Establishment Clause Limitations on Local Government— The Constitutionality and Wisdom of Legislative Prayer

By Brian R. Herman



The Establishment Clause of the First Amendment has long been a guiding light in American jurisprudence. But despite the passage of more than 200 years, many questions remain open today about the role religion should play in society. These questions include the propriety of prayer in public forums. At the local government level across the country, many state and county legislatures, town councils, and school boards open with a form of prayer. Are these religious exercises proper under the First Amendment? Or, are public governmental prayers an establishment of religion forbidden by the Constitution?

This article will analyze the constitutional implications of legislative prayer at the local government level. It will review relevant decisions in order to formulate a clearer picture of what is constitutionally permitted. It will then conclude with a policy discussion arguing that legislative prayer stands on weak constitutional footing and that local governments should end the practice.

The First Amendment

In late 1789, Congress approved what is now the First Amendment for submission to the states for ratification, which occurred in December 1791. The Religion Clauses make up sixteen words of the Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] To understand its meaning, one must be familiar with the history which influenced the Founders. As the Supreme Court has made clear, history plays an important, if not decisive, role in First Amendment jurisprudence.[2]

By the late 1700's, England had maintained for more than two centuries a religious establishment in the form of the Anglican Church, controlled by the monarch.[3] Other faiths were generally prohibited or suppressed, giving Anglicans favor in matters of state.[4] Church attendance was mandatory and citizens were required to provide financial support.[5] The result of this establishment was civil war, strife and persecution, driving many early settlers to America.[6] Similar practices arose in various colonies but were eventually met with backlash, playing out most spectacularly in the fight over religious assessments in Virginia in 1785-1786, the immediate precedent for the First Amendment.[7]

The Virginia assessment controversy revolved around a bill proposed by Patrick Henry that would tax citizens of Virginia and direct their support to designated Christian teachers.[8] Strong opposition to the assessment was led by James Madison.[9] In 1785, Madison published his *Memorial and Remonstrance Against Religious Assessments* ("Memorial").[10] The Memorial set forth a number of arguments against religious assessments. These continue to live in the separationist view underlying the First Amendment.[11] First, religion is a matter of each person's conscience and cannot be created or harmonized by force; it is not a matter for civil society or for legislatures.[12] Second, establishing taxes in support of religion is an initial step on a slippery slope toward the establishment of one sect against all others, a "first experiment on our liberties."[13] Third, every man is entitled to the free exercise of his religious

beliefs.[14] Madison's other arguments include that assessments would in fact weaken religion by making it dependent on the state, and perhaps most importantly, that religious establishments only produce negative outcomes – ignorance, superstition, bigotry and conflict.[15]

The immediate effect of Madison's Memorial was the defeat of the assessment bill.[16] It also resulted in Virginia's passage of Thomas Jefferson's "*Bill for Establishing Religious Freedom*" which proscribed compulsory support of religion and advocated free religious exercise.[17] When the First Congress began to debate the Bill of Rights only a few years later, these concerns influenced the drafters.[18] The end product – the First Amendment to the Constitution – reflects a foundational concern about personal free exercise and religious conscience, as well as the protection of religious diversity in America by the prevention of a predominant religion. Today, the First Amendment is the Founders' legacy to a thriving nation of republican government disconnected from religious establishment.

Incorporation To The States

By its terms, the First Amendment was a limitation on the federal government only, stating that "Congress shall make no law . . . ."[19] The Fourteenth Amendment expanded that reach, providing that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[20] Two important twentieth century Supreme Court cases demonstrate that incorporation has made the First Amendment, including the religion clauses, applicable to the states.

Murdock v. Pennsylvania assessed the constitutionality of applying a city licensing ordinance to the evangelizing activities of Jehovah's Witnesses.[21] The Court noted, almost in passing, that the Fourteenth Amendment makes the First Amendment applicable to the states; there was no further analysis of the issue.[22] Shortly afterwards, in a student-aid case under the Establishment Clause, the Court cited *Murdock* as it summarily noted the application of the First Amendment to the states: "The First Amendment, as made applicable to the states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion . . . .'"[23]

In a more recent case, the Court reaffirmed First Amendment incorporation. Rebuffing a district court's claim that the First Amendment did not prevent Alabama from establishing a state religion, the Court underscored the fact that states have no more power to infringe individual rights protected by the First Amendment than does Congress, emphasizing this foundational part of constitutional jurisprudence.[24]

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The Establishment Clause Framework: *Lemon v Kurtzman*

In *Lemon v. Kurtzman*, the Supreme Court attempted to reconcile a number of earlier Establishment Clause cases and announced a three-part analysis which has come to be known as the "*Lemon* test."[25] Although in more recent years its scope has in some measure been trimmed by the Court, *Lemon's* role in Establishment Clause cases is still seminal.

Lemon is a distillation of principles. Three characteristics present possible *Lemon* Establishment Clause problems: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[26] Under the three-pronged *Lemon* test, a statute: 1) must have a secular purpose; 2) must not have the primary or principal effect of advancing or inhibiting religion; and 3) must not foster excessive government entanglement with religion.[27] It is important to note that, while the Court states that Establishment Clause analysis "must begin" by measuring against these criteria, it does not explicitly indicate this is the singular standard.[28]

In *Lemon*, Pennsylvania and Rhode Island had similar statutes providing aid or reimbursement to private religious schools for the teaching of secular subjects, with numerous restrictions and oversight requirements to ensure no such aid was diverted to religious purposes.[29] The Court credited the schemes with legitimately promoting enhancement of secular education, thereby satisfying the first prong of the *Lemon* test.[30] However, the arrangement failed the third prong, which prohibits "excessive entanglement" of government and religion.

In order to ensure that teachers did not introduce religious subject matter into the secular classes, the states had created in-depth monitoring programs. This produced an impermissible melding: continuing state surveillance of the religious content of school curriculum. This was excessive government entanglement and unconstitutional.[31]

The result was a lasting framework for Establishment Clause analysis. The three-part *Lemon* test could be applied to legislative prayer and a determination made as to its constitutionality. But other developments altered the path. The first was a new test, or perhaps a new gloss on *Lemon* itself, stemming from two subsequent Supreme Court cases:

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Lynch v. Donnelly and *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*.

In *Lynch*, the Court dealt with an Establishment Clause challenge to a Christmas display that included a crèche, erected in a city's shopping district.[32] The Court upheld the display and found it did not violate *Lemon*.[33] However, Justice O'Connor's concurrence introduced a new (or altered) analysis, the endorsement test.[34] To her, the Establishment Clause's purpose was to prohibit "government from making adherence to religion relevant in any way to a person's standing in the political community."[35] Excessive entanglement, which interferes with independence, can create favored access to government, and draws political lines based on religious identification.[36] In addition, the First Amendment is violated by governmental endorsement or disapproval of religion, which sends a message to those not part of that religion that they are outsiders, while relaying a message to believers that they are favored insiders.[37] Justice O'Connor wrote that focusing on these principles reinforced *Lemon* as an analytical tool.[38]

In practice, Justice O'Connor called for the application of her "endorsement principle" to the first two prongs of *Lemon*.[39] This allowed for an analysis of the subjective and objective components of the government action at issue.[40] Under the purpose prong, the test should be whether the government's purpose was to endorse or disapprove religion, while the effect prong asked whether the action conveys a message of endorsement or disapproval. A "yes" to either question would invalidate the law.[41] Using her new framework, Justice O'Connor voted to uphold the display.[42] While this was only a concurrence joined by no other justices, the next case solidified the grounding of the "endorsement" test in the Court's Establishment Clause jurisprudence.

County of Allegheny was also a holiday display case.[43] A majority of the *Allegheny* Court joined Justice Blackmun's opinion stating that the endorsement focus was a refinement of *Lemon* analysis.[44] The Court reaffirmed the foundation of *Lemon*, with a particular focus on whether the action has a purpose or effect of endorsing religion; it held that at a minimum the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community."[45] In application then, a majority of the Supreme Court has supported the continuance of *Lemon* with an "endorsement" refinement.

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Local Government and Legislative Prayer

While *Lemon*, as amended, might appear to provide a sufficient framework for analyzing legislative prayer—whether in state legislatures, county legislatures, town halls or school boards—the Court has provided specialized guidance on the subject. *Marsh v. Chambers* considered Nebraska's practice of selecting and paying a chaplain to provide a prayer for the opening of state legislative sessions.[46] The same chaplain (and thus the same denomination) had been continuously selected for the eighteen years preceding the Court's opinion.[47] This practice was challenged by a Nebraska state legislator as a violation of the Establishment Clause.[48] In an opinion by Chief Justice Burger – the author of *Lemon* – the Court upheld Nebraska's legislative prayer.[49]

Rather than engage in *Lemon* analysis, the Court provided a long description of the history of legislative prayer in the United States.[50] It noted that opening sessions of deliberative public bodies with prayer is an integral part of the nation's history and tradition, even occurring at the opening of the Supreme Court.[51] One of the earliest actions taken by the first Congress was to authorize and appoint chaplains for the House and Senate;[52] it was only three days thereafter that Congress approved the First Amendment.[53] The Court reasoned that it would be illogical for the men who approved the First Amendment to intend that it prohibit something they had just authorized, while at the same time continuing with that practice.[54] These original legislators could not have viewed the practice of paid legislative chaplains delivering opening prayers as violating the First Amendment.[55]

The Court credited the actions of the First Congress as highly persuasive evidence of the meaning of the First Amendment and found that the longstanding practice was conclusive support that legislative prayer is not forbidden by the Establishment Clause.[56] Part of the acceptability of the prayer, in the eyes of the founding generation and the Court, came from the lack of proselytizing and the view by the First Congress that prayer did not symbolically place a seal of approval on one religious view.[57] The Court concluded that

> [I]nvok[ing] 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.[58]

This point seems to be a contortion by the Court to uphold the longstanding practice. Divine guidance is an inherent part of religion. Prayer brings a religious element into the legislative session and

establishes it within the deliberative body. The Court's claim that a religious leader continuously praying at the opening of a legislative session is not an "establishment" of religion deserves some skepticism.

The Court's final inquiry in *Marsh* was whether any specific characteristics of Nebraska's prayer system violated the generally-approved historical practice.[59] It found that the long tenure of the same chaplain of the same denomination and the public financing of that chaplain was not problematic.[60] It also said that analyzing the content of the prayer was an unacceptable judicial inquiry where there is no indication the prayer had been used to proselytize or advance any one faith or disparage any other.[61] This elaborated upon the analytical framework – beyond not proselytizing, acceptable prayers should not raise up or diminish any specific faith.

Justice Brennan dissented, joined by Justice Marshall.[62] Brennan pointed to the fact that the Court did not use the *Lemon* analysis. It could not, he said, because such an analysis would require the Court to strike down the practice of legislative prayer as violating the Establishment Clause.[63] Prayer, according to Justice Brennan, was self-evidently religious, not secular.[64] Invoking the divine guidance the Court spoke of was simply a religious act.[65] Any secular purpose, such as bringing the legislature to order and bringing its attention to the seriousness of its duty, could be done in a non-religious fashion.[66] Furthermore, legislative prayer improperly linked religious observance to the "power and prestige of the State."[67] Finally, choosing the chaplain and assuring the suitability of the prayers was excessive government entanglement.[68]

Justice Brennan's dissent is important to the issue of legislative prayer. It provides a perspective contrary to the *Marsh* Court's circumstantial and historical decision. Brennan used Jefferson's "wall of separation" analogy and would place something as religious as prayer beyond the power of government.[69]

While *Marsh* could be read to provide a general exemption from Establishment Clause jurisprudence for prayers opening legislative sessions, lower court litigation on the issue shows that *Marsh* is neither straightforward nor absolute. A more sensible reading of *Marsh* limits acceptable legislative prayers to those which are non-proselytizing and do not draw lines differentiating faiths.[70] This should disfavor denominational or sectarian prayer. In *County of Allegheny v. American Civil Liberties Union*, the Court later reflected upon *Marsh* and the role of history, indicating the case was not as broad as some would read it:

> However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.[71]

It rejected any sweeping or broad interpretations of *Marsh*, stating that even history does not justify prayers that affiliate the government with one specific faith or belief, noting that the prayer in *Marsh* lacked any references to Jesus or Christ.[72] Thus the Court reinforced that constitutionally acceptable legislative prayer under the *Marsh* exception must be non-denominational.

To see further the contours of the exception, a review of the subsequent lower level cases addressing legislative prayer is informative. It provides factual settings for comparison and a background against which *Marsh* and relevant policy considerations can be judged.

In *Wynne v. Town of Great Falls*, the town council opened all meetings with invocations and prayers in the name of Jesus, Jesus Christ, Christ or Savior. The town council conceded that its prayer practice violated *Lemon* but argued that it fell within *Marsh*'s legislative prayer exception.[73] However, the Fourth Circuit focused on *Marsh* and *Allegheny*'s limitation to nonsectarian prayer, noting that the *Marsh* Court emphasized how the Nebraska prayer did not proselytize or advance any one faith.[74] The *Wynne* decision held that a legislative prayer in the name of Jesus Christ is sectarian and exploits the opportunity to promote one religion over others, violating *Marsh* and the Constitution.[75]

Conversely, in *Simpson v. Chesterfield County Board of Supervisors*, where a county board maintained a prayer policy which tracked the nonsectarian language of *Marsh* and allowed Judeo-Christian prayers given by invited clergy of congregations in the county, the policy was permissible under *Marsh*.[76] Because the county did not insist on invoking Jesus' name and there was a wide variety of prayers, the invocations were constitutional.[77]

The Fourth Circuit opinion in *Simpson* may reflect a broad view of *Marsh* and its requirement of nondenominational prayers. The prayers were upheld despite occasional references to specific faiths, such as "the G-d of Abraham, of Moses, Jesus, and Mohammad," because the rotation of prayers given by different religious leaders served to defeat any possible proselytization.[78] That is, occasional sectarian references did not make the prayer policy unconstitutional because there was no advancement of one faith in relation to another.

One problem with the holding in *Simpson* is that the plaintiff was a Wicca who saw all Judeo-Christian prayers as sectarian because they were not so general as to incorporate her spiritual beliefs.[79] Whereas the court viewed general Judeo-Christian prayers given by Jewish, Christian and Muslim leaders as nonsectarian,[80] those not part of that heritage would understandably see the prayers as sectarian. Yet the Fourth Circuit found specific prayers acceptable.[81] The fact that the *Simpson* court held a prayer to be "nonsectarian" over the objections of a member of a different faith raises various interpretations: a narrow-mindedness that generalizes Judeo-Christian prayers as "nonsectarian;" a misunderstanding of the Supreme Court's requirement for nonsectarian prayers; or the fact that "nonsectarian prayers" are inherently impossible and thus *Marsh* is unsound and inconsistent with the Establishment Clause.

The Fourth Circuit itself provided a refinement to *Simpson,* however. A similar prayer policy, where congregations of the county were invited to give invocations at county board of commissioners meetings, was found unconstitutional because it empirically resulted in overwhelmingly sectarian prayers.[82] Prayers were offered by local religious leaders to start meetings, but almost every prayer closed with a phrase referencing Jesus and a specific tenet of

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Christianity such as the Virgin Birth.[83] Even after the enactment of a formal policy that was facially neutral, the prayers continued to display a preference for Christianity.[84] Emphasizing that prayer still has a generally acceptable place in legislative and other public meetings, the Fourth Circuit strove to show that it is based upon the nonsectarian nature of such prayers.[85]

That nonsectarian requirement is not undermined by infrequent, isolated references to specific deities; it is undermined by repeated references to tenets of Christianity which imply government weight behind the religion.[86] This is not cured by the fact that the prayers are given by religious leaders rather than board members, nor is it helped by a neutral policy which does not discourage sectarian prayers and results in a strongly sectarian factual record.[87]

Where the Lord's Prayer was the only prayer recited at the beginning of a county council's meetings for six years, it likely violated the Establishment Clause as an unconstitutional promotion of Christianity.[88] Specifically, the council president stood, faced the audience, and recited the Lord's Prayer, while the audience also stood and bowed its heads.[89] Finding that the appropriate analysis was the *Marsh-Allegheny* formulation of whether the prayer creates an unconstitutional affiliation with one faith,[90] the court granted plaintiffs' preliminary injunction against the prayer.[91] But, where a prayer policy invited all religious leaders of the community to give invocations, the list of eligible clergy included multiple faiths, and the policy required that no invocations proselytize or advance a single faith, a preliminary injunction was denied, despite references to specific aspects of the Christian faith.[92]

Some circuits have rejected a strict sectarian line-drawing approach to legislative prayer.[93] The Second Circuit advocates a totality of the circumstances test to determine whether a reasonable observer would believe that the prayer practice conveys the view that the government favors or disfavors certain religious beliefs.[94] This has overtones of Justice O'Connor's endorsement test. The question, according to the Second Circuit, is whether the governmental body, by its prayer practice, has established particular religious beliefs as more acceptable.[95] It focuses on *Marsh*'s prohibition of religious advancement and affiliation, saying that the sectarian analysis runs into the impermissible problem of establishing a theistic civic religion.[96] Also, the Second Circuit believes the sectarian test would wrongly condemn a single denominational prayer or a series of denominational prayers from different sects, neither of which it believes runs into the advancement/affiliation concern.[97] As such, it propounds a fact-intensive and case-specific use of "legal judgment," which the court acknowledges provides little help to municipalities going forward.[98]

Courts will bar prayers that proselytize, advance one faith, dismiss another, or affiliate the government with a particular denomination. These characteristics are the crucial focus. Neutral policies that proactively lead to nonsectarian prayers (or a wide diversity of prayers) and the avoidance of proselytization or advancement would be a wise approach for local legislatures.

In that case, *Galloway v. Town of Greece*, the town invited prayers by local clergy, almost all of whom were Christian.[99] For an eight year period, the town's list from which clergy were invited contained only Christian congregations.[100] Two-thirds of the prayers delivered contained references to Jesus or other specific aspects of Christianity such as the Trinity.[101] Based on the selection process's lack of neutrality among creeds and the repeated Christian references, the Second Circuit found the practice conveyed to a reasonable observer that the town had affiliated with Christianity.[102]

The Ninth Circuit is another such circuit. In *Rubin v.City of Lancaster* it faced the common fact pattern of clergy from the community being invited to give prayers.[103] Similar to the Fourth Circuit, it rejected the argument that a single sectarian reference stemming from such a policy violates *Marsh* and the First Amendment.[104] But it took the broader view of the Second Circuit that nonsectarian prayers are not required by the Constitution and stand on the same footing with sectarian prayer; the measuring stick is proselytization, advancement or disparagement.[105] Thus the Ninth Circuit upheld the challenged prayer practice because a single denominational prayer (in that case in the name of Jesus), does not create the impermissible affiliation barred by the Amendment.[106]

These cases present an arguably clear picture of the status of legislative prayer for local governments. Generally, legislative prayer is constitutionally acceptable. Courts have embraced the role that prayer has played in America's history and continues to play today. Courts will bar prayers that proselytize, advance one faith, dismiss another, or affiliate the government with a particular denomination. These characteristics are the crucial focus. Neutral policies that proactively lead to nonsectarian prayers (or a wide diversity of prayers) and the avoidance of proselytization or advancement would be a wise approach for local legislatures. Prayers that continue to espouse specific deities or tenets of one particular faith will be impermissible violations of the Constitution. Local legislatures can continue to invoke divine guidance and solemnize their activities by prayers that do not

advance, proselytize or affiliate with a given faith.

School Board Prayer

One unique species of local government prayer may require different analysis. Prayer by school boards might need to be treated differently than other legislative prayer because of the school element and connection to school-age children, which courts have typically treated with greater caution in Establishment Clause cases.[107] *Lee v. Weisman* is a relatively recent school prayer case. [108] There, principals in public schools were permitted to invite members of the clergy to deliver benedictions and invocations at middle and high school graduations. The school provided pamphlets to clergy on guidelines for their prayers.[109] The Supreme Court, per Justice Kennedy, described the case as one where state officials directed the performance of a formal religious exercise, which, although technically voluntary, was in reality obligatory.[110] It found the prayers unconstitutional, as the school, and hence government, involvement was "pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school," which violated well-settled principles of the Establishment Clause.[111]

The government involvement with which the Court took issue was the principal's power to decide whether to have a prayer, who would give it, and what the tenor of the content would be.[112] Religious practice or doctrine, even of a civic variety, is not to be prescribed by the government.[113] The First Amendment provides that no creeds are to be favored.[114] The school's supervision along with peer involvement placed coercive pressure on other students to participate, which was impermissible.[115]

Lee was distinguishable from *Marsh*, according to the Court, because the opening sessions of legislatures where adults are free to leave or enter as they choose is quite different from a school graduation ceremony which all students must essentially attend.[116] In light of that distinction, where do school board prayers fall within the Court's Establishment Clause jurisprudence? The Sixth Circuit has held that school board meetings are in the same class as other public school activities because they take place on school property and are "intertwined" with the public schools.[117] It said that the Supreme Court's school prayer cases make clear that the coercive environment of a school classroom is not the only problematic element in school prayer cases.[118] There is a problem where the very institution society has designed to foster democratic and pluralistic values intermingles with religion.[119] Both coercion of "impressionable young minds" *and* endorsement of religion in the public school context are prohibited.[120] The court's holding was supported by the factual realities it noted: the meetings occurred in school buildings, were conducted by school officials, were attended regularly by participating students, and discussed school matters.[121] This sufficiently aligned the case with school prayer cases, not *Marsh*. As a result, the school board prayer required analysis under *Lemon*.[122] The Sixth Circuit felt that solemnization could have occurred without prayer. All three *Lemon* test elements were violated, and the court granted summary judgment for the plaintiffs.[123]

The Third Circuit reached the same result in *Doe v. Indian River School District*. It highlighted the Supreme Court's focus on the protection of young students from the coercion of endorsed or sponsored religion. Because it found *Marsh* to be ill-suited to these concerns, the Third Circuit held that *Lee* and the school prayer cases were the appropriate framework for school board prayer.[124]

It too found the school board prayer to be unconstitutional under the *Lemon* test.[125] Regardless of any alleged secular purpose, the primary effect of opening school board meetings with prayer was to advance religion.[126] The result is that the legislative exception of *Marsh* and its progeny does not extend to cover school board prayer cases. While deliberative public bodies such as town or county councils may begin with prayers that do not advance or denigrate a specific faith or proselytize, school boards are contextually different and do not have the same leeway. There has been no Supreme Court case ruling school board prayers unconstitutional per se, but at the very least they are standing on infirm constitutional ground. It would be extremely difficult to imagine a school board prayer that would survive the secular purpose, effects, and entanglement prongs of *Lemon*. As such, the cautious approach for local governments would be to section off school board prayer as impermissible under the First Amendment, while leaving other legislative prayer as permissible within the bounds of *Marsh*.

Moving From "Can" To "Should": A Policy Discussion

Current jurisprudence shows that within certain boundaries, legislative prayer outside of public school boards is constitutionally permissible. But should its use continue? Is *Marsh* even a sound constitutional decision? The answer is no. And even if *Marsh* is accepted, what approach should public deliberative bodies take in today's world? In light of the ever-increasing social and religious diversity of the United States and with a view toward the true purposes of the framers of the First Amendment, public bodies should avoid the use of legislative prayer.

Marsh is wrong in light of the First Amendment and the Court's earlier jurisprudence. The First Amendment prevents Congress from making a law "respecting an establishment of religion."[127] "Respecting" is defined as "considering" or "concerning."[128] To "establish" can mean to "set up" or "bring about."[129] As a textual matter then, the First Amendment prohibits laws that consider or concern the setting up or bringing about of religion. Prayer is often the central ritual act of religion, invoking divinity and often taking place in houses of worship. It cannot be argued with seriousness that laws or policies creating legislative prayer at different levels of local government are not laws concerning the setting up of religion. Prayer is fundamentally religious, and laws setting forth prayer policies in public deliberative bodies are an establishment of religion.

While the continuing historical practice the *Marsh* Court cites is strong evidence, as is the temporal connection between the passage of the First Amend-

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ment and laws appointing congressional chaplains, the Court has itself acknowledged the fact that "historical patterns cannot justify contemporary violations of constitutional guarantees . . . ."[130] The First Amendment stands as a barrier to government combination with religious institutions.[131] By choosing prayer, government is involved with religion and creates divisiveness, violating the Amendment, history notwithstanding.

Besides failing a textual and purpose-oriented analysis of the First Amendment, *Marsh* also fails the Court's earlier Establishment Clause test, *Lemon*.[132] *Lemon* requires a secular purpose, that the action involved not have the primary effect of advancing or inhibiting religion, and that there be no excessive government entanglement with religion.[133] Justice Brennan's dissent in *Marsh* makes clear how legislative prayer fails all three prongs.[134] The purpose of such prayer is "preeminently religious," as invoking divine guidance is "nothing but a religious act."[135] Because legislative prayer places indirect coercive pressure upon minorities to conform and because, even more importantly, it links religious belief to the "power and prestige of the State," legislative prayer's primary effect is to advance religion.[136] Finally, there is excessive entanglement in both the selection of suitable clergy to deliver prayers and in the "divisive political potential" of passing laws regarding prayer.[137]

Even accepting *Marsh*, *arguendo*, its foundation may no longer be valid. The Court said the legislative prayer exception reflected a part of our social fabric, "a tolerable acknowledgment of beliefs widely held among the people of this country."[138] Perhaps that is no longer the case. The Pew Forum U.S. Religious Landscape Survey concluded that religious affiliation is "both very diverse and extremely fluid."[139] 16.1% of all Americans are unaffiliated with any faith, while one-in-four people ages 18-29 are not affiliated with any particular religion.[140] The unaffiliated category experienced the greatest rate of growth.[141] Catholicism experienced the greatest loss in affiliation and only 51% of Americans continue to identify as Protestant.[142] This indicates an increasing lack of religiosity among Americans and can perhaps imply a growing secularization. Moreover, the survey indicates at least eight distinct religions in its listing, such as Christianity or Buddhism, along with "other" religions, and numerous sects within each designated religion, such as Sunni and Shia Muslims.[143]

The picture this paints is one of exceeding religious diversity. What it means is that it may no longer be true that legislative prayer reflects tolerable acknowledgement of widely held beliefs. Legislative prayer then runs into Justice O'Connor's endorsement concerns.[144] To the many believers who do not subscribe to a Judeo-Christian faith, opening legislative sessions with "nonsectarian" prayers in the Judeo-Christian tradition would send a message that they are outsiders, disfavored in the political community based upon their religion. That is unacceptable under the First Amendment. America's religious diversity emphasizes that there may truly be no such thing as a nonsectarian prayer. Thus as the United States continues to experience religious affiliation shifts, it may be that the Supreme Court could reconsider *Marsh* and hold that there is no principled way to continue a legislative prayer practice in light of the endorsement message that it sends to different religious adherents. Alternatively, courts may view the religious diversity and find that legislative prayers fail *Marsh* because they advance or put down certain faiths, even if they are only generically Judeo-Christian.

Local governments would do well to heed the increasing religious diversity of America and note the tension and incompatibility between an amendment designed to create separation between church and state and a practice of religion not followed by all. Part of the reason there is so much lower-level litigation over local government prayers is because those suing feel like outsiders. They are Wiccans facing a Judeo-Christian prayer[145] or non-Christians facing distinctly Christian invocations.[146] The Establishment Clause stands as a guardian against such religious divisiveness in society.[147]

Conclusion

As a matter of legal advice to a local government reviewing its legislative prayer policy or considering the adoption of one, such prayer is constitutional under the First Amendment pursuant to *Marsh v. Chambers*. This prayer must not advance one faith or put down another, nor can it proselytize. A generic and nondenominational invocation would be a proper prayer under current constitutional jurisprudence. Prayers consistently invoking tenets of Christianity would likely be impermissible.

Besides the legal question however, local governments must think carefully about the political and social implications of legislative prayer. Prayer creates favored and disfavored persons depending on their religion. It places religion in the sphere of government. Crafting an appropriately nondenominational prayer may be next to impossible, inviting litigation because of the wide and increasing religious diversity of America. Local governments should move away from the use of prayer in legislative sessions. This would restore the proper balance of our constitutional design, one that Thomas Jefferson once described as placing religion "solely between Man & his G-d... building a wall of separation between Church & State."[148]

Notes

1. U.S. Const. amend. I.
2. *E.g.,* Everson v. Bd. of Educ., 330 U.S. 1 (1947).
3. Michael W. McConnell, John H. Garvey & Thomas C. Berg, Religion and the Constitution 15 (3d ed. 2011).
4. *Id.* at 15-17.
5. *Id.* at 17.
6. *Everson,* 330 U.S. at 8-9.
7. *Id.* at 11-12.
8. McConnell, *supra note* 3, at 48-49.
9. *Id.* at 50.
10. Id. at 51.
11. *Id.*
12. *Id.*
13. *Id.* at 52.
14. *Id.*
15. *Id.* at 52-53.
16. *Id.* at 50.
17. *Id.* at 56-57.
18. *Id.* at 58-59.
19. U.S. Const. amend. I.
20. U.S. Const. amend. XIV, § 1.

21. Murdock v. Pennsylvania, 319 U.S. 105(1943).
22. *Id.* at 108.
23. *Everson,* 330 U.S. at 8 (citation omitted).
24. Wallace v. Jaffree, 472 U.S. 38, 48-49 (1985).
25. Lemon v. Kurtzman, 403 U.S. 602 (1971).
26. *Id.*, (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
27. *Lemon*, 403 U.S. at 612-13.
28. *Id.* at 612.
29. *Id.* at 607-10.
30. *Id.* at 613.
31. *Id.* at 619-20.
32. Lynch v. Donnelly, 465 U.S. 668, 671 (1984).
33. *See id.* at 685.
34. *Id.* at 687-88.
35. *Id.* at 687.
36. *Id.* at 688.
37. *Id.*
38. *Id.* at 689.
39. *Id.* at 690.
40. *Id.*
41. *Id.* at 690.
42. *Id.* at 694.
43. Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 578-79 (1989).
44. *Id.* at 592.
45. *Id.* at 592-94 (internal quotation marks and citations omitted).
46. Marsh v. Chambers, 463 U.S. 783, 784-85 (1983).
47. *See id.*
48. *Id.* at 785.
49. *Marsh,* 463 U.S. at 784-86; *Lemon,* 403 U.S. at 606.
50. *See Marsh*, 463 U.S. at 786-92.
51. *Id.* at 786.
52. *Id.* at 787-88.
53. *Id.* at 788.
54. *Id.*
55. *Id.*
56. *Id.* at 790-91.
57. *Id.* at 792.
58. *Id.*
59. *Id.* at 792-93.
60. *Id.* at 793-94.
61. *Id. at* 794-95.
62. *Id.* at 795.
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64. *Id.* at 797.
65. *Id.*
66. *Id.*
67. *Id.* at 798.
68. *Id.* at 798-99.
69. *See id.* at 802-03.
70. *See id.* at 794-95.
71. *Cnty. of Allegheny,* 492 U.S. at 603.
72. *Id.*
73. *Id.* at 302 n.8.
74. *Id.* at 297.
75. *Id.* at 298-300.
76. Simpson v. Chesterfield Cnty. Bd. of Supervisors, 404 F.3d 277, 278-79 (4th Cir. 2005).
77. *Id.* at 283-84.
78. *See id.* at 284.
79. *See id.* at 279-80.
80. *See id.* at 279.
81. *Id.* at 284.
82. Joyner v. Forsyth Cnty, 653 F.3d 341, 343, 350 (4th Cir. 2011).
83. *Id.* at 342.
84. *Id.* at 344.
85. *Id.* at 346-47.
86. *Id.* at 349.
87. *Id.* at 350, 353-54.
88. Mullin v. Sussex Cnty., 861 F. Supp. 2d 411, 426-27 (D. Del. 2012).
89. *Id.* at 415-16.
90. *Id.* at 420.
91. *Id.* at 429.
92. *See* Jones v. Hamilton Cnty., 2012 WL 3763963, at *1-2, 17 (E.D. Tenn. 2012).
93. Galloway v. Town of Greece, 681 F.3d 20, 29 (2d Cir. 2012).
94. *Galloway,* 681 F.3d at 29.
95. *Id.* at 30.
96. *Id.* at 28-29.
97. *Id.* at 29.
98. *Id.* at 30.
99. *Id.* at 23.
100. *Id.* at 24.
101. *Id.*
102. *Id.* at 30-33.
103. Rubin v. City of Lancaster, 710 F.3d at 1087, at 1089-90 (9th Cir. 2013).
104. *See id.* at 1092-95.
105. *Id.* at 1094.
106. *Id.* at 1095.
107. *See, e.g.,* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963); *see also* Lee v. Weisman, 505 U.S. 577, 592 (1992).
108. *Lee,* 505 U.S at 580.
109. *Id.* at 581.
110. *Id.* at 586.
111. *Id.* at 587.
112. *Id.* at 587-88.
113. *See id. at* 589.
114. *Id.* at 590.
115. *See id.* at 593.
116. *Id.* at 596-97.
117. Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 377 (6th Cir. 1999).
118. *Id.* at 378.
119. *Id.*
120. *Id.* at 379.
121. *Id.*
122. *Id.* at 383.
123. *Id.* at 385.
124. *Doe,* 653 F.3d at 275, 278-82.
125. *Id.* at 290.
126. *Id.* at 283-84.
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