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Unanswered Prayers: *Lund v. Rowan County* and the Permissiveness of Sectarian Prayer in Municipalities

*Kristopher L. Caudle**

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I. INTRODUCTION

Have you ever experienced an awkward prayer moment? Maybe you're a teacher and your principal ended an impromptu prayer at a staff meeting with "in Jesus's Name We Pray, Amen." Perhaps you've attended a town banquet and the Mayor blessed the meal with a prayer to "God the Father Almighty." In either hypothetical, if you, your co-worker, or your dinner guest held a competing religious belief, would you feel uncomfortable? If so, are the direct references to "Jesus" more offensive to you than the passive references to God? Does it matter to you that both the principal and the Mayor are government actors? If you're having trouble answering, or distinguishing a "civil nicety"[1] from something that feels more like preaching, you're not alone. Courts vacillate on prayer issues all the time.[2] But, since the second half of the twentieth century, the Supreme Court's trend has been to gradually limit prayer in many familiar realms of public life,[3] with one notable exception, the legislature.[4]

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1. Joyner v. Forsyth Cnty., 653 F.3d 341, 356 (4th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097 (2012) (Niemeyer, J., dissenting).

2. *See, e.g.*, *infra* Part III.A & Part III.B (analyzing two competing circuit approaches to one particular area of prayer policy, legislative prayers).

3. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (finding compulsory rendition of the pledge of allegiance in school setting unconstitutional); Engel v. Vitale, 370 U.S. 421 (1962) (holding teacher-led school prayer unconstitutional); Abbington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (holding school-sponsored Bible reading unconstitutional); Wallace v. Jaffree, 472 U.S. 38 (1985) (holding a compulsory moment of silence at school unconstitutional).

4. 463 U.S. 783 (1983) (holding that a Nebraska legislature's practice of employing a paid chaplain to deliver prayer before meeting was not a violation of the Establishment Clause); *see infra* Part III (analyzing the circuit split post-*Marsh*).

In *Marsh v. Chambers*, a majority of Supreme Court justices found prayers given by a chaplain, in front of the Nebraska State legislature, did not violate the Establishment Clause.[5] At the time, the Court characterized legislative prayer as a natural by-product of Protestantism, and little more than "simply a tolerable acknowledgment of beliefs widely held among the people of this country."[6] Today, the religious paradigm is shifting and empirical data suggests that "the United States is on the verge of becoming a minority Protestant country."[7] Accordingly, as traditional presumptions about American religion fade, *Marsh* continues to elicit controversy, largely because tough questions about prayer policy in America remain unanswered by the Supreme Court.

Legislative prayer is controversial for three reasons. First, legislative prayer stands at the crossroads of three venerable First Amendment doctrines: neutrality,[8] free speech,[9] and government

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5. *Marsh*, 463 U.S. at 783.

6. *Id.* at 792.

7. *See* PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC (Feb. 2008), *available at* religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf. The U.S. Religious Landscape Survey was conducted by the Pew Forum and surveyed over 35,000 Americans. *Id.* Pew reports there are major "shifts taking place in the U.S. religious landscape." *Id.* The largest movement was recorded in those who identified themselves as "unaffiliated." *Id.* Likewise, the Catholic Church reported the largest net loss of membership. *Id.* These results bolster the existence of an increasingly competitive marketplace for religion, one where the underlying rationale behind *Marsh* may not still have traction. *Id.*

8. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (A state practice must "neither advance[] nor inhibit[] religion.").

9. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). Denial or censorship of a legislative prayer may offend a person's otherwise valid free speech rights in a public forum. *See* Robert Luther III & David B. Caddell, *Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands A "Practice Focused" Analysis*, 48 SANTA CLARA L. REV. 569, 571–72 (2008) ("Legislative bodies that refuse to allow those who are permitted to pray the right to mention specific deities of their choosing—Jesus, Allah, Jehovah, or others—in their prayers undermines diversity and the free speech rights of these individuals, and, in turn, renders these traditionally solemn occasions meaningless.").

speech.[10] Second, *Marsh* only explicitly addressed prayer in state legislatures, but its principles extend to "other deliberative bodies,"[11] such as municipalities. In 2014, the municipal setting is at the apex of the legislative prayer debate, primarily because external variables, such as the identity of the prayer-giver,[12] the context of the prayer, and the demographics of the community where prayer is offered, are most stratified.[13] Finally, *Marsh* remains the only Supreme Court case to ever squarely address legislative prayer.[14] As a corollary, interpretation has fallen almost solely to lower courts, where it has received mixed results since the Supreme Court's dicta in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter,*[15] a non-legislative prayer case that interpreted a footnote in *Marsh* as drawing a distinction between "sectarian" and "non-sectarian" legislative prayer, with the former being

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10. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (holding that the city's placement of donated monument in public park was "government speech" and thus not subject to free speech constitutional scrutiny). Scholars have argued that the *Summum* holding may have clear applications to the legislative prayer issue. *See* Scott W. Gaylord, *When the Exception Becomes the Rule:* Marsh *and Sectarian Legislative Prayer Post-*Summum, 79 U. CIN. L. REV. 1017 (2011); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1019–21 (2010).

11. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

12. *See* Brett Harvey & Joel Oster, *Who Said That? A Simple Question that May Change the Way Courts View Legislative Prayer*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 69, 69–74 (2013) (noting that a court's classification of a prayer-giver as a private actor as opposed to a government one influences the Establishment Clause outcome). Likewise, the scope of potential prayer givers governed by the *Marsh* rule presents inherent problems. *Cf. Marsh*, 463 U.S. 783 (paid Christian chaplain); Hinrichs v. Bosma, 440 F.3d 393 (7th Cir. 2006) (volunteer clergy members from across Indiana); Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004) (Wiccan); Soc'y of Separationists, Inc. v. Whitehead, 870 P.2d 916 (Utah 1993) (Greek Orthodox Church, the Baha'i Faith, the Japanese Church of Christ, the Church of Scientology, the Eckankar Faith, and others).

13. *See* Lund, *supra* note 10, at 1019–21 (describing how demographics can serve as one element in determining the sectarian nature of a prayer); *see also* Brian D. Lee, *God Save the United States and This Honorable Court: Navigating Through the Marsh After* Joyner v. Forsyth County, *653 F.3d 341 (4th Cir. 2011)*, 37 S. ILL. U. L.J. 441, 463 (2013) (noting in his argument that "requiring legislative prayers to be nonsectarian in order to pass constitutional muster fails to take into account the religious demographics of the community in which the prayers are given").

14. *See infra* Part II.B.

15. 492 U.S. 573 (1989).

prohibited and the latter being permissible.[16] Since *Allegheny*, circuit courts have disagreed on the proper application of the *Marsh* doctrine,[17] and the appropriate role of the court, if any, in monitoring religious speech in the legislative arena.[18] Given the current split in authority, some municipalities have adopted formal "neutral" prayer policies, mirroring the language in *Marsh*,[19] while others have continued to operate without substantive guidelines or abandoned prayer at meetings all together.[20]

At the heart of the controversy are two sets of competing ethos surrounding the usage of "sectarian" words in legislative prayer, which author Noah Feldman terms "legal secularist" and "values evangelicals."[21] A sectarian prayer is a prayer that evokes "ideas or images identified with a particular religion,"[22] or "details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ."[23] In the American Judeo-Christian tradition, a familiar sectarian prayer is one that directly invokes

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16. *Id.* at 602–20.

17. *See infra* Part III.A & Part III.B (examining the legislative prayer circuit split).

18. *See* Pelphrey v. Cobb Cnty., 547 F.3d 1263 (11th Cir. 2008) (upholding a county's prayer practice and declining to "parse" the content of individual prayers at issue); *see also* Robert Luther III & David B. Caddell, *Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands A "Practice Focused" Analysis*, 48 SANTA CLARA L. REV. 569 (2008) (analyzing the mixed results among circuit court rulings since *Marsh*).

19. *See, e.g.*, Joyner v. Forsyth Cnty., 653 F.3d 341 (4th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097 (2012) (neutral prayer policy struck down by the Fourth Circuit); Rubin v. Lancaster, 710 F.3d 1087 (9th Cir. 2013), *cert. denied*, ___ U.S. ___, 134 S. Ct. 284 (2013) (neutral prayer policy upheld by the Ninth Circuit).

20. *See* Joe Depriest & Adam Bell, *Lawsuits Prompt Pause for Some Sectarian Prayers*, CHARLOTTE OBSERVER (Aug. 5, 2013), http://www.charlotteobserver.com/2013/08/05/4215342/lawsuits-prompt-pause-for-some.html#.Un_OCZNetTF.

21. NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 7–8 (2005). Sectarian prayer is just one example of the wider disagreements these two belief systems hold on religion in public life.

22. Lee v. Weisman, 505 U.S. 577, 588 (1992).

23. *Id.* at 641 (Scalia, J., dissenting). Circuit court judges have weighed in as well. *See Joyner*, 653 F.3d at 364 (Niemeyer, J., dissenting) ("To be sure, a prayer that references Jesus is sectarian.").

the name of "Jesus Christ,"[24] whereas a "non-sectarian" prayer is more generic, composed with "inclusiveness and sensitivity" for other religions, and usually just referencing "God" generally.[25]

"Legal secularists" believe sectarian prayers have no role in contemporary public functions[26] and use the *Allegheny* line of cases following *Marsh* to prohibit colorful references to individual deities in the legislature.[27] In contrast, "values evangelicals" seek to promote "traditional moral values that can in theory be shared by everyone,"[28] and use *Marsh* as a shield to validate direct, often vivid, and frequent references to "Jesus Christ" in legislative prayers.[29] Although the legislative prayer issue is easily polarized by these competing belief systems, in reality, "the line is not completely bright between sectarian and non-sectarian"[30] and legislative prayer cases continue to be litigated.

Rowan County, North Carolina, is the latest battleground in the culture war.[31] In March 2013, a Federal Judge in the Middle District Court of North Carolina issued a preliminary injunction that barred Rowan County Commissioners from giving "sectarian prayers" at county meetings.[32] Rather than acquiesce to the court order, Rowan County's

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24. *See* Joyner, 353 F.3d at 364. (Niemeyer, J., dissenting).

25. *See Lee*, 505 U.S. at 581.

26. *See* FELDMAN, *supra* note 21 and accompanying text, at 8.

27. *See infra* Part III.A (highlighting opinions in the Fourth Circuit and the Second Circuit that build off the majority opinion in *Allegheny* and mirror aspects of the "legal secularist" point of view).

28. *See* FELDMAN, *supra* note 21 and accompanying text, at 7.

29. *See id.* One of the key commonalities within the "values evangelical" point of view is "promoting a strong set of ideas about the best way to live one's life and urging the government to adopt those values and encourage them wherever possible." *Id.* Sectarian prayer is just one way a "values evangelical" may choose to share his or her beliefs. *See id.* at 7–8. Since it is still unclear to what extent sectarian prayers are allowable under *Marsh*, the "values evangelical" point of view is naturally aligned with *Marsh*.

30. Pelphrey v. Cnty. of Cobb, 547 F.3d 1263, 1272 (10th Cir. 2008).

31. *See infra* Part IV (describing the on-going litigation revolving around Rowan County's use of sectarian prayer at commission meetings); *see also infra* Part V (analyzing the prayers given in Rowan County against the historical background of the Establishment Clause).

32. *See* Memorandum Opinion And Order at 27–28, Lund v. Rowan County, N.C. No. 1:13-cv-00207-JAB-JLW (July 23, 2013), *available at* https://www.aclu.org/religion-belief/lund-et-al-v-rowan-county-memorandum-opinion-and-order [hereinafter *Memorandum Opinion*].

Commissioners openly engaged in a public campaign defying the injunction.[33] The Commissioners' defiance first gained notoriety when County Commissioner Jim Sides replaced his "usual American flag necktie," for one "embellished with Jesus" before he recited the Lord's Prayer at a subsequent county meeting.[34] Reporters in attendance later asked Commissioner Sides if he violated Rowan County's injunction.[35] Commissioner Sides replied, "(Beaty) said I couldn't use the name Jesus in prayer . . . [h]e didn't say I couldn't preach."[36] Commissioner Sides was also asked if he thought his prayer made anyone in the audience "uncomfortable,"[37] to which he responded, "I don't know they had the opportunity to leave . . . [n]o one throwed [sic] any tomatoes."[38] Meanwhile, the case received national attention when sympathetic North Carolina legislators introduced the "Rowan County, North Carolina Defense of Religion Act" in the North Carolina General Assembly, seeking recognition that states were free to make laws establishing religion.[39] Then, in the fall of 2013, over one thousand protestors convened outside of the Rowan County Courthouse to "Rally for Rowan"[40] and protest the district court's preliminary injunction.

Reflecting the "values evangelical" point of view, Rowan County's case identifies two critical First Amendment concerns: the

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33. Nathan Hardin, *Sides Delivers Lord's Prayer, Says It Doesn't Violate the Injunction*, SALISBURY POST (Aug.19, 2013), http://www.salisburypost.com /article/20130819/SP01/130819684.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. H.J. Res. 494, 2013-2014 Sess. (N.C. 2013). Although the bill received national attention, it was not advanced beyond the N.C. House floor. *See* Jeremy Markovich, *The Defense of Religion Act Is Dead. Why Did It Exist?*, WCNC.COM CHARLOTTE (Apr. 4, 2013), http://www.wcnc.com/news/politics/The-Defense-of-Religion-Act-Whats-fact-whats-fiction-201460571.html.

40. Mark Wineka, *Large Crowd Converges on Salisbury to Support Rowan County Commissioners*, SALISBURY POST (Sept. 17, 2013), http://www.salisburypost.com/article/20130917/SP01/130919767. The local event was entitled "Rally for Rowan" and was organized by Return America, Rowan County's litigating attorney David Gibbs III, and Dr. Ron Baity. *See September Rally to Support Rowan Co. Prayer*, North Carolina Family Policy Council (Sept. 5, 2013), http://ncfamily.org/stories/130905s1.html.

current logistical problems elected officials must address if they choose to facilitate a prayer opportunity under *Marsh*[41] and the uncertainty potential prayer-givers face when offering a legislative prayer. Neither party enjoys clear awareness of their First Amendment rights and obligations. And, without a resolution, both concerns may chill speech in a constitutionally protected forum.[42]

This term in *Town of Greece v. Galloway*,[43] the Supreme Court revisits legislative prayer, this time through the lens of local government, to review the constitutionality of an informal prayer practice comparable to the prayers at issue in Rowan County.[44] This Note will explore the current state of the *Marsh* doctrine, prior to the Supreme Court's opinion in *Galloway*. Part II recounts the history of the legislative prayer debate in the United States, tracing the origins of the practice from the colonial era through modern Supreme Court jurisprudence. Part III builds on this framework to examine the current split in authority among circuit courts. Part IV then outlines the factual narrative in *Lund v. Rowan County*[45] Part V uses the facts in *Lund* to argue that, in the absence of more concrete substantive guidelines from the Supreme Court to augment *Marsh*, even overtly sectarian prayers like the ones at issue in Rowan

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41. *See generally* Marc Rohr, *Can the City Council Praise the Lord? Some Ruminations About Prayers at Local Government Meetings*, 36 NOVA L. REV. 481 (2012).

42. *See* Brief of Rev. Dr. Robert E. Palmer as *Amicus Curiae* Supporting Petitioner at 15–17, Town of Greece v. Galloway, __ U.S.__, 131 S. Ct. 2388 (2013) (No.12-696), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads /2013/01/Palmer-Amicus-Brief-12-696.pdf. Arguably, the Supreme Court's inaction has already had a chilling effect on municipal speech in North Carolina. *See* Depriest & Adam Bell, *supra* note 20; *see also infra* note 185 (describing how some North Carolina municipalities have abandoned prayer programs because of uncertainties in policy).

43. __ U.S. __, 133 S. Ct. 2388 (2013).

44. America's demographics have changed greatly since *Marsh* was resolved in 1983. Perhaps our perceptions on legislative prayer have followed suit. *See* Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1239 (1986) (demonstrating how the tolerance of sectarian prayer in a contemporary presidential address would have a different reception today than a century ago: "[t]oday's American public . . . is far less homogeneous than the American public of Lincoln's time, and many would feel uncomfortable with a contemporary Presidential address as laden with biblical rhetoric and ideas as was Lincoln's").

45. *See infra* Parts IV & V.

County are still permissible under a deferential reading of *Marsh* and its progeny.

II. THE "UNIQUE" HISTORY OF LEGISLATIVE PRAYER IN THE UNITED STATES

A. A Brief History of the Establishment Clause

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion."[46] For the first half of United States history, this principle was foreclosed to direct application among the states.[47] However, once the First Amendment became applicable to the states[48] through the Fourteenth Amendment, the Supreme Court struck down many state-endorsed religious customs on Establishment Clause grounds,[49] which in turn significantly expanded the doctrine.

By the middle of the twentieth century, the Establishment Clause was understood to mean, "[n]either a state nor the Federal Government" could "set up a church" or "pass laws which aid one religion . . . all religions, or prefer one religion over another."[50] This interpretation was reflected in *Lemon v. Kurtzman*,[51] when the Supreme Court addressed the constitutionality of direct aid in the parochial school setting.[52] There, the Supreme Court articulated a three-part test to evaluate Establishment Clause challenges. Under the *Lemon* test, to survive constitutional scrutiny a state's policy: (1) "must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) the policy "must not foster 'an excessive

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46. U.S. CONST. amend. I.

47. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("[T]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.") (internal citation omitted); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (holding that the Fourteenth Amendment incorporated the First Amendment's Establishment Clause provisions to the states).

48. *See Cantwell*, 310 U.S. at 303; *Everson*, 330 U.S. at 1.

49. *See supra* note 3 and accompanying text.

50. *Everson*, 330 U.S. at 15.

51. 403 U.S. 602 (1971).

52. *Id.* at 612–13.

government entanglement with religion.'"[53] Thereafter, the *Lemon* test became the hallmark inquiry for Establishment Clause challenges in the United States.[54]

Still, no one test has completely dominated the Establishment Clause field.[55] In *Lynch v. Donnelly*,[56] the Supreme Court described its unwillingness "to be confined to any single test or criterion" in the "sensitive" area of Establishment Clause challenges.[57] Although a majority of the Court in *Lynch* upheld a city's erection of a nativity scene under *Lemon*,[58] Justice O'Connor's concurrence articulated an alternative test.[59] In O'Connor's view, the crux of an Establishment Clause inquiry should simply ask whether the government's action endorsed a particular religion.[60] The so-called "endorsement test"[61] collapses the first two prongs of *Lemon* into a more fundamental inquiry that judges the intent of the actor and the actual message conveyed to its audience.[62] Under the "endorsement test," a government actor violates the Establishment Clause if the purpose or effect of his or her message approves or disapproves of a religion.[63] This standard is often measured by whether a "reasonable observer, mindful of the history, purpose, and context"[64] of a government action would perceive there to be an endorsement of

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53. *Id.* (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).

54. *See* George R. Kennedy, *God(s) in Congress: A Two-Step Analysis Addressing the Constitutionality of Guest-Chaplain Invocations, and A Call for Aggressive Enforcement of the Establishment Clause*, 98 IOWA L. REV. 1731, 1736 (2013).

55. The majority in Lynch v. Donnelly, 465 U.S. 668 (1984), cited three instances where the Court declined a *Lemon* test analysis to resolve an Establishment Clause challenge. *S*ee Marsh v. Chambers, 463 U.S. 783 (1986); Tilton v. Richardson, 403 U.S. 672, 677–78 (1971); Larson v. Valente, 456 U.S. 228 (1982).

56. 465 U.S. 668 (1984).

57. *Id.* at 669.

58. *Id.* at 668.

59. *Id.* at 687–94 (O'Connor, J., concurring).

60. *Id.* at 690 (O'Connor, J., concurring).

61. *See generally* ALAN BROWNSTEIN, THE FIRST AMENDMENT: THE ESTABLISHMENT OF RELIGION CLAUSE: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE (2007); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499 (2002) (analyzing the strengths and weaknesses in the application of the "endorsement test").

62. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

63. *Id.*

64. Van Orden v. Perry, 545 U.S. 677 (2005).

religion. As Part II.B shows, the Supreme Court has never applied the *Lemon* or endorsement tests to legislative prayer challenges.

B. The Marsh *Doctrine*

A legislative prayer is an invocation that is designed to "invoke Divine guidance on a public body entrusted with making the laws."[65] History supports that the Founding Fathers of the United States, the very men who drafted the Establishment Clause, debated the issue and resolved that prayers delivered before an elected body did not generate a constitutional issue.[66] Thus, the tradition of both sectarian and non-sectarian legislative prayer has persisted in the United States Congress, as well as a majority of state legislatures, into the twenty-first century.[67]

1. *Marsh v. Chambers*

History aside, a legislative prayer necessarily requires a religious act and a government proxy, exactly the type of "entanglement" that *Lemon* was designed to prohibit.[68] Recognizing that, "[s]tanding alone, historical patterns cannot justify contemporary violations of

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

66. *See id.* at 786–92 (analyzing the historical record of legislative prayer in Congress). *See generally* DONALD L. DRAKEMAN, CHURCH, STATE AND ORIGINAL INTENT 263–326 (2010) (providing a historical overview of early American relationship between religion and government, describing the importance of original intent, and articulating how to incorporate original intent into modern constitutional practice); *see also* First Prayer of the Continental Congress, 1774, *available at* http://chaplain.house.gov/archive/continental.html (memorializing Reverend Jacob Duche's delivery of a prayer to the members of the First Continental Congress, a prayer that included overtly Judeo-Christian themes).

67. *See* Brief for Members of Congress as Amici Curiae in Support of Petitioner at 7–24, Town of Greece v. Galloway, __ U.S.__, 131 S. Ct. 2388 (2013) (No.12-696), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013 /01/Greece-Members-of-Congress-Amicus.pdf (analyzing empirical data on the history, substance, and practice of sectarian prayer in the United States Congress); *see also* Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1172 (2009) (recounting the historical chaplaincies in the legislature from the First Continental Congress through the *Marsh* era).

68. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

constitutional guarantees,"[69] the Supreme Court granted certiorari in *Marsh v. Chambers* to analyze the conflict and determine whether a two hundred year old Nebraska practice of opening legislative sessions with a prayer violated the Establishment Clause.[70] In *Marsh*, the state of Nebraska employed a Presbyterian minister as a paid chaplain to open legislative sessions with an invocation of prayer.[71] The chaplain's prayers spanned over a sixteen-year period and included both sectarian and non-sectarian references to Christian theology.[72] The district court and the Court of Appeals for the Eighth Circuit applied the *Lemon* test and found that Nebraska's use of state funds to employ the chaplaincy violated the Establishment Clause.[73]

The Supreme Court reversed both lower courts and declined to apply the *Lemon* test, relying instead on the original intent of the Founding Fathers[74] and the "unambiguous and unbroken"[75] historical record of legislative prayer "deeply embedded in the history and tradition of this country."[76] Building on this "unique history,"[77] the *Marsh* Court departed from the *Lemon* analysis and, instead, articulated a different "historical" standard to judge legislative prayers:

> The content of the prayer is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us

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

70. *Id.*

71. *Id.* at 784–85

72. *See id.* at 783–84.

73. *Marsh*, 463 U.S. at 785–86.

74. *Id.* at 790–91 ("It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.").

75. *Id.* at 792.

76. *Id.* at 786.

77. *Id.* at 791.

> to embark on a sensitive evaluation or to parse the content of a particular prayer.[78]

Therefore, *Marsh* stands for two clear propositions. First, based on the historical record of legislative prayer in the United States, prayers given in front of a legislature are permissible, unless the prayer opportunity (or more specifically the forum for the prayer) was used to "proselytize," "advance," or "disparage" one religion over another.[79] Second, unless the "prayer opportunity" has been exploited, it is not the role of the court to "parse" the words embedded in individual prayers offered at legislative gatherings.[80] At the same time, *Marsh* also left many practical questions unanswered.

Under *Marsh*, as a threshold matter, a court must first determine if the prayer opportunity is exploited. If it is, then a court is free to parse the content of prayers and assess any potential Establishment Clause violations. But, if the prayer opportunity is not exploited, parsing is prohibited. Herein lies the problem: How can a judge critically examine whether a prayer "proselytizes" or determine when prayers invoking deities like Jesus Christ, Allah, or Buddha begin to "advance or "disparage" other religions, without first parsing the content? This ambiguity leads to two imperfect outcomes.

On one hand, a court could infer from *Marsh* that a close scrutiny of the factual record, including the content of the prayers, is a necessary first step to ascertain whether the prayer opportunity was exploited. But, under this approach the court also runs the risk of adding its own meaning to the prayers, taking words out of context, and arguably parsing the content in the process. On the other hand, a court could also read *Marsh* literally, and if the prayer opportunity was facilitated reasonably, arguably a court could conclude it has nothing left to review. This approach, while easier to facilitate, would allow a larger cross-section of prayer, likely dominated by the prevailing religious viewpoint of the region. *Marsh* provided very little guidance to

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78. *Id.* at 794–95.
79. *Id.*
80. *Id.*

determine the correct approach. As such, the holding has been widely debated at the circuit court level.[81]

Notwithstanding circuit court analysis, *Marsh* is recognized as the Supreme Court's narrow exception to general Establishment Clause principles[82] and endures as both the alpha and the omega of legislative prayer jurisprudence.[83] However, the Supreme Court has since collaterally invoked *Marsh*'s historical analysis in the resolution of two closely related Establishment Clause challenges involving religious symbolism and ceremonial deism at the beginning of the 1990s. Read together, the Court's opinions have raised questions about the scope of *Marsh*.

2. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*

In *Allegheny*, the Supreme Court addressed whether a town's placement of a crèche and a menorah on the front steps of the county's courthouse during the winter holiday season violated the Establishment Clause.[84] Unlike *Lynch*, where the majority employed the *Lemon* test, the *Allegheny* majority employed Justice O'Connor's "endorsement test" and held that under the totality of circumstances, clearly Christian and Jewish themed symbols placed on a prominent public building with the express visual consent of the mayor had the effect of endorsing religion.[85] Justice Kennedy's dissent validated the crèche, in part, by harmonizing the historical value in the town's display with the historical value the *Marsh* Court found in legislative prayer.[86]

81. *See infra* Part III.

82. *See* Simpson v. Chesterfield Cnty. Bd. of Supervisors, 404 F.3d 276, 281 (4th Cir. 2005) ("*Marsh,* in short, has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines."). *But see* Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (Kennedy, J., dissenting) (arguing that *Marsh* is not an exception to the Establishment Clause).

83. *See, e.g.*, Forsyth Cnty., N.C. v. Joyner, 653 F.3d 341 (4th Cir. 2011), *cert. denied*, ___ U.S. ___,, 132 S. Ct. 1097 (2012).

84. *See Allegheny*, 492 U.S. at 573–77.

85. *See id.* at 574.

86. *See id.* at 662–64 (Kennedy, J., dissenting).

Yet, Justice Blackmun, writing for the majority, found Justice Kennedy's reliance on *Marsh* inapplicable.[87] Justice Blackmun reasoned that, notwithstanding historical merit, if the prayers at issue in *Marsh* would have "[had] the effect of affiliating the government with any one specific faith or belief," they too would have been unconstitutional.[88] The *Allegheny* Court noted that this was not an issue in *Marsh* because the Chaplain "removed all references to Christ" after commencement of litigation.[89] This commentary has led many circuit courts to view the inclusion of sectarian references in prayer with great suspicion.[90]

3. *Lee v. Weisman*

The applicability of *Marsh* was also the subject of critique in *Lee v. Weisman*,[91] where the Supreme Court was again asked to judge the permissiveness of public prayers under the Establishment Clause; this time at a public high school graduation ceremony.[92] In *Lee*, the principal of a local New York primary school invited a local rabbi to give the graduating class a pre-approved, non-sectarian prayer that reflected the "American civil religion."[93] There, the majority held that prayers in the graduation setting were distinguishable from the legislative setting and violated the Establishment Clause in two ways.[94]

First, prayers offered in front of elected bodies were presumed to reach mainly adults capable of rationalizing the prayer, whereas prayers disseminated at a graduation ceremony would be heard by children and the "coercive" effect of the prayer outweighed any tangible benefits.[95]

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

88. *Id.*

89. *Id.*

90. *See infra* Part III.

91. 505 U.S. 577 (1992).

92. *Id.* at 577.

93. *Id.* at 581. The principal in *Lee* instructed Rabbi Gutterman to read a pamphlet entitled "Guidelines for Civic Occasions," which recommended all prayers be composed with "inclusiveness and sensitivity." *Id.*

94. *Id.* at 580–99.

95. *Id.* For a general look at the nature and history of "civil religion" in the United States, see ROBERT N. BELLAH, BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD (1970); Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1239 (1986).

Secondly, and more broadly, the majority held that the principal, a government actor, violated the Establishment Clause when he attempted to alter the rabbi's prayer even though his motives were benevolent.[96] The *Lee* Court reasoned that to allow a government actor to censor an individual's prayers would give the government the power to steer the religious message, thus establishing a "civic religion."[97]

After thirty years, *Marsh* is still the guiding principle to resolve legislative prayer challenges, but it must also be viewed in context with other competing doctrines. *Lynch*, *Allegheny*, and their progeny offer an attractive "endorsement test" alternative to *Marsh*'s purely historical analysis. Similarly, *Lee*'s "coercion test" prohibited the government from censoring prayer in the graduation setting, but it is unclear to what extent this principle is analogous to the legislative prayer setting, where the audience is composed almost entirely of adults. Thus, as Part III outlines, circuit courts applying *Marsh* to legislative prayer challenges remain divided.

III. CIRCUIT SPLIT (1998–2013)

The Supreme Court's peripheral analysis of *Marsh* in *Allegheny* and *Lee* has provided fodder for divisive circuit court decisions.[98] Since *Marsh*, five circuits have issued appellate opinions interpreting *Marsh*.[99] To facilitate discussion, I have placed these circuits into two broad categories that highlight their disparate approaches: (1) a "policy in

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96. *Lee*, 505 U.S. at 586–89. The majority held "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 589.

97. *Id.*

98. *See* Lund, *supra* note 10 and accompanying text; *see also infra* Parts III.A. & III.B.

99. The Second, Fourth, Ninth, Tenth and Eleventh Circuits have all issued influential appellate opinions directly addressing the Establishment Clause issues in legislative prayer. The Seventh Circuit addressed prayer in the state legislative context in *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006), but the case was remanded back to district court and subsequently dropped. The Sixth Circuit has also recently upheld a facial challenge to an inclusive prayer policy in *Jones v. Hamilton County Gov., Tenn.*, No. 12-6079, 2013 WL 3766656 (6th Cir. July 19, 2013). The court rendered no binding opinion on the as-applied challenge because the policy had only been instituted for two months at the onset of the court's disposition.

practice"[100] approach, and (2) a "deferential" approach. The "policy in practice" approach is a useful descriptor for the interpretation of the Fourth Circuit and the Second Circuit. Those jurisdictions place significant weight on not only the policy's language, but also the frequency of sectarian prayers and whether the policy's implementation tends to favor one religious viewpoint. The "policy in practice" jurisdictions have been criticized for "parsing" words, phrases, and religious themes from contested prayers.[101] In contrast, those jurisdictions that have adopted a deferential approach, specifically the Ninth and Eleventh Circuits, give more deference to *Marsh* and generally apply less scrutiny to the individual words, phrases, and religious themes in a contested prayer, especially if they are part of a codified, neutral prayer policy.

A. "Policy in Practice" Approach

1. Fourth Circuit

By far the largest outgrowth of circuit court analysis on legislative prayer is located in the Fourth Circuit. Since 2004, the Fourth Circuit has issued four appellate opinions weighing in on sectarian legislative prayer.[102] However, to fully understand the "policy in practice" approach, it must first be contrasted to *Snyder v. Murray City Corp.*,[103] one of the earliest circuit court cases to interpret *Marsh* arising out of the Tenth Circuit. In *Snyder*, a local citizen petitioned his city council for approval to offer a prayer at a forthcoming council

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100. Rubin v. City of Lancaster, 710 F.3d 1087, 1095 (9th Cir. 2013). The plaintiff's complaint coined the term "policy in practice." *Id.*

101. *See* Forsyth Cnty. v. Joyner, 653 F.3d 341, 355–67 (4th Cir. 2011) (Niemeyer J., dissenting), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097 (2012).

102. *Id.*; Turner v. City Council of City of Fredericksburg, V.A. 534 F.3d 352 (2008); Simpson v. Chesterfield Cnty. Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005); Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004).

103. 159 F.3d 1227 (10th Cir. 1998) (en banc). The *Wynne* Court distinguished its holding from *Snyder* largely based on semantics. *Wynne*, 376 F.3d at 301, n.6 ("[W]e find . . . the *Snyder* Court unpersuasive, and inconsistent with the plain language of *Marsh*."). Similarly, the *Simpson* Court noted the "lack of guidance" provided by the Supreme Court in *Marsh* and deferred to its own interpretation, as opposed to that of another circuit. *Simpson*, 404 F.3d at 281.

meeting.[104] Murray City denied Snyder's request because of a previous public statement where Snyder made clear his prayer would address the misguided nature of prayer in public, and advocate for a stronger separation of church and state.[105] The Tenth Circuit validated the city's decision, holding that legislative prayers were *sui generis*,[106] and should only be disturbed if the prayer-giver uses the opportunity to "proselytize" or disparage another religion.[107] Unlike later Fourth Circuit cases, *Snyder*'s interpretation of *Marsh* collapsed the word "advance" into the "disparge[ment]" prong of *Marsh* and defined "proselytize" to mean someone "that aggressively advocates a specific religious creed, or . . . derogates another religious faith or doctrine."[108]

Six years later, the Fourth Circuit's first legislative prayer opinion, *Wynne v. Town of Great Falls*,[109] distinguished its rationale from *Snyder* and harmonized its findings with an expansive interpretation of *Allegheny*, generating a circuit split. In *Wynne*, a Wiccan plaintiff alleged that a town council's repeated direct invocations of "Jesus Christ" were sectarian prayers that exceeded the allowances of *Marsh* and violated the Establishment Clause.[110] The *Wynne* Court

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104. *Snyder*, 159 F.3d at 1228.

105. *Id.* at 1230.

106. *Id.* at 1232. The majority found great significance in the Supreme Court's derogation of the *Lemon* test in *Marsh* and its deliberate attempts not to extend the historical analysis into other Establishment Clause realms. *See id.* Therefore, the *Snyder* Court resolved that legislative prayer had achieved a "generic form" that would in many instances allow prayers to survive facial challenges. *See id.*

107. *Id.* at 1233–34. *Snyder* also prohibited the selection of a prayer if it stemmed from an "impermissible motive." *Id.* at 1234. Here, the city's denial of Snyder's prayer did not derive from an impermissible motive because the evidence demonstrated that the City of Murray knew Snyder would use the platform to perpetuate prayers that were properly excluded under the "proselytize" prong of *Marsh*.

108. *Id.* at 1234.

109. 376 F.3d 292 (2004).

110. *Wynne*, 376 F.3d at 294–95. The court drew a distinction between a prayer given consistent with the "Judeo-Christian" tradition and the prayers offered at town council meetings. *Id.* at 299–300. A "Judeo-Christian" prayer has elements that are common to both Jewish and Christian faiths. *Id.* Here, the town council's references to Jesus Christ invoked "a deity in whose divinity *only* those of the Christian faith believe." *Id.* at 300 (emphasis in original). The former prayers were consistent with *Marsh* and the latter violated *Marsh*. *Id.*

unanimously agreed with the plaintiff and struck down the Great Falls practice.[111]

The *Wynne* holding has two significant implications to the development of the "policy in practice" approach. First, *Wynne* read the dicta in *Allegheny* as adding a significant new layer of gloss onto *Marsh*.[112] In the court's view, *Allegheny* refined *Marsh*'s approach, albeit outside of the legislative prayer context, to mean: "[G]overnment may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)."[113] Thus, the *Wynne* Court used *Allegheny*'s dicta to conclude that sectarian prayer, invoked in a local government setting, "exploited a prayer opportunity" and established the requisite government preference for a particular religion described in *Allegheny*.[114] Second, *Wynne* dispensed with *Snyder* and interpreted "advance" to mean "'forward, further, [or] promote' the belief"and "proselytize" to mean "'convert' others to that belief."[115] Moreover, the court found that "advance" and "proselytize" were not inclusive.[116] Rather, they "have different meanings and denote different activities,"[117] each sufficient to trigger Establishment Clause liability under *Marsh*.[118] Thus, *Wynne*'s disjunctive interpretation means that mere advancement of religion alone can violate *Marsh*, generating a very low standard for appellate judges to dismiss questionable legislative prayers.

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111. *See id.* at 299.

112. *Id.* at 298–300.

113. *Id.* at 297 (quoting Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 605 (1989)) (emphasis omitted).

114. *Id.* at 298–300.

115. *Id.* at 300 (alteration in original).

116. *Id.*

117. *Id.*

118. *Id.* Here, the court noted that the *Marsh* test is disjunctive, and therefore, a violation of either prong would render the prayer unconstitutional. *Id.* The disjunctive nature of the *Marsh* test was questioned in *Snyder v. Murray City Corp.*, 159 F.3d 1227 (1998). The question of usage was also recently brought up by Justice Kennedy during oral argument for *Galloway*, where he asked the plaintiff's counsel to clarify the proposed narrowing of the *Marsh* test by treating "the word 'advance' only as modified by 'proselytize'?". Transcript of Oral Argument at 27, Town of Greece v. Galloway, ___ U.S. ___, 133 S. Ct. 2388 (2013) (No. 12-696), 2013 WL 5939896, at *27.

A year later, the Fourth Circuit added to *Wynne*, this time by affirming a local municipality's prayer policy in *Simpson v. Chesterfield County Board of Supervisors.*[119] In *Simpson*, the Board of Supervisors for the County of Chesterfield, Virginia, adopted a formal prayer policy tailored to comply with *Marsh*, stating that "invocation[s] must be non-sectarian with elements of the American civil religion and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief."[120] In administrating the policy, Chesterfield County solicited local clerics from a diverse pool of religious faiths to perform non-sectarian invocations at county meetings,[121] although the vast majority of churches who responded were Christian.[122]

Simpson, who was also a Wiccan, petitioned the County Board to perform a Wiccan prayer at a county meeting or, in the alternative, to remove all prayer from county meetings.[123] The county declined to include the Wiccan prayer, reasoning that a divinity "invoked by practitioners of witchcraft," was likely not within the "non-sectarian" requirement of the policy.[124] Simpson disagreed and brought suit alleging an Establishment Clause violation.[125] The *Simpson* Court sided with Chesterfield County, validating the prayer policy, as well as its decision to exclude the Wiccan prayer.[126] But, *Simpson* is still in line with *Wynne*'s disfavor of sectarian prayer. Although the Chesterfield County Board had originally tolerated prayers referencing "Jesus," the county later amended its policy to prohibit all direct references to "Jesus" to avoid "the slightest hint of sectarianism."[127] Therefore, the court found that since the policy "strived for inclusiveness," and reflected a

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119. 404 F.3d 276 (4th Cir. 2005).

120. *Id.* at 278 (quoting the Chesterfield Board's prayer policy mandate that an "invocation must be non-sectarian with elements of the American civil religion and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief").

121. *Id.* at 279.

122. *Id.* at 278.

123. *Id.* at 279–80.

124. *Id.* at 280.

125. *Id.*

126. *Id.* at 287 ("We cannot adopt a view of the tradition of legislative prayer that chops up American citizens on public occasions into representatives of one sect and one sect only, whether Christian, Jewish, or Wiccan.").

127. *Id.* at 279.

commitment to a "non-sectarian" ideal—something the defendants in *Wynne* lacked[128]—Chesterfield County's policy was also permissible.

Thus, the Fourth Circuit's first two legislative prayer cases laid the foundation for the "policy in practice" approach. *Wynne* flatly prohibits a local government from offering strictly Christian prayers to the exclusion of others because to do so advances one religion over another.[129] At the same time, *Simpson* gives deference to prayers offered as part of a diverse, non-sectarian prayer policy.[130] Taken together, these cases left open the possibility that sectarian prayers, disseminated through a neutral prayer policy aimed at diversity, would still pass constitutional muster in the Fourth Circuit.

However, seven years after *Simpson*, a majority of the Fourth Circuit struck down Forsyth County's neutral prayer policy in *Joyner v. Forsyth County*,[131] holding that it too had the effect of advancing the Christian faith.[132] The Forsyth City Board of Commissioners solicited prayer-givers from diverse religions within the jurisdiction to offer invocations at official meetings.[133] Prayer-givers acted as private citizens and the Board played no role in censoring the content of the prayer.[134] Like *Wynne*, many of the prayers given at Board meetings were sectarian.[135] Unlike *Wynne*, no religion was excluded, and the policy was more neutral than the policy upheld in *Simpson*.[136] Nevertheless, a

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128. *Id.* Furthermore, the court seemed to infer that a presence of diversity afforded the Board more discretion to select among many competing faiths and reduce potential divisiveness flowing from a controversial prayer at its meeting. *See id.* at 284–85.

129. *See Wynne*, 376 F.3d at 301–02.

130. *See Simpson*, 404 F.3d at 287–89.

131. 653 F.3d 341 (4th Cir. 2011).

132. *Id.* at 349.

133. *Id.* at 343. The Board selected clergy members for invocations informally until 2007 when it codified its earlier practice into an official policy. *Id.* at 343–44.

134. *Id.* at 343.

135. *Id.* at 343–44.

136. In *Joyner*, the Forsyth County Board solicited religious invocations from religious leaders in and out of the community using the "yellow pages, internet research, and consultation with the local Chamber of Commerce." *Id.* Likewise, "[n]o eligible congregation was excluded," and to encourage diversity "the Board decided not to schedule any leader for consecutive meetings or for more than two meetings in any calendar year." *Id.* Although the Chesterfield County Board's policy mimicked *Joyner*'s, a distinction can still be made. In *Simpson*, prayers were

majority of the court held that a facially neutral policy, which operated to give a reasonable impression of affiliation with one religion, was still inconsistent with the Fourth Circuit's interpretation of *Marsh*.[137] In so holding, the majority dismissed the dissent's assertion that their review of the prayer policy at issue constituted "parsing" of prayer content.[138] Rather, the majority believed *Marsh* interpreted the First Amendment to require more and to "shut our eyes to patterns of sectarian prayer" would leave the court "without an ability to decide the case."[139] Likewise, the court weighed in on the identity of the prayer-giver, holding that the classification of a prayer-giver as a public or private actor was of little constitutional significance because "[i]t was the governmental setting for the delivery of sectarian prayers that courted constitutional difficulty, not those who actually gave the invocation."[140] Therefore, even if the prayer-giver is a government actor, like the Rowan County Commissioners in *Lund*, this fact is not dispositive in determining whether the prayer opportunity was abusive.

Judge Paul Niemeyer's dissent in *Joyner* found the majority's rationale misplaced, holding that "the Establishment Clause does not require that Forsyth County censor and restrict legislative prayers as the majority mandates."[141] As a threshold matter, Judge Niemeyer found the fact that Forsyth County instituted a neutral policy demonstrated that the

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solicited using just, "the telephone book" and there was no provision to rotate prayer-givers. *See Simpson*, 404 F.3d at 278.

137. The majority elaborated on the form of a constitutional prayer:

> It should not reject the tenets of other faiths in favor of just one. Infrequent references to specific deities, standing alone, do not suffice to make out a constitutional case. But legislative prayers that go further—prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith—transgress the boundaries of the Establishment Clause. Faith is as deeply important as it is deeply personal, and the government should not appear to suggest that some faiths have it wrong and others got it right.

Id. at 349.

138. *Id.* at 351.

139. *Id.*

140. *Id.* at 350.

141. *Joyner*, 653 F.3d at 358 (Niemeyer, J., dissenting).

prayer opportunity had not been exploited.[142] And, as a corollary, without exploitation of the prayer opportunity itself, a court could not "parse" out the content of the prayers.[143] As an example, Judge Niemeyer pointed to the majority's reliance on one particularly damaging sectarian prayer in the record given by a local minister.[144] The prayer at issue made a number of references to specific tenets of the Christian faith, such as the "Cross of Calvary," "Virgin Birth," and the "Gospel of Jesus Christ."[145] This close scrutiny of individual prayers, Judge Niemeyer explained, "simply because of its description of Jesus' role in Christianity," was "precisely the content-inquiry that *Marsh* intended to foreclose."[146] Moreover, such an exercise rendered the purpose of the prayer opportunity meaningless.[147] This task, he believed, was "best left to theologians, not courts of law."[148]

2. Second Circuit

The Second Circuit's recent appellate opinion in *Galloway v. Town of Greece*[149] muddies the *Marsh* analysis. Unlike the facially neutral policy in *Joyner*, *Town of Greece* addressed an un-codified local prayer tradition, where the town solicited a broad array of prayer-givers from different faiths within the municipality.[150] However, in practice, the

142. *Id.* at 356, 362 (Niemeyer, J., dissenting) ("Forsyth County did not exploit the prayer opportunity to advance any one religion over others.").

143. *Id.* at 364–65 (Niemeyer, J., dissenting).

144. *Id.* at 361 (Niemeyer, J., dissenting).

145. *Id.* at 349 (majority opinion).

146. *Id.* at 361 (Niemeyer, J., dissenting).

147. *Id.* at 356 (Niemeyer, J., dissenting) (commenting that the majority's reduction of prayer "treats prayer agnostically; reduces it to civil nicety; [and] hardly accommodates the Supreme Court's jurisprudence in *Marsh*").

148. *Id.* at 365 (Niemeyer, J., dissenting) (citation omitted). The dissent's argument was dismissed by the majority because it would "inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein." *Id.* at 354. Scholar Christopher C. Lund elaborates on the lack of a political remedy and the demographic reality that is inescapable in predominately Christian jurisdictions. *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, *supra* note 10, 1011–12; *see also infra* Part V.C.1.

149. 681 F.3d 20 (2d Cir. 2013), *cert. granted*, ___ U.S. ___, 133 S. Ct. 2388 (2013).

150. *See id.* at 23–24.

citizenry was predominately Christian, and the majority of prayers disseminated at town meetings were sectarian.[151] The district court awarded summary judgment to the town, citing the plaintiff's inability to demonstrate how the town improperly excluded minority religious faiths.[152] The Second Circuit appellate court reversed, holding "that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint."[153]

The recent Second Circuit holding may be at odds with the "policy in practice," approach. On one hand, the court's use of the word "endorsement" rather than "advancement" in the opinion, without announcing any formal acceptance of the "endorsement test" doctrine, only an ambiguous reliance on "legal judgment,"[154] could indicate doctrinal tension. Moreover, it could signal the Second Circuit's abandonment from the historical analysis in *Marsh* all together. On the other hand, perhaps *Town of Greece* can still be reconciled with *Marsh* and the "policy in practice" approach.

Notwithstanding the nomenclature, both of the "policy in practice" circuits still interpret the text of *Marsh* similarly. Although the Fourth Circuit considers improper prayer "advancement" and the Second Circuit considers it "endorsement," the legislative prayer result still seems to be the same. Both circuits observe the prayer practice as a whole and conduct a case-by-case, fact-intensive inquiry into the prayers offered and the context in which they are disseminated. Both circuits also read *Allegheny*'s prohibition on "sectarian" prayer broadly, placing a premium on the "frequency" of those prayers. It also seems that the Second Circuit has adopted the Fourth Circuit *Joyner* majority, de-emphasizing the demographic factors of a community where prayers are given.[155] In any event, the holding in *Town of Greece* raises serious doubts about the future application of *Marsh*.

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151. *Id.* at 24.
152. *Id.* at 25.
153. *Id.* at 30.
154. *Id.* at 30.
155. *Id.* "In our view, whether a town's prayer-selection process constitutes an establishment of religion depends on the extent to which the selection process results in a perspective that is substantially neutral amongst creeds." *Id.* at 31.

B. "Deferential" Approach

In the Eleventh and Ninth circuits, *Marsh* receives a much different treatment. The crux of *Snyder*'s majority and *Joyner*'s dissent have resonated in recent legislative prayer opinions in the Eleventh and Ninth Circuits, who have upheld facially neutral prayer policies without a sensitive parsing of their substantive content. [156]

1. Eleventh Circuit

Deference was instrumental in the development of the Eleventh Circuit's initial interpretation of *Marsh* in *Pelphrey v. Cobb County*.[157] In *Pelphrey*, the plaintiffs relied on *Allegheny* to argue that *Marsh* broadly prohibited sectarian prayer.[158] The appellate court conducted an initial inquiry into the prayer opportunity afforded by Cobb County, rather than addressing the substance of the prayer, and found no exploitation.[159] Although the court acknowledged that *Marsh* did not prohibit sectarian prayer, the court "decline[d] [the] role of 'ecclesiastical arbiter,'"[160] and refused to parse the content of individual prayers, believing that "the line is not completely bright between sectarian and nonsectarian."[161] The approach in *Pelphrey* was recently re-affirmed in *Atheists of Florida, Inc. v. City of Lakeland*,[162] where the Eleventh Circuit was again confronted with a facially neutral prayer policy challenge. The result was the same,

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156. *See* Rubin v. City of Lancaster, 710 F.3d 1087 (9th Cir. 2013), *cert. denied before judgment*, 2013 WL 3789507 (Oct. 2013); Atheists of Florida, Inc. v. City of Lakeland, 713 F.3d 577 (11th Cir. 2013); Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008).

157. 547 F.3d 1263 (11th Cir. 2008).

158. *Pelphrey*, 547 F.3d at 1270–72.

159. *See id.* at 1270–73.

160. *Id.* at 1274. The court noted not only its own judicial incompetency for prayer determinations ("We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions"), but also the "opaque" standards offered by the plaintiffs. *Id.* For instance, the court noted the plaintiff's response to whether "King of Kings," was sectarian, "King of kings may be a tough one . . . . It is arguably a reference to one God . . . . I think it is safe to conclude that it might not be sectarian." *Id.*

161. *Id.* at 1272.

162. 713 F.3d 577 (11th Cir. 2013).

eroding doubts that *Pelphrey*, decided prior to *Joyner*, was not distinguishable from the controlling law in the Fourth Circuit.[163]

2. Ninth Circuit

Perhaps most combative to the "policy in practice" approach is the recent opinion in *Rubin v. City of Lancaster*,[164] where the Ninth Circuit Court of Appeals upheld the City of Lancaster's prayer policy on facial and "as applied" challenges.[165] In *Rubin*, the City of Lancaster executed a neutral, diversely inclusive prayer policy that solicited volunteer prayer-givers for its meetings,[166] similar to plans struck down in the Fourth Circuit[167] and upheld in the Eleventh Circuit.[168] However, in practice many of the volunteers were Christian, and many of the prayers directly invoked the name of Jesus.[169] Building on the legacy of *Marsh,* and the lessons of *Joyner* and *Pelphrey,* the court found that a neutral prayer policy simply did not exploit the prayer opportunity under *Marsh.*[170] Similar to the *Pelphrey* court, *Rubin* held that since the prayers in *Marsh* themselves were, in many cases, "explicitly Christian," *Marsh* could not be read to preclude sectarian Christian references.[171]

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163. In *Pelphrey*, the majority stated: "the Fourth Circuit read *Marsh* as we do, to allow a county to invite clergy from diverse faiths to offer 'a wide variety of prayers' at meetings of its governing body." *Pelphrey*, 713 F.3d at 1273. However, this statement was made in reliance on *Simpson* not *Joyner*. *Atheist's of Florida, Inc.* confirms that the two circuits do indeed have conflicting approaches. *See* Atheist's of Florida, Inc., 713 F.3d 577, 590–91 (2013) (upholding the decision in *Pelphrey* and applying the *Pelphrey* test to resolve the case).

164. 710 F.3d 1087 (9th Cir. 2013), *cert. denied before judgment*, 2013 WL 3789507 (Oct. 2013).

165. *Rubin*, 710 F.3d at 1095–99.

166. *Id.* at 1089-90 (majority opinion).

167. *See supra* Part III.A.

168. *See supra* Part III.B.

169. *Rubin*, 710 F.3d at 1090.

170. *Id.* at 1097.

171. *Id.* at 1092–93 (quoting Marsh v. Chambers, 463 U.S. 783, 793, n. 14 (1983)). *See also* Newdow v. Bush, 355 F. Supp. 2d 265, 285 n. 23 (D.D.C. 2005) (noting that "the legislative prayers at the U.S. Congress are overtly sectarian"); Brief of Members of Congress *Amicus Curiae, supra* note 67 and accompanying text.

The *Rubin* court also found the policy constitutional in effect.[172] In contrast to the majority in *Joyner*, the court in *Rubin* found the preponderance of Christian references insignificant because it was simply a product of "demographics," beyond the reach of the judicial system's control.[173] Likewise, the court found that the execution of a neutral government policy does not advance one religion over another.[174] Rather, it remains an element of private choice where the Supreme Court has deferred judgment.[175]

Thus, the recent additions of *Atheists of Florida, Inc.*, and *Rubin* add a new layer of analysis onto *Pelphrey* and create a strong alternative to the "policy in practice" approach. However, these circuits seem to give the most deference to neutral prayer policies. Therefore, even if the results in the deferential circuits are applied to *Lund*, Rowan County's sectarian prayers were informal, making the result less certain. However, as Parts IV and V will show, if appropriate deference is given to *Marsh* itself, a broad category of sectarian prayer, formal or informal, is still permitted.

IV. *LUND V. ROWAN COUNTY*

In January of 2012, the Supreme Court denied certiorari to review the Fourth Circuit's decision in *Joyner*.[176] Since this decision,

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172. *See Rubin*, 710 F.3d at 1097–98.

173. *Id.* at 1099. To this point Judge O'Scannlain analogized the government's Establishment Clause liability in legislative prayer with their liability in the school-voucher setting. *Id. See also* Zelman v. Simmons-Harris, 546 U.S. 639 (2002) (holding that a state's choice to fund education through a neutral voucher program did not violate the establishment clause even though 96% of the funds were distributed to parochial schools). Applying *Zelman* to the legislative prayer setting, the court drew the same conclusion, that "when a neutral government policy or program merely allows or enables private religious acts, those acts do not necessarily bear the state's imprimatur." *Rubin*, 710 F.3d. at 1099.

174. *See Rubin*, 710 F.3d at 1097–98.

175. *See id.* at 1099. The majority further found that just as it cannot guarantee complete diversity in prayer invitations, "[n]or can it compel leaders of those congregations to accept its invitations." *Id.*

176. Joyner v. Forsyth Cnty., 653 F.3d 341 (4th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S.Ct. 1097 (2012) (holding that Forsyth County's use of sectarian prayer at county meetings violated the Establishment Clause of the First Amendment).

North Carolina has become fertile ground for liberal interest group challenges to municipal prayer practices.[177] Indeed, more than twenty municipalities were contacted by the American Civil Liberties Union ("ACLU") regarding their compliance with the Fourth Circuit's holding in *Joyner*.[178] Rowan County was among those counties contacted by the ACLU and received a "cease and desist" letter, asking that its commissioners stop the use of "unconstitutional sectarian prayer," at commission meetings.[179] Rowan County, unlike many of its neighboring communities,[180] had maintained no formal policy but did conduct informal prayers at county meetings for decades without substantive guidelines.[181]

In its letter, the ACLU noted they had "received more complaints about sectarian legislative prayer by the Rowan County Board of Commissioners than any other local government in North Carolina in the past several years."[182] Rowan County declined to formally respond to the ACLU letter,[183] but its antipathy for the merits of the claim became increasingly public.[184] In spite of the threat of

177. *See* Joe Depriest & Adam Bell, *supra* note 20.

178. *See* Karissa Minn, *ACLU Asks Commissioners to Stop Opening Meetings With Prayer,* SALISBURY POST (Feb. 16, 2012, 12:01 AM), http://www.salisburypost.com/News/021612-ACLU-contacts-county-about-prayer-qcd.

179. *Id.*

180. *See* Depriest & Bell, *supra* note 20 and accompanying text. *Cf.* Galloway v. Town of Greece, 681 F.3d 20 (2d Cir. 2013), *cert. granted,* ___ U.S. ___, 133 S. Ct. 2388 (2013). Like Rowan County, the Town of Greece maintained no formal prayer policy before the town's practice was challenged by local citizens. *Town of Greece*, 681 F.3d at 22.

181. Rowan County does not have a formal prayer policy, and the facts are still in dispute as to how long sectarian prayers may or may not have been offered at commission meetings. The plaintiff's complaint alleges that sectarian prayers have been offered since "November 2007." Verified Complaint For Declaratory And Injunctive Relief And Nominal Damages at 2, Lund v. Rowan County, North Carolina (Mar. 12, 2013) (1:13 cv-00207-JAB-JLW), *available at* https://www.aclu.org/religion-belief/lund-et-al-v-rowan-county-complaint [hereinafter *Lund Complaint*].

182. Minn, *supra* note 178.

183. *Id.*

184. *Lund Complaint*, *supra* note 181, at 10. In the days following receipt of the ACLU letter, the combative comments by Commissioner Jim Sides were made public: "I will continue to pray in JESUS name" and "I volunteer to be the first to

litigation and the chilling effect seen among neighboring municipalities,[185] sectarian prayer continued at subsequent Rowan County commission meetings until the ACLU, on behalf of three Rowan County residents, filed suit to enjoin Rowan County's Commissioners from continuing their prayer practice on March 12, 2013.[186]

The plaintiffs brought their complaint under 42 U.S.C. §1983, challenging "the constitutionality of the sectarian prayer practice in Rowan County."[187] The plaintiffs' central allegation asserts that "[s]ince November 2007, 97% of all Board meetings have featured expressly Christian prayer" and that these prayers have "promoted divisiveness" within meetings.[188] To bolster this allegation, the plaintiffs included thirteen separate anecdotal references to sectarian prayers given during meetings from 2007 to 2013.[189] Among the sectarian invocations, some of the more colorful allegations include:

> We can't be defeated, we can't be destroyed, and we can't be denied because we are going to live forever with you through the salvation of Jesus Christ. Lord be with us today and provide us with your supreme guidance and wisdom as we conduct the business of Rowan County. And, as we pick up the Cross, we will proclaim His name above all

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go to jail for this cause . . . and if you will go [sic] my bail in time for the next meeting, I will go again!" *Id.* at 11.

185. *See* Depriest & Bell, *supra* note 20. In 2011, the Kannapolis City Council abandoned its use of sectarian prayer after a Wisconsin non-profit called the Freedom From Religion Foundation cautioned use of sectarian prayers. *Id.* In 2013, Union, Lincoln, and Iredell Counties all heeded similar warnings. *Id.*

186. *See Lund Complaint*, *supra* note 181, at 13–18.

187. *Id.* at 2, 13. Plaintiffs also allege that Rowan County has violated Article 1, §13 and Article 19 of North Carolina's Constitution, interpreted to "require religious neutrality." *Id.* at 13.

188. *Id.* at 2, 11.

189. *Id.* at 8. Rowan County formally denied the allegation that 97% of commission meetings were opened with sectarian prayer. Rowan County was "without knowledge sufficient to form a belief" as to merits of the descriptive list of sectarian prayers in allegations 25–27. Both responses are codified in their answer to the court. *See* Defendant's Answer to Plaintiff's Complaint For Declaratory And Injunctive Relief And Nominal Damages at 1–4, Lund v. Rowan County (No. 1:13-cv-207-JAB-JLW) (Aug. 2, 2013) [hereinafter *Rowan County Answer*].

> names, as the only way to eternal life. I ask this in the name of the King of Kings, the Lord of Lords, Jesus Christ.[190]

The plaintiffs found the prayers inappropriate for differing reasons[191] and sought declaratory relief as well as a preliminary injunction to prevent Rowan County from "knowingly and/or intentionally delivering or allowing to be delivered sectarian prayers at meetings of the Rowan County Board of Commissioners."[192] In response, Rowan County filed a motion to dismiss in the United States District Court for the Middle District of North Carolina.[193] The county argued that dismissal was proper on three independent grounds: the plaintiffs lacked standing, the court did not have sufficient guidelines to determine a "sectarian prayer," and Rowan County held no vicarious liability for prayers given by commissioners.[194] The District Court dismissed each argument in turn under current Fourth Circuit precedent.[195]

A. Standing

Rowan County argued that the plaintiffs failed to allege a "concrete or particularized" injury because as citizen participants in county meetings, they were not required to participate in prayers, nor were they "excluded from participation . . . subjected to harassing, taunting or otherwise humiliating actions."[196] The court held that in Establishment Clause cases the actual harm necessary for standing arises

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190. *See Lund Complaint*, *supra* note 181, at 9 (emphasis omitted).

191. *Id.* at 3–4. Two plaintiffs agreed that the prayer practice has the effect of affiliating "the County with one particular faith" while another felt excluded in the meetings. *Id.*

192. *Id.* at 13.

193. *See Memorandum Opinion*, *supra* note 32, at 26. In the alternative to the motion to dismiss, Rowan County also filed a motion to stay the proceedings, pending resolution of *Town of Greece v. Galloway* in the Supreme Court. *Id.* at 27. This motion was denied and the court found "no reason to ignore the current state of the law." *Id.*

194. *Id.* at 8.

195. *See id.* at 1–28.

196. *Id.* at 11 (quoting from the Defendant's Brief In Support of Motion to Dismiss, at 31).

out of the "unwelcome direct contact with a religious display that appears to be endorsed by the state."[197] Therefore, because plaintiffs were citizens of Rowan County, with a record of attending meetings, and were expected to continue attending meetings where unwelcome religious statements were consistently made, standing was satisfied.[198]

B. Political Question

Rowan County also argued that the court could not "formulate a definition" capable of truly demarcating between sectarian and non-sectarian prayer.[199] As such, the plaintiff's claim presented a non-justiciable political question, for which the court lacked subject-matter jurisdiction.[200] However, the court found that the sectarian nature and permissibility of legislative prayers, policies, or customs was fairly determinable through case law in the Fourth Circuit and that subject-matter jurisdiction was proper.[201]

C. Vicarious Liability

Rowan County further argued that a municipality carries no vicarious liability for 42 U.S.C. §1983 violations under the holding of *Monell v. Department of Social Services*[202] and that any sectarian prayers offered by county commissioners were given as private citizens, not as government actors.[203] Under *Monell*, a plaintiff can attach vicarious

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197. *Id.* (quoting Suhre v. Haywood Cnty. 131 F.3d 1083, 1086 (4th Cir. 1997)).

198. *Id.* at 13–16.

199. *Id.* at 13.

200. *Id.*

201. *Id.* at 14; *see* Joyner v. Forsyth Cnty., 653 F.3d 341, 349, *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097 (2012) (describing that "legislative prayer must strive to be nondenominational" and "infrequent references to deities, standing alone, do not suffice to make out a constitutional claim"); *see also* Wynne v. Town of Great Falls, 376 F.3d 292, 300 (discriminating between a prayer that "invoked a deity whose divinity *only* those of the faith believe" and "without 'explicit references'. . . to Jesus Christ, or the patron saint.") (internal quotations omitted).

202. 436 U.S. 658 (1978).

203. *See Memorandum Opinion*, *supra* note 32, at 17 (citing *Monell*, 436 U.S. at 691–92).

liability to a municipality if the plaintiff establishes that his injury was "proximately caused by a written policy ordinance, or by a widespread practice that is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.'"[204] Here, the plaintiffs alleged that no formal policy existed and the County operated under the informal tradition of "rotating through the Commissioners to offer a prayer" and that "whether to pray, and what to pray, is made by the individual commissioners not Rowan County."[205] The court found that the prayers delivered government speech rather than private speech because they occurred in a "local government meeting" where "government business is discussed and where the Commissioners pray in support of that business."[206]

Following the district court's award of a preliminary injunction to the plaintiff, Rowan County formally responded to the court with its answer.[207] Judge Beaty's treatment of Rowan County's motion to dismiss was squarely in line with Fourth Circuit precedent post-*Joyner*. However, *Galloway* provides the Supreme Court an opportunity to examine the entire body of the *Marsh* doctrine as it has developed over thirty years and determine if the Fourth Circuit's interpretation of *Marsh* is the right one, a subject I take up below.

V. ROWAN COUNTY'S INFORMAL SECTARIAN PRAYERS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE UNDER *MARSH*

When the United States Supreme Court made the policy choice to allow prayer in front of deliberative bodies, it also implicitly chose to entertain all of the human foibles and frailties that prayer in a public forum elicits. In the abstract of course, prayer-givers would temper their words reasonably, harmless prayers would be easily delineated from harmful ones, and all religious viewpoints would be represented equally. Intuitively, human nature tells us this result cannot be achieved in theory, much less in practice. Indeed, prayer is perhaps the most intimate and spiritual moment of personal reflection a human being can articulate,

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204. *Id.* at 17–18 (citing City of St. Louis v. Prapronik, 485 U.S. 112, 127).

205. *Memorandum Opinion*, *supra* note 32, at 18.

206. *Id.* at 19 (citing *Turner*, *Doe*, and *Joyner*, where Council members were found to be government rather than private actors).

207. *See Rowan County Answer*, *supra* note 189.

saddled with centuries of religious strife, tempered in some more than in others. Moreover, the content of prayers reflect the historical and cultural experiences of the community where the prayer is offered, a viewpoint that may, or may not, be religiously or socio-economically diverse. Furthermore, even sensible prayer-givers, engulfed with emotion, may not always instinctively know if or when their prayer has crossed a judicially imposed line of permissiveness. These normative factors did not go unnoticed by the *Marsh* Court.[208]

To manage the realities of legislative prayer, the Court *chose* to place very few substantive restrictions on the content of a legislative prayer-giver's speech and stripped a judge's power to engage in "comparative theology."[209] Ultimately, the Roberts Court will appraise the wisdom of this decision. Until then, legislative prayer policy "begins and ends"[210] with *Marsh*.

As such, the "deferential" approach adopted in the Eleventh and Ninth Circuit Courts rather than the "policy in practice" approach is most consonant with the spirit of *Marsh* for four reasons: (1) the history and context of legislative prayer demands judicial deference; (2) incidental advancement of religion does not exploit the prayer opportunity; (3) *Marsh* prohibits proselytization, not evangelism, a necessary distinction to be made within the doctrine, and (4) mere sectarian prayers, without more, prohibit a court from "parsing" the content of individual prayers. As Part V will demonstrate, without further clarity on the substance of legislative prayers directly from the Supreme Court, the prayers in Rowan County, however colorful or unapologetically sectarian in nature, still do not violate the Establishment Clause under *Marsh*.

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208. *See* Marsh v. Chambers, 463 U.S. 783, 819–21 (1983) (Brennan, J., dissenting) (describing the policy implications of allowing prayer in front of legislatures and denoting the Court's institutional incompetence to regulate "religious life").

209. *See* Brett B. Harvey & David A. Cortman, *An Open Letter to Interested Parties Regarding the Legality of Public Invocations*, Alliance Defending Freedom (May 1, 2013), at 9, *available at* http://www.adfmedia.org/files/OpenLetterPublicInvocations.pdf (coining as "comparative theology" the type of speech analyzed in *Pelphrey*).

210. Transcript of Oral Argument at 14, Town of Greece v. Galloway, ___ U.S. ___, 133 S. Ct. 2388 (2013) (No.12-696), 2013 WL 5939896, at *14.

A. The History and Context of Marsh *Demand Judicial Deference*

The Supreme Court has repeated many times that "we are a religious people and our institutions presuppose a higher being."[211] *Marsh* re-enforces this idea. Legislatures at all levels of American government continue a 200-year-old tradition vetted by the draftsmen of the Constitution and affirmed by a majority of the Supreme Court just a generation ago.[212] This tradition bolsters not only "legislative prayer generally but . . . *sectarian* legislative prayer specifically."[213] Since 1983, legislative prayer has been distinguished from the placement of a religious crèche in *Allegheny*, as well as the prayers offered at a graduation ceremony in *Lee*. Likewise, *Lee* acknowledged the audience for legislative prayers, presumably adult citizens, were not susceptible to "coercion," or religious indoctrination in the same manner as primary school children.[214] Had the Supreme Court taken the opportunity to equate those intersections of church and state with *Marsh*, the uniqueness of legislative prayer would be significantly diminished.[215] The Court declined such an opportunity.

In light of this "unique" history, the *Snyder* court presumed the legitimacy of all legislative prayers, labeling them *sui generis*.[216] Although the "deferential approach" circuits have retreated from *Snyder's* presumption, they have upheld sectarian references offered as part of neutral legislative prayer-policies.[217] Unlike those sectarian

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211. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 313 (1952); *see also* Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part) ("Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion . . . .") (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 306 (2002) (Goldberg, J., concurring)).

212. *See supra* notes 50–51 and accompanying text.

213. Rubin v. City of Lancaster, 710 F.3d 1087, 1093 (9th Cir. 2013) (emphasis in original).

214. *See* Lee v. Weisman, 505 U.S. 577, 577 (1992).

215. *See id.* at 596–97.

216. *See* Snyder v. Murray City Corp., 159 F.3d 1227, 1231–33 (10th Cir. 1998) (en banc), *cert. denied*, 526 U.S. 1039 (1999); *see also supra* note 110 and accompanying text.

217. *See supra* Part III.B.

prayers, the sectarian prayers in *Lund* were offered by County Commissioners, not local citizens and were not part of a formal neutral policy.[218]

However, this distinction should not be dispositive, given that the substance of the message and the practical effects of the prayers offered in Rowan County mirror comparable prayers upheld in the "deferential" approach circuits. For example, in *Rubin* a contested prayer ended with the statement: "Bring our minds to know you and in the precious, holy and righteous and matchless name of Jesus I pray this prayer. Amen and Amen. God bless you."[219] Also like *Rubin*, no prayer-giver in Rowan County was denied an opportunity to pray and a predominately Christian message was disseminated over time.[220] Therefore, even if *Snyder* overreaches, and *Marsh* does not create a presumption of validity, the reasoned deference to legislative prayer as a category, utilized in the "deferential" approach, provides the most sensible starting point for the *Marsh* inquiry.

B. Incidental Advancement of Religion Does Not Exploit the Prayer Opportunity

Even without a presumption of validity, the sectarian prayers in *Lund* should still be permitted because the prayer opportunity was not exploited. Without exploitation of the prayer opportunity, legislative prayer, sectarian or otherwise, cannot trigger Establishment Clause liability.[221] A prayer opportunity is exploited only if it stems from an "impermissible motive" or as *Marsh* framed it, "proselytize[s] or advance[s] any one, or . . . [d]isparage[s] any other, faith or belief."[222] However, there is no judicial consensus on what exactly constitutes "advancement" or "proselytizing" behavior.

Notwithstanding proselytization, the Fourth Circuit construes "proselytize" and "advance" as disjunctive verbs, meaning that advancement of religion alone could exploit the prayer opportunity.[223]

218. *See Memorandum Opinion*, *supra* note 24, at 2–8.
219. *See Rubin*, 710 F.3d at 1090.
220. *Id.* at 8–10.
221. *Marsh*, 463 U.S. at 794–95 (1983).
222. *Id.* at 794–95.
223. *See supra* Part III.A; *see also supra* notes 96–99.

Under this approach, advancement is interpreted broadly, including any prayers that "forward, further, [or] promote' the belief."[224] Similar to the Fourth Circuit approach, the Second Circuit adopts the "advancement" approach but through the alternative lens of "endorsement."[225] In contrast, the *Rubin* Court concluded that mere advancement of religion, without more, cannot violate the prayer opportunity because it sets an unrealistic threshold to judge legislative prayer under *Marsh*.[226]

The history of the Supreme Court's Establishment Clause jurisprudence supports *Rubin*'s analysis and indicates *Marsh* was not designed to prevent mere advancement of religion.[227] Indeed, "all prayers 'advance' a particular faith or belief in one way or another."[228] Had the Supreme Court wanted to dispose of legislative prayer in this manner, as it did silent school prayer[229] immediately after *Marsh*, the first two prongs of the *Lemon* test would have easily accomplished the task.[230] The Court declined this opportunity. Therefore, because the Supreme Court abandoned the *Lemon* test in *Marsh*, and the more recent "endorsement test" is in essence a collapsed version of the *Lemon* test, *Marsh* must be viewed as permitting a broader category of legislative prayer than the "policy in practice" approach has prescribed.[231]

224. *See* Wynne v. Town of Great Falls, 376 F.3d 292, 300 (2004).

225. *See* Galloway v. Town of Greece, 681 F.3d 20, 30 (2d Cir. 2013) ("We conclude . . . that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint. This conclusion is supported by several considerations, including the prayer-giver selection process, the content of the prayers, and the contextual action (and inactions) of prayer-givers and town officials.").

226. *See Rubin*, 710 F.3d at 1097.

227. *Id.*

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

229. *See* Wallace v. Jaffree, 472 U.S. 38 (1985) (applying the *Lemon* test and striking down silent prayer in public schools).

230. *Rubin*, 710 F.3d at 1097.

231. *Id.*

C. Marsh*'s Proselytization Prong is an Uncertain Standard*

1. *Marsh* Should Prohibit Prayers that Proselytize not Evangelize

The primary purpose of *Marsh* was to prevent "a more aggressive form of advancement, i.e., proselytization"[232] which is not present in *Lund*.[233] Admittedly, *Marsh* did not provide a formal definition for "proselytize," nor did it include anecdotal guidance for lower courts to conclusively characterize proselytizing behavior. In fact, "[The Supreme Court has] never defined the term 'proselytize,' much less provided any workable legal test for determining precisely what qualifies as prohibited proselytizing."[234] Since *Marsh*, the *Wynne* and *Snyder* courts have agreed on the dictionary definition: an action "to convert from one religion, belief, opinion, or party to another."[235] But, while "[d]ictionaries can be useful aids . . . they are no substitute for a close analysis of what words mean,"[236] and an appellate court could provide clearer guidelines to prayer-givers by distinguishing "proselytization" from "evangelism." A recent interpretation of the U.S. Military, another area of the government with its own well-documented church and state issues,[237] draws such a distinction.[238]

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

233. *See supra* Part IV (explaining the context of the prayers offered by Rowan County); *see also infra* Part IV.C.1 (arguing that *Lund's* sectarian prayers lack the character of the prayers held to proselythize in *Snyder*).

234. *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, *supra* note 10 at 1010, n.179 (quoting Christian M. Keiner, *Preaching from the State's Podium: What Speech Is Proselytizing Prohibited by the Establishment Clause?,* 21 BYU J. PUB. L. 83, 85 (2007)).

235. *Id.* (quoting 3 *WEBSTER'S NEW INTERNATIONAL DICTIONARY (UNABRIDGED)* (1986)); *see also id.* at 1234 ("[T]he kind of legislative prayer that will run afoul of the Constitution 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.").

236. *See* MCI Telecommuns. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 240 (1994) (Stevens, J., dissenting).

237. *See generally* Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89 (2007) (explaining the history and First Amendment constitutional issues that military chaplaincies face).

On May 2, 2013, the Department of Defense submitted a press release titled "Statement on Religious Proselytizing," that described the Department's opinion of what constituted proselytizing behavior: "Service members can share their faith (evangelize), but must not force unwanted, intrusive attempts to convert others of any faith or no faith to one's beliefs (proselytization)."[239] When the U.S. Military interpretation is applied to *Lund* and compared with *Snyder,* as the facts are laid out below, it becomes clear that the Rowan County Commission's sectarian references fall closer to evangelism, or "sharing one's faith,"[240] rather than outright proselytization, an intrusive attempt to convert listeners to a particular belief.[241]

Snyder correctly illustrates the type of behavior *Marsh* was designed to limit. In *Snyder*, a local citizen's prayer was considered to "proselytize" when the prayer called all legislative prayers "hypocritical," "blasphemous," "evil," "mis-guided," and sought support for abolition of the entire prayer forum.[242] Unlike the speaker in *Snyder*, the prayers in *Lund* were evangelical in nature because they praised specific tenets of the Christian faith, such as "the Cross at Calvary," and the "King of Kings,"[243] but without seeking to exclude or disparage other religious beliefs.[244] To be sure, many of the prayers in *Lund* did allude to the supremacy of Jesus Christ, and the glorification of his message to the world.[245] Likewise, the unapologetic public statements and recital of the Lord's Prayer by Commissioner Sides could be construed as overt symbolism of Christianity. However, both statements were made in response to a news report, after the complaint was filed, intended as a

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238. *See* United States Central Command General Order 1B (Mar. 13, 2006), *available at* http://www.militaryatheists.org/regs/JPGO1B-4.pdf (Part 2 of General Order 1B enumerates "prohibited activities" of military personnel and lists "[p]roselytizing of any religion, faith or practice.").

239. *See also* Warren Throckmoron, *Is the Military Preparing to Court Marshal Christians?*, PATHEOS (May 2, 2013), http://www.patheos.com/blogs/warrenthrockmorton/2013/05/02/is-the-military-preparing-to-court-marshal-christians/.

240. *Id.*

241. *See id.*

242. Snyder v. Murray City Corp., 159 F.3d 1227, 1235 (10th Cir. 1998).

243. *See Memorandum Opinion*, *supra* note 32, at 9 (emphasis omitted).

244. *See Memorandum Opinion*, *supra* note 32, at 8–10.

245. *Id.*

protest of the Middle District's preliminary injunction.[246] Therefore, these statements may be persuasive in the court of public opinion, but they should not play a role in the factual record of the case. More importantly, all prayers offered by the Commission lacked the animus of the speakers in both *Wynne* and *Snyder*,[247] and were offered for an evangelical purpose, the emotional and spiritual guidance of the Commission, not to combat dissenting religious opinion.

2. Future Utility of the Proselytization Prong

Legal scholars have also questioned the future utility of *Marsh*'s proselytization prong.[248] Professor Christopher Lund posits two alternative courses for the future of legislative prayer. The first option takes the form of a sectarian balancing test. As Professor Lund puts it, the "proselytizing test . . . could become a variant of the non-sectarian standard . . . requiring that a certain percentage of prayers be sectarian before the process as a whole is considered proselytizing."[249] Under a balancing approach, the relative sectarian weight of a prayer would be measured on an objective spectrum, in part by the demographic composition of the locality.[250] Therefore, the fact that ninety-seven percent of the prayers in *Lund* were alleged to be sectarian[251] would have to be fully reconciled with the fact that a majority of Rowan County citizens adhere to some variant of Christianity.[252] Furthermore, two courts have indicated their willingness to side-step this consideration altogether. Both *Rubin* and the *Joyner* dissent held the frequency of sectarian prayers were unimportant because it was "simply the product of demographics,"[253] a social function beyond the control of the legal system.

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246. *Id.*

247. *See* Wynne v. Town of Great Falls, 376 F.3d 292, 295–96 (4th Cir. 2004).

248. *See* Lund, *supra* note 10.

249. *Id.* at 1011.

250. *Id.* at 1011–12.

251. *See Memorandum Opinion*, *supra* note 32, at 2.

252. Rowan County, North Carolina (NC), CITY-DATA.COM, http://www.city-data.com/county/Rowan_County-NC.html (last visited Mar. 7, 2014).

253. *See Joyner*, 653 F.3d at 363 (Niemeyer, J., dissenting).

Alternatively, the proselytization prong "could simply become a way that courts get out of the business of reviewing legislative prayers."[254] This conclusion also bodes well for Rowan County because "[i]f past cases are any guide the proselytizing language of *Marsh* would likely lead to almost complete judicial deference for state and local governments."[255] Increased deference to local governments, whose actors are closest to the pulse of their communities, would validate both the prayers in *Joyner* and *Lund*, where a predominately Christian message was disseminated, but to a predominately Christian community. Local government actors subject to popular election would also be more accountable to their populous than an unelected judicial body. This solution, however, rests on an equally shaky constitutional footing, given the "general premise that the government's religion should be decided by a majority vote contradicts the most basic of the Court's Religion Clause principles."[256]

Thus, the history of the Establishment Clause shows that incidental advancement of religion from sectarian prayer sets an unrealistic bar for municipalities to facilitate prayer. Likewise, there is significant ambiguity in the meaning of the word proselytize, as well as the limits the *Marsh* Court sought to impose on its usage. Thus, as Part V.D shows, in the legislative prayer setting, judges should avoid the temptation to "parse" the substance of individual prayers.

D. Mere Sectarian Prayer, Without More, Prohibits a Court from "Parsing" the Content of Individual Prayers

Marsh plainly mandates that judges are not to "parse" the content of legislative prayers.[257] The "deferential" circuits have heeded the command, and the "policy in practice" circuits have not.[258] The latter read *Marsh*'s footnote 14,[259] along with *Allegheny*,[260] to permit a closer

254. *See* Lund, *supra* note 10, at 1011.

255. *Id.*

256. *Id.* at 1020–21.

257. Marsh v. Chambers, 710 463 U.S. 783, 795 (1983).

258. *Cf. supra* Parts III.A., III.B.

259. *See Marsh*, 463 U.S. at 793 n.14 (The court describes how "Palmer characterizes his prayers as 'nonsectarian,' 'Judeo Christian,' and with 'elements of the American civil religion.' Although some of his earlier prayers were often

scrutiny of sectarian prayer.[261] However, the *Rubin* court reached the opposite conclusion. *Rubin* interpreted *Marsh* to have affirmed all the prayers offered in Nebraska's legislative prayer history, not just the non-sectarian prayers offered after 1980.[262] In fact, Nebraska's history was replete with sectarian prayer, as is the current United States Congress.[263] Moreover, the Supreme Court has drawn no affirmative distinction between prayers offered in front of state legislatures and municipalities[264] and *Lee*, although untested in legislative prayer cases, rebuts *Simpson* and teaches that prayers cannot be censored to reach a government "non-sectarian" ideal.[265]

Even if an appellate court could act as a "board of censors,"[266] the value of such a process would be futile because "*any* practice of legislative prayer, even if it might look 'non-sectarian' to nine Justices of the Supreme Court, will inevitably and continuously involve the state in one or another religious debate."[267] Therefore, at a minimum, *Marsh* and *Allegheny* do not conclusively prohibit sectarian prayer, and *Lund*'s sectarian prayers did not seek to convert their audience of listeners. As such, any further inquiry should be forestalled, and the substance of the prayers should not be "parsed" to determine their self-worth.

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explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.") (internal citations omitted).

260. Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989) ("[N]ot 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.'") (internal citations omitted).

261. Rubin v. City of Lancaster, 710 F.3d. 1087, 1092–93 (9th Cir. 2013).

262. *Id.* at 1093–94.

263. *See id.*; *see also* Brief for Members of Congress as *Amicus Curiae*, *supra* note 67 and accompanying text.

264. Justice Kennedy alluded to this point in the *Town of Greece* oral argument, stating: "In a way it sounds quite elitist to say, well, now, we can do this in Washington and Sacramento and Austin, Texas, but you people up there in Greece can't do that." Transcript of Oral Argument at 55, Town of Greece v. Galloway, ___ U.S. ___, 133 S. Ct. 2388 (2013) (No. 12-696), 2013 WL 5939896, at *55.

265. *See* Lee v. Weisman, 505 U.S. 577, 578–79 (1992).

266. Marsh v. Chambers, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting).

267. *Id.* at 819 (Brennan, J., dissenting) (emphasis in original).

VI. CONCLUSION

It is a canon of First Amendment jurisprudence that "[s]ound approaches to the state's treatment of religion cannot be collapsed into any single formula."[268] Parts I and II re-affirm this general theory and demonstrate how the special rules for legislative prayer fit into the broader First Amendment puzzle. However, as the circuit split in Part III shows, if legislative prayer is to endure at the local level in the twenty-first century, municipalities, like Rowan County, need enhanced substantive guidance to inform local prayer policy or, in the alternative, affirmation that *Marsh* is no longer the primary guiding principle. In the absence of a contemporary reboot, the factual background illustrated by *Lund* in Part IV and analyzed in Part V shows that a correct application of *Marsh* is still sufficient to resolve, even extreme, sectarian legislative prayer issues. However, given the evangelical nature of the human spirit, the result will too often elicit close judgment calls and invite continued judicial intervention. Therefore, the Roberts Court must face the same difficult policy choice that the *Marsh* Court faced in 1983, this time against the backdrop of a shifting religious paradigm.[269] The Supreme Court's judgment will go a long way in appraising the current state of the Establishment Clause in 2014.

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268. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 1 (2006).

269. *See supra* Parts III.A. & III.B.