The Uncertain Constitutionality of Prayers That Open School Board Meetings

by Chad Ford

IS IT A VIOLATION of the United States Constitution for a North Carolina school board to open its meetings with a prayer?

There is no definitive answer to this question because it lands directly between two competing lines of constitutional thought. One line, springing from the 1971 United States Supreme Court decision in *Lemon v. Kurtzman*,[1] has sustained virtually every challenge to government-sponsored religious expressions in public schools, including prayer. The other line, springing from the Court's 1983 decision in *Marsh v. Chambers*,[2] has held that religious prayers authorized by a legislative body at the opening of its sessions do not violate the Constitution.

Is saying a prayer at the beginning of a school board meeting more like a teacher praying in a classroom (almost certainly unconstitutional), or is it more like a chaplain opening a session of the United States House of Representatives with a prayer (held to be constitutional)? Courts have gone both ways. The answer in a particular case may turn on such factors as the board's purpose in having the opening prayer, whether the board has a history of opening its meetings with prayer, the way the individuals offering the prayer are selected, the content of the prayers, and the likelihood that children will be exposed to the prayers through compelled attendance at the school board meeting.

This article describes the two competing lines of cases and offers an analysis of the application of the law in different school board situations.

Brief History of the Establishment Clause

The Establishment Clause of the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion."[3] Extended to the states and their local governments by the Fourteenth Amendment, the directive of the Establishment Clause is "seemingly straightforward," but there has been no consistent view as to when a law "establishes" a religion.[4] Instead, Establishment Clause jurisprudence is little more than a "blurred, indistinct and variable barrier"[5] whose application turns on sifting through the facts of each individual case.[6]

Establishment Clause questions have created confusion since the adoption of the Bill of Rights, and they continue to be quite controversial. Despite the divisiveness of the debate, and the fact-specific nature of

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1. Lemon v. Kurtzman, 403 U.S. 602 (1971).

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

3. U.S. CONST. amend. I.

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

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

6. *Compare* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (holding that a nativity scene in a town square did *not* violate the Establishment Clause because it was surrounded by secular Christmas decorations, such as Santa Claus and Christmas trees), with Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 601–2 (1989) (holding that a nativity scene in a town square *did* violate the Establishment Clause because it stood apart from the other, more secular decorations on display in the square).

any inquiry into questions concerning the Establishment Clause, the Supreme Court has developed, in *Lemon v. Kurtzman*, a three-prong test to determine when a government-sponsored activity offends the Establishment Clause.[7]

Under *Lemon*, a government-sponsored activity will not violate the Establishment Clause if (1) it has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not create an excessive entanglement of the government with religion.[8] If the challenged practice fails any part of the *Lemon* test, it violates the Establishment Clause.[9] The first prong of the *Lemon* test focuses on the intentions of the government. Namely, did "the government intend to convey a message of endorsement or disapproval of religion."[10] The second prong asks whether, "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[11] The last prong looks to "the character and purpose of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."[12] The key to the third prong is "excessive entanglement." Not every interaction between a government and religious authority would be a violation of the Establishment Clause. The court has "always tolerated some level of involvement between the two."[13]

Marsh v. Chambers

The only clear departure from the *Lemon* test since its inception came in 1983, in *Marsh v. Chambers*, in which the Supreme Court held that a state legislature's practice of opening each day's session with a prayer delivered by a state-paid chaplain did not violate the Establishment Clause of the First Amendment.[14] The Court began its analysis by comparing Nebraska's practice with the "unique history" of the United States Congress, noting that the practice of opening sessions of "legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of the country." The court reasoned that:

> . . . in light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being."[15]

To bolster that argument, the Court noted that the drafters of the Establishment Clause expressed their support for legislative prayer by voting to employ a legislative chaplain for the first Congress. Just three days before the first Congress adopted the language of the Establishment Clause, it authorized the appointment of paid chaplains to offer invocations at the beginning of each congressional session.[16] Is this a clear indication that the men who authored the First Amendment did not view paid legislative chaplains offering invocations in Congress as a violation of the Establishment Clause?[17] Or is it evidence that the enactment of the First Amendment and the Bill of Rights was forced upon Congress by the states as a condition for their ratification of the original Constitution?[18] The Court found it untenable that the first Congress "intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable."[19]

The result in *Marsh* departs from the Court's earlier Establishment Clause jurisprudence in several critical ways.[20] First, the Court began the analysis of the case with the caveat that "standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees."[21] It appears, from the rest of the opinion, that the Court goes on to ignore its own admonition by deciding the case because of well-established historical patterns. Nevertheless the Court's result may not be as inconsistent with the aforementioned proposition as it initially seems. Perhaps the Court viewed the facts in this case through the lens of a centuries-old empirical observation—despite two hundred years of beginning

7. *Lemon,* 403 U.S. at 612–13.
8. *Id*.
9. *See* Stone v. Graham, 449 U.S. 39, 40–41 (1980).
10. Edwards v. Aguillard, 482 U.S. 578 (1987).
11. *Lynch*, 465 U.S. at 690.
12. *Lemon*, 403 U.S. at 614.
13. Agostini v. Felton, 521 U.S. 203, 232–33 (1997).
14. *Marsh*, 463 U.S. at 793–95.
15. *Id.* at 792 [quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)].
16. *See Marsh*, 463 U.S. at 787–88 (1983).
17. *Id.* at 788.
18. *Id.* at. 816.
19. *Id.* at 790–91.
20. *See* RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITUTIONAL INTERPRETATION 257 (1987) (noting that "Marsh makes a strange fit with the Court's prior decisions").
21. *Marsh*, 463 U.S. at 790.

A *De Minimis* Violation: A Word about Ceremonial Deism

If the Establishment Clause precludes "government from conveying or attempting to convey a message that religion or particular religious belief is favored or preferred," how can opening a legislative session with a prayer, as well as such practices as reciting the Pledge of Allegiance to a nation "under God," offering an invocation to God prior to court proceedings, celebrating Christmas as a national holiday, or using the Bible to administer oaths, ever survive constitutional scrutiny?

These practices, often termed *ceremonial deism*, have historically been protected from Establishment Clause scrutiny primarily because "they have lost through rote repetition any significant religious content."[1] Practices such as legislative prayer, some argue, are so innocuous, even to most religious authorities, minorities, agnostics, and atheists, that they are viewed as not posing much of a threat to religious liberty.[2] As Supreme Court Justice William Brennan wrote in the opinion to *Lynch v. Donnelly*, these practices are "uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases."[3] Brennan's view was that "the practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning."[4] Thus observing Christmas as a national holiday, printing the words "In God We Trust" on U.S. currency, and reciting "one nation under God" in the Pledge of Allegiance are merely *de minimis* violations, if they are violations at all, of the Establishment Clause.[5]

Some have argued that legislative prayer also is little more than a *de minimis* violation, somehow unworthy of attention.[6] They claim that such prayer serves a legitimate secular purpose—to provide a serious and solemn mood, express confidence in the future, and encourage recognition of what is worthy of appreciation in society.[7] Of course, the Supreme Court has stated several times that "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent."[8] However, the majority in *Marsh* felt that even that slippery slope could be traversed. "It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."[9]

What constitutes a *de minimis* violation is in the eye of the beholder. In *Marsh*, the Court found legislative prayer to be a *de minimis* violation. In *Lee v. Weisman*, however, the Court rejected the *de minimis* argument; the prayer in that case was recited at a public high school commencement.[10] The practice of legislative prayer, even if the prayer itself is viewed as "nonsectarian" to the nine justices of the United States Supreme Court, could inevitably and continuously involve the state in one or another religious debate. Furthermore, as Justice Brennan laments in his *Marsh* dissent, if upholding the practice of legislative prayer requires a denial that "prayer is religion in act" or that "praying means to take hold of a word, the end, so to speak of a line that leads to God," many supporters of legislative prayer would be handed little more than a Pyrrhic victory.[11]

The *de minimis* argument is quite problematic. Out of necessity it trivializes religion by reducing prayer to an amorphous, rote, and meaningless act. One of the primary purposes for the Establishment Clause is to prevent this type of degradation through separation and neutrality. James Madison, the "father" of the Constitution, wrote that the Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy to permit its 'unhallowed perversion' by a civil magistrate."[12] If, by making a *de minimis* argument, supporters of prayer at public meetings were forced to minimize the purpose and the act of prayer in order to satisfy the Establishment Clause, it would indeed be a Pyrrhic victory.

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1. Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).
2. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2167 (1996).
3. *Lynch*, 465 U.S. at 717.
4. *Id.*
5. *See Epstein*, *supra* note 2 at 2083.
6. Marsh v. Chambers, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting).
7. *See Epstein*, *supra* note 2 at 2160.
8. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963); *see* Stone v. Graham, 449 U.S. 39, 42 (1980).
9. *Marsh*, 463 U.S. at 795 [quoting *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring)].
10. 505 U.S. 577, 594 (1992).
11. *Marsh*, 463 U.S. at 811 (Brennan, J., dissenting).
12. Engel v. Vitale, 370 U.S. 421, 432 (1962) (quoting MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, 2 WRITINGS OF MADISON 187).

legislative sessions with sectarian prayers, legislative invocations in both Congress and the Nebraska legislature have not led to an establishment of a state religion.[22] Second, *Marsh* is the first and only Establishment Clause case since 1971 to not apply the three-pronged *Lemon* test. Justice William Brennan notes this in his dissent in an attempt to limit the holding of *Marsh*. "That it fails to so [apply the *Lemon* test] is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer."[23]

Brennan, in his dissent, protested the departure from traditional Establishment Clause analysis and went on to apply the *Lemon* test to the facts in *Marsh*. He quickly concluded that "if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause."[24] He found that the legislative prayer had a preeminently religious purpose, had a religious effect, and led to excessive "entanglement" between the state and religion.[25] One of the essential factors in Brennan's analysis was the fact that the Nebraska legislature had chosen the same Presbyterian minister as chaplain for sixteen years and that it was he who often offered the nonsectarian prayers before the legislature.[26] Because of the fact-specific historical analysis employed by the Court to uphold legislative invocations, many commentators have argued that all *Marsh* holds is that "legislative prayer," delivered by an established chaplain system, with a long and unbroken historical legacy, is not per se unconstitutional.[27]

Despite the seemingly uncertain ground upon which the *Marsh* exemption was created, the holding in *Marsh* was consistent with case law in lower courts upholding legislative prayers.[28] After *Marsh*, there have been few reported cases on legislative prayer. In the most significant case of these, *Snyder v. Murray City Corp.*, the Tenth Circuit Court of Appeals upheld against a constitutional challenge to a city council's custom of opening meetings with an invocation.[29] The council allowed any citizen who desired to "sign up" to deliver a prayer at the beginning of their "reverence period." The plaintiff, Tom Snyder, drafted a prayer that called on public officials to cease the practice of praying before government meetings.[30] Snyder signed up to recite the prayer at the opening of a council meeting and sent a copy of the prayer he was to deliver to the council in advance. The council, after reading the prayer, refused to grant Snyder permission to recite it. Snyder sued, maintaining that the refusal amounted to an "establishment" of a religion. The Tenth Circuit, relying solely on *Marsh*, read that case as "establishing the constitutional principle that the genre of government religious activity that has come down to us over 200 years of history and which we now call 'legislative prayer' does not violate the Establishment Clause."[31] Because the peculiarity of this genre of government religious activity requires the government to select a particular speaker, the Tenth Circuit also read *Marsh* as establishing the principle that selecting a particular person to offer an invocation does not violate the Constitution.[32] The Court then followed that line of thought down to its logical conclusion. "[T]here can be no Establishment Clause violation merely in the fact that a legislative body chooses not to appoint a certain person to give its prayers. The act of choosing one person necessarily is the act of excluding others."[33]

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

In *Marsh* the Supreme Court did place some limits on the scope and selection of legislative invocations. First, a prayer falls outside the exception when "the

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

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

24. *Id.*

25. *Id.* at 797–98.

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

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

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

29. 159 F.3d 1227 (1998).

30. The following is an excerpt from Snyder's prayer:

> OUR MOTHER, who art in heaven (if, indeed there is a heaven and if there is a god that takes a woman's form) hallowed be thy name . . . We pray that you prevent self-righteous politicians from misusing the name of God in conducting government meetings . . . we pray that you strike down those that misuse your name and those that cheapen the institution of prayer by using it for their own selfish political gain . . . We ask that you deliver us from the evil of forced religious worship now sought to be imposed upon the people of the state of Utah by the actions of misguided, weak and stupid politicians, who abuse power in their own self-righteousness." (*Snyder*, 159 F.3d at 1228, n.3.)

31. *Id.* at 1233.

32. *Id.*

33. *Id.*

prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[34] Second, the Court warned that the selection of a person to recite the prayer might be a violation if the selection "stemmed from an impermissible motive."[35] Neither of these limitations, however, requires a system of equal access to offer legislative prayers. The Tenth Circuit, in *Snyder*, noted, "It is clear under *Marsh* that there is no 'impermissible motive' when a legislative body or its agent choose to reject a government-sanctioned speaker because the tendered prayer falls outside the long-accepted genre of legislative prayer."[36]

These limitations are easier to state than to apply. First, the act of praying to a supreme power assumes the existence of supreme power. Therefore, at one level, all prayers "advance" a particular faith or belief.[37] However, *Marsh* seems to underscore the conclusion in *Snyder* that "the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause."[38] How does a legislature create nondenominational and non-proselytizing standards? The individuals offering invocations in *Marsh* and *Snyder* were advised to use nondenominational and nonproselytizing prayers. However, each speaker was free to determine that standard individually. To do otherwise, Justice John Paul Stevens wrote in his dissent in *Marsh*, would inevitably involve the state in one religious debate after another, alternatively implicating the Free Exercise Clause and the Establishment Clause of the Constitution.[39]

If a legislative body decides to have an invocation, must the body review and accept or reject each invocation based on the content of the prayer in order to avoid conflicting with *Marsh*? When the body prohibits someone from reciting a prayer that is outside the ecumenical bounds of the prayers contemplated in *Marsh*, the body may actually be enforcing the principle in *Marsh*—that a legislative prayer not "advance" or "proselytize" but be "simply a tolerable acknowledgement of beliefs widely held among the people of this country."[40] However, if the body, in order to protect an assault on "beliefs widely held among the people" in their communities, prohibits a prayer that advances or proselytizes a position or view of God that is offensive to the majority of the members of the community, has it not "established" a state religion as defined by the Court in Establishment Clause jurisprudence?[41] Of course, the Court gets into some content-based analysis already whenever it applies the *Lemon* test, but it may be an entirely different matter to direct local legislative bodies to do the same thing.

In *Snyder*, the Tenth Circuit had a difficult time determining what the criteria should be for determining when a prayer "advances" or "proselytizes." The court found that Snyder's prayer fell "well outside" the genre of prayers approved in *Marsh* because it disparaged those who believe that legislative prayer is appropriate and that it "aggressively" proselytized "for his particular religious views" by asking for divine assistance to "guide" civic leaders to "the wisdom of separating church and state."[42] Ultimately the court ruled that because Snyder's prayer sought "to convert his audience to his beliefs," his prayer was proselytizing and therefore that the city council had the right to ban it, as it was the kind of prayer that would run afoul of *Marsh* and the Establishment Clause.[43] On the other hand, the Supreme Court, in *Marsh*, implicitly approved of legislative prayers that explicitly stated that our nation and its leaders "can be saved only by becoming permeated with the spirit of Christ."[44] The prayers that the Court ruled were permissible in *Marsh* and in the U.S. Congress were filled with sectarian references and implorations to convert their audiences into true believers or at least to a Christian way of thinking.[45]

It is interesting to note that the court could have taken an entirely different route in upholding the decision of the city council not to allow Snyder to recite his

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

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

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

37. *Id.*, n.10.

38. *Id.*

39. *Marsh*, 463 U.S. at 819 (Stevens details how an attempt by the state to fashion a "non-sectarian" prayer would trouble both individuals who would have constitutional objections to any prayer formulated by an arm of government and individuals who would object on theological grounds to a limitation of their right to pray as their conscience dictates).

40. *Snyder*, 159 at 1234, *quoting Marsh*, 463 U.S. at 792.

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

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

43. *Id.*

44. 138 CONG. REC. S1515 (daily ed. Feb. 18, 1992) (prayer by congressional chaplain in the United States Congress).

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

"prayer." It is not a simple matter to determine when a prayer is actually a prayer and when it is, instead, a political speech aimed at provoking or raising issues of policy. In the case of Snyder's "prayer," the court would have been justified in ruling that it was not a prayer at all, but rather a political speech. Such a speech, the court could have found, would be inconsistent with the express secular purpose of the city council's reverence period. The council would then have the right to limit when and where a political speech can be given, according to free speech doctrine that allows certain kinds of speech to be regulated with time, place, and manner restrictions. This strategy would have steered the court and legislative bodies away from analyzing prayers for their tendencies to "advance" or "proselytize" and would keep legislative bodies away from the free-exercise questions that invariably are implicated by such a limitation. However, this approach is not without its problems. Although it avoids the task of determining when a prayer "advances" or "proselytizes" a certain religion, it saddles courts and legislative or deliberative bodies with the task of determining when a prayer is really a prayer. Such a task would be equally daunting and fraught with potential for abuse.

Special Concerns for School Boards

Does *Marsh* and its tolerance of the use of prayer apply to school boards? The answer is unclear and involves two broad issues. First, does *Marsh* apply to school boards at all? Perhaps, it can be argued, *Marsh* applies only to legislative bodies and school boards are not legislative bodies. Second, even if a school board is the type of body to which *Marsh* would apply, is the opening of a school board meeting with a prayer overruled nonetheless by the long line of cases prohibiting government-sponsored religious activity in the school setting?

Legislative versus Deliberative Bodies

In *Marsh*, the Court said, "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[46] Most courts have taken this language to mean that the decision in *Marsh* applies not only to invocations before *legislative* bodies but also to invocations that open the sessions of *deliberative* public bodies.[47] Other courts, in the context of public school board meetings, have taken a much more narrow view of the scope of *Marsh,* holding that *Marsh* is "clearly limited to the legislative setting."[48]

North Carolina school boards have characteristics of legislative bodies. They are composed of elected officials, and they make policy decisions that are broadly applicable to students and employees. On the other hand, North Carolina school boards do not have the authority to pass ordinances or to levy taxes. A court that did not want to apply *Marsh* to a school board could conclude that *Marsh* applies only to legislative bodies and that North Carolina school boards are not legislative bodies.

On the other hand, if North Carolina school boards are not *legislative* bodies, they are surely at least *deliberative* bodies. In one court's words, "to 'deliberate' is to examine, weigh and reflect upon the reasons for or against" a possible decision. "Deliberations thus connote not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision."[49] Using that broad definition, it is difficult not to categorize a school board as a deliberative body.

Thus *Marsh* may apply to school boards on the ground that they could be said to be legislative bodies. Or, if school boards are said *not* to be legislative bodies, *Marsh* may apply on the ground that school boards are deliberative bodies, and it could be said that *Marsh* applies to deliberative bodies.

The School Setting: A Special Case

Even if *Marsh* would otherwise apply to school boards, is the use of prayer to open a board meeting overruled by the long line of cases prohibiting government-sponsored religious activity in the school setting?

The Supreme Court and other federal courts, relying on a dual rationale, have consistently sustained virtually every challenge to government-sponsored religious

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

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

48. *See* Graham v. Central Sch. Dist., 608 F. Supp 531, 535 (S.D. Iowa 1985); Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 380 (6th Cir. 1999) ("the only public bodies other than legislatures to which the Court specifically refers are the United States Courts . . . and never again makes any mention of 'other deliberative public bodies'").

49. Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 40 (Cal. Ct. App. 1968).

expressions in public schools, including prayer.[50] First, they want to protect young, impressionable students who are compelled to attend public school from having to participate in what are essentially religious expressions couched in a public setting.[51] Second, they believe that because public schools are especially important to the maintenance of a democratic, pluralistic society, school officials should be particularly scrupulous in not entangling schools with religion.[52] The Supreme Court took the public school rationale one step further, in *Lee v. Weisman*, by holding that the participation of school officials in prayer in a public school setting outside of the classroom—in this case, a public school graduation ceremony—also violates the Establishment Clause.[53] The Court considered attendance at the ceremonies to be "obligatory" and thus coercive, but it ultimately held the prayers to be a violation of the Establishment Clause because "our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform."[54]

The conflicting spheres of Establishment Clause jurisprudence described above overlap at the public school board meeting. Should official prayers at these meetings be governed by the Supreme Court's opposition to government-sponsored religious activity in public schools as reflected in *Lee*? Or are these types of prayers the same as prayers of legislative or "other deliberative bodies," which the Court approved of in *Marsh*? The answer is not an easy one. Some school boards regularly invite students to attend meetings. Should the question turn on the presence of impressionable, young students at board meetings?

Two Recent Cases

Two recent cases reflect the difficulty courts have in applying *Marsh* to school board meetings. In the most recent case, *Coles v. Cleveland Board of Education*,[55] the Sixth Circuit had to choose between two clear strands of Establishment Clause jurisprudence: either apply the *Marsh* exception, as the defendants asked, or rely on *Lee* and thus apply the *Lemon* test to the question of prayer at local school board meetings. In *Coles*, the Sixth Circuit rejected the *Marsh* analysis, applied the *Lemon* test and held that invocations offered at public school board meetings violated the Establishment Clause. It noted that the Supreme Court has been very careful to prevent religion from creeping into the public school setting.[56] Unlike *Marsh*, which according to the Sixth Circuit is a historical anomaly, the Supreme Court's jurisprudence on religion in public schools is long, clear, and unwavering.[57] The *Coles* court concluded that the atmosphere at a school board meeting is more like the regular classroom environment than the environment of a legislature.

Just a year before *Coles*, a California district court, in *Bacus v. Palo Verde Unified School District Board of Education*, ruled the exact opposite way of *Coles*, holding that a public school board was a deliberative body and fell under the criteria established by *Marsh*.[58] The *Bacus* court focused on the duties of the school board, that the plaintiffs were adults, and that the number of children in attendance was small and children usually were accompanied by their parents on a voluntary basis.[59] Given that scenario, the *Bacus* court held that none of the dangers outlined by the Supreme Court in *Lee* were present and therefore that *Marsh* was controlling.

Praying for Guidance

It is difficult, in practical terms, to determine from these lines of cases exactly what a North Carolina school board may do legally when faced with the question of whether or not to begin its meetings with an invocation. As a guide, the concluding section of this article examines four examples of situations in which an invocation is said before a school board meeting and attempts to distill, from the case law, the appropriateness and the pitfalls of each approach.

Example 1: The Marsh *Model*

A school board has, every session without interruption for the past fifty years, hired a chaplain to begin each day's session with a nonsectarian prayer. The purpose of the prayer, according to the board, is to create a sense of solemnity of purpose before the beginning of each meeting.

Such a prayer clearly fits the *Marsh* model and is likely to be constitutional. It follows the facts of *Marsh*

50. *See Coles*, 171 F.3d 377.
51. *Id.*
52. *Id.*
53. 505 U.S. 577 (1992) (holding that where state officials direct the performance of a formal religious exercise at graduation ceremonies at public schools, the practice violates the Establishment Clause of the First Amendment).
54. *Id.* at 609 (Blackmun, J., concurring).
55. 171 F.3d 369 (1991).
56. *Id.* at 383.
57. *Id.* at 381–83.
58. *Bacus*, 11 F. Supp. 2d 1192, 1197 (1998).
59. *Id.*

closely: long history, secular purpose, paid clergy, prayers neither "advance" nor "proselytize." However, most North Carolina school boards *will not fit* such a model. We know of no North Carolina school board that has a paid chaplain or a long, unbroken history of opening its meetings with prayer.

Example 2: School Board Prayer

A new school board is elected. The members decide to begin each meeting with a prayer by a member of the local clergy. The board meets in the gym of the local school, and meetings are attended primarily by parents. However, students do occasionally attend meetings, to receive awards, to testify, or just to listen. Most of the time when they do attend, they come with their parents. The school board exercises all of its legislative and deliberative functions.

Is the school board acting constitutionally? The circuits are split. On one hand, it could be argued that *Marsh* applies because the board is a legislative or deliberative body. But it also could be argued that the Supreme Court's rationale in *Lee* applies: Schools serve a special function and should avoid entanglement in religion. In this scenario students will be present and the prayers will be delivered on public property. Yet any children in attendance are not required to be there, they come with their parents, and it seems less likely that they would be "swayed" by a prayer in this setting than by teacher-sponsored prayer in the classroom. It is nonetheless unclear what the court ultimately would decide to do in such a situation.

This scenario differs from *Marsh* on two grounds. First, the board becomes involved in the regular practice of choosing who is allowed to offer the invocation, and second, there is no long-standing history of opening their meetings with a prayer. Clearly these are important distinctions, but such a practice may still be constitutional if the court were to apply *Marsh* to this set of facts. The act of selecting a member of the clergy from the local community and the act of hiring a paid chaplain do not seem to be essentially different. In both cases, the body chooses who will be allowed to offer the prayer. In this scenario, as long as the board does not discriminate among religions (for example, inviting only Christian ministers and excluding other religious authorities from offering an invocation), this should not be a problem. It is unclear whether a school board would have to go so far as to set up a rotation that includes a representative of every congregation or organized religious group in town. And even though the local school board does not have a long history of opening its meetings with an invocation, the Court in *Marsh* focused primarily on the long history of invocations before public bodies in general in deciding that "prayer is deeply embedded in the history and tradition of the country."[60] Although a court may find that the lack of a "long unbroken history" is constitutionally problematic, given the Supreme Court's reliance on the history of legislative prayer in general in *Marsh*, this is unlikely to be a major issue.

Example 3: Voluntary Prayer

A school board had been selecting a member of the local clergy to offer an invocation before its meetings. Recently, however, concerns were raised that the board was not being inclusive enough in its selections, so now anyone who wants to "sign up" can offer an invocation. The board simply goes down the list and allows everyone who has signed up to have a turn. To avoid the likelihood of prayers becoming sectarian, the board has established prayer guidelines that outline what elements can and cannot be included in a prayer. After several particularly sectarian prayers were offered, the board, fearful of violating the law, began to ask those who had signed up to provide the board with a written copy of the prayer one day before the person is slated to say the prayer. On a few occasions, the board has asked individuals to tone down certain aspects of their prayers.

This type of situation closely fits that of the Utah case *Snyder*. According to the Tenth Circuit, such behavior would be constitutional. However, this example also illustrates some of the major difficulties with this type of prayer. First, there is probably no problem with allowing individuals to "sign up" for prayer per se. The problem comes when a board attempts to limit the content of the prayers. This school board in this situation is faced with a double-edged sword. On one hand, in order to comply with *Marsh*, the invocations offered at board meetings cannot "advance" or "proselytize." That means that guidelines and perhaps even screening are necessary to ensure that the prayers will be constitutionally protected. On the other hand, it is no easy task to decide when a prayer advances or proselytizes, and such an attempt invariably implicates both the Establishment Clause (by censoring what can and cannot be said in a prayer, a council deems certain religious ideas as acceptable and others as unacceptable, thus establishing a reli-

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

gion) and the Free Exercise Clause (by interfering with a citizen's religious practice). Such a practice is so fraught with constitutional pitfalls that it may be wise to avoid it altogether.

Example 4: School Board Members Offer the Prayers

The head of the school board begins each meeting by asking those who wish to do so to rise for an invocation (or for silent meditation), which is delivered by a particular member of the school board. The board member delivering the invocation determines the content of the prayer. A different board member offers a prayer at each meeting until everyone has had a turn.[61]

This situation is uniquely different from the one the Court faced in *Marsh.* Therefore it is possible that such a practice would be examined under the *Lemon* test instead of the *Marsh* exception. In this case both the law concerning the Establishment Clause and the rights of free speech are implicated. Even if the board gives no indication that it is in any way approving of or advancing one particular belief, the potential for abuse is there and would seem to implicate the Establishment Clause. Though such a practice may have a secular purpose, it may not have a secular effect. It is one thing to have a member of clergy who is unaffiliated with any government position offer the invocation and quite another to have a board member give the prayer. It is possible that, by delivering such a prayer, the board would convey the message that it is advancing a particular belief. Furthermore it could entangle the board member delivering the prayer in the practice of religion. On the other hand, the board could say that by having a secular board member rather than a minister deliver the invocation, it is demonstrating more strongly the secular nature of the opening prayer. A particular religion is not being endorsed because a certified representative of a particular religion is not giving the prayer. Finally, board members may have countervailing First Amendment free speech rights that ultimately would have to be balanced against any Establishment Clause question.

61. The facts of this case are similar to those of *Marsa v. Wernik* [430 A.2d 888, 889 (N.J. 1981)] (holding that the procedure followed, i.e., having a particular council member call for a silent meditation or deliver an invocation the content of which was selected by such council person did not violate the Establishment Clause).

Conclusion

Under *Marsh*, a legislature or other public deliberative body may have an official invocation given by a paid or unpaid clergy member without violating the Establishment Clause of the Constitution. Whether this general principle applies to school boards, however, is not clear. Some courts have held that the line of cases prohibiting prayer in public schools, like *Lee*, prohibits the saying of prayers at school board meetings. Other courts have held that *Marsh* applies to prayers said in the school board setting. If *Marsh* does not apply, school boards will have a difficult time passing the *Lemon* test. If *Marsh* does apply, school boards must still take steps to make sure that the prayers are constitutionally permissible. To keep from conflicting with the Constitution, official invocations offered during school board meetings must refrain from proselytizing or advancing a particular religion. Because of the difficulty of defining when a prayer is sectarian and when it proselytizes, it is extremely difficult to give concrete guidance on what sort of prayers would be acceptable and what sort of prayers would violate the Establishment Clause. Furthermore, any attempts by a school board to write a prayer or to censor the content of a prayer may violate a person's free exercise or free speech rights and would seem to unnecessarily entangle the body with functions normally carried out by religious bodies and individual citizens. ■