting that the practice of opening sessions of “legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of the country.” The Court reasoned that

... 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 society. To invoke divine guidance on a public body entrusted with making the laws is not, in these circumstances, an “establishment” of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, “[W]e are a religious people whose institutions presuppose a Supreme Being.”<sup>13</sup>

To bolster that argument, the Court noted that the drafters of the Establishment Clause expressed their support for legislative prayer by voting to employ a legislative chaplain for the first Congress. Just three days before the first Congress adopted the language of the Establishment Clause, it authorized the appointment of paid chaplains to offer invocations at the beginning of each congressional session.<sup>14</sup> Is this a clear indication that the men who authored the First Amendment did not view paid legislative chaplains offering invocations in Congress as a violation of the Establishment Clause?<sup>15</sup> Or is it evidence that the states forced Congress to enact the First Amendment and the Bill of Rights as a condition for ratification of the original Constitution?<sup>16</sup> The Court found it untenable that the first Congress “intended the Establishment Clause of the First Amendment to forbid what they had just declared acceptable.”<sup>17</sup>

12. *Marsh v. Chambers*, 463 U.S. 783, 793–95 (1983).

13. *Id.* at 792 [quoting *Zorach v. Clauson*, 343 U.S. 308, 313 (1952)].

14. *See Marsh*, 463 U.S. at 787–88.

15. *Id.* at 788.

16. *Id.* at 816.

17. *Id.* at 790–91.

The result in *Marsh* departs from the Court's earlier Establishment Clause jurisprudence in several crucial ways.<sup>18</sup> First, the Court began the analysis of the case with the caveat that "standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees."<sup>19</sup> From the rest of the opinion it appears that the Court proceeds to ignore its own admonition by deciding the case based on well-established historical patterns. Nevertheless, the Court's result may not be as inconsistent with the aforementioned proposition as it initially seems. Perhaps the Court viewed the facts in this case through the lens of centuries-old experience—despite two hundred years of beginning legislative sessions with sectarian prayers, legislative invocations in both Congress and the Nebraska legislature have not led to an establishment of a state religion.<sup>20</sup> Secondly, *Marsh* is the first and only Establishment case since 1971 not to apply the three-pronged *Lemon* test. Trying to limit the holding of *Marsh*, Justice Brennan highlights this departure from the *Lemon* test in his dissent. "That it fails to do so [apply the *Lemon* test] is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer."<sup>21</sup>

Brennan, in his dissent, protested this departure from traditional Establishment Clause analysis and then went on to apply the *Lemon* test to the facts in *Marsh*. He subsequently concluded, "[I]f the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause."<sup>22</sup> He found that legislative prayer had a preeminently religious "purpose" and "effect" and led to excessive "entanglement" between the state and religion.<sup>23</sup> One of the essential factors in Brennan's analysis was the fact that for sixteen years the Nebraska legislature had chosen the same Presbyterian minister who often offered sectarian prayers before its sessions.<sup>24</sup> Because of the fact-specific historical

analysis employed by the Court to uphold legislative invocations, many commentators have argued that all *Marsh* holds is that "legislative prayer," delivered by an established chaplain system with a long and unbroken historical legacy, is not per se unconstitutional.<sup>25</sup>

Despite the seemingly uncertain ground upon which the *Marsh* exemption was created, the holding in *Marsh* was consistent with case law in lower courts upholding legislative prayers.<sup>26</sup> After *Marsh*, however, there have been few reported cases on legislative prayer. In the most significant of these, *Snyder v. Murray City Corp.*, the Tenth Circuit upheld against a constitutional challenge the Murray City council's custom of opening meetings with an invocation.<sup>27</sup> The council allowed any citizen who desired to "sign up" to deliver a prayer at the beginning of its "reverence period." The plaintiff, Tom Snyder, drafted a prayer that called on public officials to cease the practice of praying before government meetings.<sup>28</sup> Snyder signed up to pray at the opening of a council meeting and sent a copy of the prayer to the council beforehand. The council, after reading the prayer, refused to grant Snyder permission to recite it, and Snyder sued, maintaining that the refusal amounted to an "establishment" of a religion. The Tenth Circuit, relying solely on *Marsh*, read that case as "establishing the constitutional principle that the genre of government religious activity that has come down to us over 200 years of history and which we now call 'legislative prayer' does

25. See Judge Lucero's dissent in *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1236 (10th Cir. 1998) for a summary of arguments that compel a narrow reading of *Marsh*; Mark S. Kouris & Kyrie Elaison, *A Constitutional Amendment Is No Panacea for the Prayer in City Council Meeting Dilemma*, UTAH L. REV. 1385, 1418–25 (1992).

26. See *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979); *Colo. v. Treasurer and Receiver Gen.*, 392 N.E.2d 1195 (Mass. 1979); *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968); and *Marsa v. Wernik*, 430 A.2d 888 (N.J. 1981).

27. *Snyder*, 159 F.3d at 1227.

28. Here is an excerpt from Snyder's prayer: "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 pray that you prevent self-righteous politicians from misusing the name of God in conducting government meetings . . . we pray that you strike down those that misuse your name and those that cheapen the institution of prayer by using it for their own selfish political gain. . . . 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 misguided, weak and stupid politicians, who abuse power in their own self-righteousness." *Snyder*, 159 F.3d at 1129, note 3.

18. See Rodney K. Smith, *Public Prayer and the Constitution: A Case Study in Constitutional Interpretation* 257 (1987) (noting that "*Marsh* makes a strange fit with the Court's prior decisions").

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

20. Paul Ryneski, *The Constitutionality of Praying at Government Events*, DET. C.L. MICH. ST. U. L. REV. 603, 608 (1996).

21. *Marsh*, 463 U.S. at 796.

22. *Id.*

23. *Id.* at 797–98.

24. *Id.* at 800, n. 9.

not violate the Establishment Clause.”<sup>29</sup> Because the peculiarity of this genre of government religious activity requires government selection of a particular speaker, the court also read *Marsh* as establishing the principle that choosing a particular person to offer an invocation does not violate the Constitution.<sup>30</sup> The court then followed that line of thought to its logical conclusion. “[T]here can be no Establishment Clause violation merely in the fact that a legislative body chooses not to appoint a certain person to give its prayers. The act of choosing one person necessarily is the act of excluding others.”<sup>31</sup>

### An Exception or the Rule? The Limits of *Marsh*

The *Marsh* Court did place some limits on the scope and selection of legislative prayers. First, a prayer falls outside the exception when “the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”<sup>32</sup> Second, the Court warned that the selection of a person to recite the prayer might be a violation if the selection “stemmed from an impermissible motive.”<sup>33</sup> Neither of these limitations, however, requires a system of equal access to offering the prayers. The Tenth Circuit in *Snyder* noted, “It is clear under *Marsh* that there is no ‘impermissible motive’ when a legislative body or its agent choose to reject a government-sanctioned speaker because the tendered prayer falls outside the long-accepted genre of legislative prayer.”<sup>34</sup>

The *Marsh* limitations are easier to express than to apply. The act of praying to a supreme power assumes its existence. Therefore, at one level, all prayers “advance” a particular faith or belief.<sup>35</sup> *Marsh*, however, seems to underscore the conclusion in *Snyder* that “the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment

Clause.”<sup>36</sup> How does a legislature create nondenominational and nonproselytizing standards? Since the individuals offering invocations in *Marsh* and *Snyder* were advised to apply these standards to their prayers, each was free to determine what those standards were individually. To do otherwise, Justice Stevens says in his dissent in *Marsh*, will inevitably involve the state in one religious debate after another, alternatively implicating the Free Exercise and Establishment Clauses of the Constitution.<sup>37</sup>

If a legislative body decides to have an invocation, must the body review and accept or reject each invocation based on its content to avoid conflicting with *Marsh*? When a legislative or deliberative body prohibits someone from reciting a prayer that is outside the ecumenical bounds of the type *Marsh* considered, it actually may be enforcing the principle in *Marsh* that a legislative prayer not “advance” or “proselytize” but be “simply a tolerable acknowledgement of beliefs widely held among the people of this country.”<sup>38</sup> However, if a legislative body, in order to protect an assault on “beliefs widely held among the people,” prohibits a prayer that advances or proselytizes a position or view of God that is offensive to the majority of the members of the community, hasn’t it “established” a state religion as defined by the Court in Establishment Clause jurisprudence?<sup>39</sup> Of course, the Court gets into some content-based analysis already whenever it applies the *Lemon* test, but it may be more problematic to direct local legislative bodies to do likewise.

In *Snyder* the Tenth Circuit had a difficult time determining what the criteria should be for determining when a prayer “advances” or “proselytizes.” The court found that, in this case, *Snyder*’s prayer fell “well out-

29. *Id.* at 1233.

30. *Id.*

31. *Id.*

32. *Marsh*, 463 U.S. at 794–95; see also *Snyder*, 159 F.3d at 1234 (noting that the kind of prayer that runs afoul of *Marsh* is one that “proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine”).

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

34. *Snyder*, 159 F.3d at 1234.

35. *Snyder*, 159 F.3d at 1234, n. 10.

36. *Id.*

37. *Marsh*, 463 U.S. at 819 (Stevens details how an attempt by the state to fashion a “non-sectarian” prayer would trouble both individuals having constitutional objections to any prayer formed by a government organ as well as individuals with theological objections to a limitation of their right to pray in the way their consciences dictate).

38. *Snyder*, 159 F.3d at 1234 (quoting *Marsh*, 463 U.S. at 792).

39. See generally, Constitutional Law—Establishment Clause—*Tenth Circuit Holds That City May Deny Opportunity to Deliver Proselytizing Legislative Prayers*, 112 HARV. L. REV. 2025 (1999) (“In . . . focusing myopically on an untenable distinction between acceptable and unacceptable prayer content, the *Snyder* court reached a result inconsistent with Supreme Court precedent. More fundamentally, the court’s approach to evaluating legislative prayers seems to undermine, rather than protect, the long-standing tradition the *Marsh* Court explicitly sought to preserve”).

side” the genre of prayers approved in *Marsh* because it disparaged those who believe that legislative prayer is appropriate. Snyder’s prayer also “aggressively proselytize[d] for his particular religious views” by asking for divine assistance to “guide” civic leaders to “the wisdom of separating church and state.”<sup>40</sup>

Ultimately the court ruled that because Snyder’s prayer “seeks to convert his audience to his beliefs,” it was indeed proselytizing, and the Murray City council had the right to ban such a prayer because it would run afoul of *Marsh* and the Establishment Clause.<sup>41</sup> On the other hand, the Supreme Court, in *Marsh*, implicitly approved of legislative prayers which clearly stated that our nation and its leaders “can be saved only by becoming permeated with the spirit of Christ.”<sup>42</sup> The prayers that the Court ruled were permissible in *Marsh* and in the U.S. Congress were filled with sectarian references and supplications to convert the audience into true believers or at least to a Christian way of thinking.<sup>43</sup>

Interestingly, in *Snyder* the court could have gone another route entirely in upholding the decision of the Murray City council not to allow Snyder to recite his “prayer.” It is difficult to determine exactly when a prayer is a prayer or when it is, instead, a political speech aimed at provoking or raising issues of policy. In the case of Snyder’s “prayer,” the court could have justifiably ruled it was not a prayer at all, but a political speech. Such a speech, the court could have found, would be inconsistent with the express secular purpose of a reverence period. According to free speech doctrine allowing certain speech to be regulated with time, place, and manner restrictions, the Murray City council would have the right to limit when and where a political speech is given. This strategy would have steered the court and legislative bodies away from analyzing prayers for tendencies to “advance” or “proselytize” and would keep legislative bodies away from the free-exercise questions that free speech doctrine invariably implicates. However, such an approach is not without its problems. While avoiding the task of determining

when a prayer “advances” or “proselytizes” a certain religion, courts and legislative or deliberative bodies must then determine when a prayer is really a prayer. Certainly this task would be equally daunting and fraught with potential for abuse.

## “Other Deliberative Bodies”

One of the major unsettled questions of *Marsh* is to what extent the exception upholding the constitutionality of government-sponsored prayers extends to “deliberative bodies” in local government. The phrase is found at the beginning of the Court’s discussion of the historical legacy of legislative prayer. “The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.”<sup>44</sup> Clearly, this implies that *Marsh* applies to all legislative bodies, not just federal or state ones. City councils and county boards, for example, would be included under the *Marsh* exception. Most courts have argued that the decision in *Marsh* applies not only to legislative invocations but also to all invocations opening the sessions of a deliberative public body.<sup>45</sup>

In the context of public school board meetings, other courts have taken a much more narrow view of *Marsh*, holding that *Marsh* is “clearly limited to the legislative setting.”<sup>46</sup> Restricting the application of *Marsh* only to “legislative bodies” in school board cases may be just a device to distinguish school board prayers from other forms of legislative prayer, as there is a whole body of countervailing case law and public policy prohibiting prayer in public schools.<sup>47</sup> What effect will such views have on prayers by advisory boards, like planning boards, which aren’t necessarily

40. *Snyder*, 159 F.3d at 1235.

41. *Id.*

42. Prayer by Congressional Chaplain in the United States Congress, 138 CONG. REC. S1515 (daily ed. Feb. 18, 1992).

43. See 139 CONG. REC. S2977 (daily ed. March 17, 1993) (“Help us heed Jesus’ invitation to come to Him when we ‘labor and are heavy laden.’ Help us to count on His understanding, His love, His forgiveness, His renewal”) and 138 CONG. REC. S3171 (daily ed. March 11, 1992) (“Lord Jesus, put Thine arm around them to give them strength, and speak to them to give them wisdom greater than their own”).

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

45. See *Snyder*, 159 F.3d 1227; *Bachus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp. 2d 1192, 1196 (C.D. Calif., 1998); *Stein v. Plainwell Community Schs.*, 822 F.2d 1406, 1409 (6th Cir. 1987).

46. See *Graham v. Central Sch. Dist.*, 608 F. Supp 531, 535 (S.D. Iowa 1985); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 380 (6th Cir. 1999) (“[T]he only public bodies other than legislatures to which the Court specifically refers are the United States Courts . . . [the Court] never again makes any mention of ‘other deliberative bodies’ ”).

47. For a more detailed discussion of prayer at public school board meetings, see Chad Ford, “Do Public School Board Invocations Have a Prayer? Should the Law Concerning Prayer in Legislative Bodies or Prayer in Public Schools Apply to the Case of School Board Prayer?” *School Law Bulletin* 30 (Fall 1999).

legislative but definitely deliberative? If *Marsh* means that legislative or deliberative bodies may claim an exception from the *Lemon* test, then advisory boards, like planning boards, would be able to offer invocations (subject to the restrictions in *Marsh*). If the Court meant to limit the reach of *Marsh* to legislative bodies and other bodies that serve a legislative function, as courts have argued in school board cases, then advisory boards may face stiffer constitutional restrictions concerning invocations.

## Praying for Guidance

It is difficult, in practical terms, to pull out from this line of cases exactly what a North Carolina legislative or deliberative body should do when faced with the question of whether to begin its meetings with an invocation. In conclusion we look at four examples of invocations before legislative or deliberative body meetings and try to distill, from the case law, the appropriateness and pitfalls of the various approaches.

### Example 1: The *Marsh* Model

For every session without interruption over the past one hundred years, a city council has hired a chaplain to begin each day's session with a nonsectarian prayer. The purpose of the prayers, according to the council, is to create a sense of solemnity before the beginning of each day's work in the public interest.

Such a prayer clearly fits the *Marsh* model and is likely to be constitutional. It follows the facts of *Marsh* closely: long history, secular purpose, paid clergyman, prayers do not "advance" or "proselytize." However, many, if not most, North Carolina legislative or deliberative bodies will not fit such a model. There is no known North Carolina local government that has a paid chaplain or the long, unbroken history that the Court cited in *Marsh*.

### Example 2: Prayer by Invitation

For the last eight years the city council has selected different clergymen from the community and invited them to offer the invocation at council meetings. The council instructs the clergymen, when offering prayers, to be sensitive to members of the audience who do not share their beliefs. The council makes it a practice to include clergy from every faith in the city.

This scenario differs from *Marsh* on two grounds. First, the council becomes involved in the regular

practice of choosing who is allowed to offer the invocation, and second, there is no long-standing history of prayer in the council meetings. While these are clearly important distinctions, such a practice may still be constitutional under *Marsh*. For example, the act of selecting local clergymen from the community and the act of hiring a paid chaplain do not seem to have many essential differences. In both cases a governmental body is choosing who will be allowed to pray. In this scenario, if the council did not discriminate among religions (for example, only inviting Christian ministers and excluding other religious authorities from offering invocations) there should not be a problem. It is unclear whether a council would have to go so far as to set up a rotation that includes every clergyman, congregation, or organized religion in town. And though the council itself doesn't have a long history of invocations in its local meetings, the Court in *Marsh* primarily focused on the long history of invocations before public bodies in general when deciding "prayer is deeply embedded in the history and tradition of the country."<sup>48</sup> Though a court may find that the lack of a "long unbroken history" is constitutionally problematic, given the Supreme Court's reliance on the history of prayer in general in *Marsh*, this is unlikely to be a significant issue.

### Example 3: Voluntary Prayer

A city council selects local clergymen to offer invocations at its meetings. Concerns are raised that the council isn't being inclusive enough, so it decides to let anyone who wants to offer an invocation "sign up." The council simply goes down the list and allows everyone who had signed up to have a turn. To avoid the likelihood that prayers could become sectarian, the council writes up guidelines explaining what can and cannot be included in the prayers. After several particularly sectarian prayers, the council, fearful of violating the law, asks those who signed up to provide a written copy of the prayer one day before they are scheduled to pray. On a few occasions, the council asks individuals to tone down certain aspects of their prayers.

This type of situation closely fits *Snyder*. According to the Tenth Circuit, such a practice would be constitutional. However, this example illustrates some of the major difficulties with legislative prayer. First, there is probably no problem with allowing individuals to "sign up" for prayer per se. A dilemma arises when a council must limit the content of the prayers. The

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

problem is twofold. On one hand, to comply with *Marsh* the invocations cannot “advance” or “proselytize.” As a result, guidelines and perhaps even screening are necessary to ensure that the prayers are constitutionally protected. On the other hand, deciding when a prayer advances or proselytizes would be quite difficult, invariably implicating both the Establishment Clause (by censoring prayer content, a council can be establishing a religion by deeming certain religious ideas acceptable and others unacceptable) and the Free Exercise Clause (by interfering with a citizen’s religious practice). Such a task would be so fraught with constitutional pitfalls that it may be wise to avoid it altogether.

#### Example 4: Council Members Offer the Prayers

For as long as it has been established, the city council begins its meetings the same way. The mayor asks those who so wish to rise for a moment of silence or an invocation delivered by a particular member of the council. Each member delivering the invocation determines the prayer’s content. At every meeting a different council member offers a prayer until everyone has had a turn.<sup>49</sup>

This situation is uniquely different from the one the Court faced in *Marsh* and would likely be examined under the *Lemon* test instead of the *Marsh* exception. In this scenario both Establishment Clause law and the rights of free speech are implicated. Even if the council gives no indication that it is in any way approving of or advancing one particular belief, the potential for abuse exists and would possibly implicate the Establishment Clause. Though this particular practice may have a secular purpose, it may not have a secular effect. It is one thing to have a clergyman, who is unaffiliated with any government position, offer the invocation and another thing entirely to have a council member give the prayer. Offering a prayer in this manner might convey a message that the council was advancing a particular belief over others and it may

49. The facts of this case are similar to those of *Marsa*, 430 A.2d at 888–89 (N.J. 1981) (holding that the procedure followed, i.e., having a particular council member call for a silent meditation or deliver an invocation the content of which was selected by such council person, did not violate the Establishment Clause).

entangle the council member delivering the prayer in the practice of religion. On the other hand, the council could argue that a prayer given by a council member is more secular in nature than one given by a minister. No particular faith is being endorsed because no certified representative of a religion is giving the prayer. Finally, council members may have countervailing First Amendment free speech rights that ultimately would have to be balanced with any Establishment Clause questions.

### Conclusion

Under current law, a legislature or other public deliberative body may have an official invocation by a paid or unpaid clergy member without violating the Establishment Clause of the Constitution. To avoid conflict with the Constitution, official invocations offered in the legislature or before other public bodies must refrain from proselytizing or advancing a particular religion. The complexity of determining when a prayer is sectarian or proselytizes makes it difficult to give concrete guidance on which sorts of prayer would be acceptable and which would violate the Establishment Clause. Furthermore, any attempts by a legislative body to write prayers or censor their content may violate prayers’ free exercise or speech rights and may entangle them unnecessarily with functions normally carried out by religious bodies and individual citizens.

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