RECENT CASES

FIRST AMENDMENT — ESTABLISHMENT CLAUSE — FOURTH CIRCUIT HOLDS THAT COUNTY COMMISSIONERS' PRACTICE OF OFFERING SECTARIAN PRAYERS AT PUBLIC MEETINGS IS UNCONSTITUTIONAL. — *Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (en banc).

The United States has a tradition of legislative prayer[1] dating back to before the Founding.[2] Despite this history, the Supreme Court has dealt directly with the constitutionality of the practice only twice: in *Marsh v. Chambers*,[3] which permitted chaplains paid by legislatures to deliver opening invocations, and in *Town of Greece v. Galloway*,[4] which clarified that sectarian legislative prayer is not per se unconstitutional.[5] These cases have established within broader Establishment Clause law a special jurisprudence of legislative prayer, one that is based almost entirely on historical practice and tradition rather than standard establishment doctrine.[6] Recently, in *Lund v. Rowan County*,[7] the Fourth Circuit struck down as an Establishment Clause violation a county Board of Commissioners' practice of opening its public sessions with sectarian prayers offered solely by the elected commissioners.[8] The *Lund* court's difficulty in analyzing a prayer practice disanalogous to those in *Marsh* and *Town of Greece* illustrates the limits of the Supreme Court's special legislative prayer jurisprudence, and demonstrates the need for greater alignment with standard Establishment Clause tests.

The five-member Board of Commissioners of Rowan County, North Carolina, had a practice of opening each bimonthly public meeting with an invocation.[9] The prayers were given exclusively by the commis-

---

[1] "Legislative prayer" refers to the practice of opening legislative sessions, whether federal, state, or local, with prayer.

[2] Marsh v. Chambers, 463 U.S. 783, 786 (1983).

[3] 463 U.S. 783.

[4] 134 S. Ct. 1811 (2014).

[5] *Id.* at 1828. "Sectarian prayer" is prayer that "uses ideas or images identified with a particular religion." Lee v. Weisman, 505 U.S. 577, 588 (1992). Before *Town of Greece*, there were a few instances in which the Court disapproved of sectarian legislative prayer in dicta. *See, e.g.*, *id.* at 589; County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989) ("[I]n *Marsh* itself, the Court recognized that not even the 'unique history' of legislative prayer can justify . . . 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.'" (citations omitted)). However, *Marsh* and *Town of Greece* are the only Supreme Court cases to squarely address legislative prayer, and *Town of Greece* nullified any precedential value the dicta may have had.

[6] *See* Simpson v. Chesterfield Cty. Bd. of Supervisors, 404 F.3d 276, 281 (4th Cir. 2005).

[7] 863 F.3d 268 (4th Cir. 2017) (en banc).

[8] *Id.* at 272.

[9] *Id.*

sioners themselves, all of whom were Protestant.[10] The commissioner giving the prayer would typically ask attendees to stand and pray with him,[11] and the Pledge of Allegiance and county business would follow immediately after the prayer.[12] During the five-year period before the case, ninety-seven percent of the prayers offered were sectarian, and Christianity was the only religion represented.[13] The prayers sometimes evangelized, such as by praying for the world to believe in Jesus,[14] and included statements that placed Christianity above other faiths.[15] Three Rowan County residents filed suit against the Board of Commissioners, arguing that this practice violated the Establishment Clause.[16]

The District Court for the Middle District of North Carolina issued a preliminary injunction preventing the Board from offering sectarian prayers.[17] In doing so, the court looked to *Marsh v. Chambers*, the only Supreme Court case on legislative prayer at the time. *Marsh* established that legislative prayer practices should be evaluated based on historical practice, rather than through traditional Establishment Clause analysis.[18] If a practice was analogous to tradition, then it was permissible under the Establishment Clause as long as "the prayer opportunity [was not] exploited to proselytize or advance any one, or to disparage any other, faith or belief."[19] The district court found that Rowan County's sectarian prayers likely violated this proscription.[20]

After the preliminary injunction was issued, the Supreme Court decided *Town of Greece*, which upheld a town council's practice of opening its sessions with sectarian prayers offered by invited ministers and laypeople.[21] The Court used *Marsh*'s historical frame and found that history did not mandate nonsectarian prayer.[22] It also stated that for prayer practices falling outside historical traditions, courts should conduct a "fact-sensitive [inquiry]."[23] Finally, *Town of Greece* clarified

---

[10] *Id.* at 282.

[11] *Id.* at 272.

[12] *Id.*

[13] Lund v. Rowan County, 103 F. Supp. 3d 712, 714 (M.D.N.C. 2015).

[14] *See, e.g.*, *Lund*, 863 F.3d at 273 ("Father I pray that . . . the world may believe that you sent Jesus to save us from our sins." (quoting prayer of Oct. 5, 2009)).

[15] *See, e.g.*, *id.* ("[A]s we pick up the Cross, we will proclaim His name above all names, as the only way to eternal life." (alteration in original) (quoting prayer of Mar. 5, 2012)).

[16] *Lund*, 103 F. Supp. 3d at 715.

[17] Lund v. Rowan County, No. 1:13-cv-207, 2013 WL 12137142, at *11 (M.D.N.C. July 23, 2013) (opinion and order granting preliminary injunction).

[18] *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983).

[19] *Id.* at 794–95.

[20] *Lund*, 2013 WL 12137142, at *10.

[21] Town of Greece v. Galloway, 134 S. Ct. 1811, 1816, 1828 (2014).

[22] *Id.* at 1820.

[23] *Id.* at 1825 (plurality opinion); *see also id.* at 1824 (majority opinion) ("[Courts inquire] into the prayer opportunity as a whole, rather than into the contents of a single prayer." (citing *Marsh*, 463 U.S. at 794–95)).

that prayers still could not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."[24]

Considering both *Marsh* and *Town of Greece*, the district court in *Lund* found that Rowan County's prayer practice was still unconstitutional, primarily because the sectarian prayers were offered by a closed universe of prayer givers — the commissioners themselves — who were representatives of the government.[25] It therefore permanently enjoined a prayer practice in which only commissioners led prayers and directed citizens to stand and pray along.[26]

The Fourth Circuit reversed.[27] Writing for the panel, Judge Agee[28] determined that the identity of the prayer giver was not constitutionally relevant.[29] He then considered the other elements of the practice one by one[30] and closed by finding that the Board's practice was not coercive.[31] Judge Wilkinson dissented, writing that all the elements, taken together, unconstitutionally affiliated the government with a single faith.[32]

On a rehearing en banc, the Fourth Circuit affirmed the district court.[33] Writing for the majority, Judge Wilkinson[34] found that the county's prayer practice, considered holistically, was unconstitutional.[35] He first expounded on the two primary differences between the county's practice and that in *Marsh* and *Town of Greece*: the identity of the prayer giver and the "'closed-universe' of prayer-givers."[36] Both precedents involved invited clergy and laypeople, not legislators, offering the prayers, and neither precedent restricted prayer opportunities to a certain set of people.[37] According to the court, the combination of these two aspects distinguished the case from both historical tradition and precedent.[38]

---

[24] *Id.* at 1823.

[25] Lund v. Rowan County, 103 F. Supp. 3d 712, 723, 733–34 (M.D.N.C. 2015).

[26] *Id.* at 734.

[27] Lund v. Rowan County, 837 F.3d 407, 411 (4th Cir. 2016).

[28] Judge Shedd concurred in Judge Agee's opinion.

[29] *Lund*, 837 F.3d at 420.

[30] *Id.* at 420–25.

[31] *Id.* at 430.

[32] *See id.* at 431 (Wilkinson, J., dissenting).

[33] *Lund*, 863 F.3d at 292.

[34] Judge Wilkinson was joined by Chief Judge Gregory and Judges Motz, King, Duncan, Keenan, Wynn, Floyd, Thacker, and Harris.

[35] *Lund*, 863 F.3d at 281 ("We conclude that it is the combination of these elements — not any particular feature alone — that 'threatens to blur the line between church and state to a degree unimaginable in *Town of Greece*.'" (quoting *Lund*, 837 F.3d at 435 (Wilkinson, J., dissenting))).

[36] *Id.* at 277 (quoting Lund v. Rowan County, 103 F. Supp. 3d 712, 723 (M.D.N.C. 2015)).

[37] *Id.* at 278. Judge Wilkinson wrote that even though *Town of Greece* did not directly address the prayer givers' identity, "the decision takes for granted the use of outside clergy." *Id.*

[38] The court was careful to state that legislator-led prayer is not per se unconstitutional, and is in fact supported by history. *Id.* at 279–80. Instead, it simply clarified that the "identity of the prayer-giver is relevant to the constitutional inquiry." *Id.* at 280.

Because precedent thus did not "direct a particular result," Judge Wilkinson proceeded to "conduct a 'fact-sensitive' review."[39] He examined each of the four main elements of the county's practice: "commissioners as the sole prayer-givers; invocations that drew exclusively on Christianity and sometimes served to advance that faith; invitations to attendees to participate; and the local government setting."[40] All of these features raised constitutional concerns because they served to associate the government with, and promote, a single faith.[41]

Judge Motz[42] concurred. She explained that the Board's practice ran afoul of the "Establishment Clause's basic commitment to neutrality"[43] because a reasonable observer would conclude that the Board preferred Christianity.[44] She also found no support for sectarian legislator-led prayer in the historical record beginning with the First Congress.[45]

Judge Agee[46] authored the lead dissent, arguing that the en banc majority prohibited what *Town of Greece* allowed lawmakers to do.[47] The majority, he wrote, improperly read into Supreme Court precedent the distinction between a legislator and an invited chaplain, and in fact ignored the historical tradition of lawmaker-led prayer.[48] Judge Agee further elaborated on the similarities between the other elements of the Board's practice and those at issue in *Town of Greece* and *Marsh*, finding that each feature had a constitutional analogue in Supreme Court precedent and therefore that the practice as a whole was acceptable.[49]

Judge Niemeyer[50] also dissented, arguing that the legislator/invited chaplain distinction was constitutionally irrelevant, especially given the history of legislators offering prayers, and that the county's prayer practice was otherwise "virtually indistinguishable" from that in *Town of Greece*.[51]

Lund is a prime illustration of the limits of the Supreme Court's special legislative prayer jurisprudence and the need for greater alignment with standard Establishment Clause case law. The Fourth Circuit distinguished *Lund* from historical practice and precedent by focusing on

---

[39] *Id.* at 276 (quoting Town of Greece v. Galloway, 134 S. Ct. 1811, 1825 (2014) (plurality opinion)).

[40] *Id.* at 281. These factors were relevant because they were the ones the Supreme Court considered in *Town of Greece*. *See* 134 S. Ct. at 1820–24; *id.* at 1824–28 (plurality opinion).

[41] *See Lund*, 863 F.3d at 284.

[42] Judge Motz was joined by Judges Keenan and Harris.

[43] *Lund*, 863 F.3d at 292 (Motz, J., concurring).

[44] *Id.* at 293.

[45] *Id.* at 294–95.

[46] Judge Agee was joined by Judges Niemeyer, Traxler, Shedd, and Diaz.

[47] *Id.* at 322 (Agee, J., dissenting).

[48] *Id.* at 307–10.

[49] *Id.* at 306.

[50] Judge Niemeyer was joined by Judge Shedd.

[51] *Id.* at 299 (Niemeyer, J., dissenting).

the degree of entwinement between the government and the prayers. Because the government was not entwined to the same extent in *Marsh* or *Town of Greece*, the court was left with little guidance for its examination. It thus turned to general Establishment Clause principles and values, but without a framework in which to place them, leading to an unanchored analysis. *Lund*'s analytical difficulties highlight why traditional Establishment Clause tests should be used when history and precedent provide no analogue to a given prayer practice.

The court distinguished *Lund* from *Marsh* and *Town of Greece* in several ways: the prayers elevated Christianity;[52] the setting was more coercive;[53] and lawmaker-led prayer has historically been the exception rather than the rule.[54] But the court's analysis reveals that its driving concern was the "much greater and more intimate government involvement" in the prayers, compared to tradition and precedent.[55] First, the court stated early on that there were two main elements distinguishing the county's practice: county legislators were the prayer givers, and prayer opportunities were restricted to those legislators. Combined, these aspects created a "closed-universe"[56] of lawmaker-prayer-givers, which meant that "the prayer-giver was the state itself."[57] Second, the court explicitly rejected the argument that the commissioners were acting in their private capacity, instead highlighting that they were "the very embodiment of the state"[58] and that there was no "meaningful distinction between the commissioners and the Board."[59] Third, the entwinement between the government and the prayers aggravated the court's concerns about other aspects of the prayer practice. Sectarian content, when offered by elected representatives, affiliated the government with one faith.[60] Commissioners' prayers elevating Christianity appeared to be the state directing citizens to accept one religion.[61] Commissioners' requests to stand and pray were "a request on behalf of the state."[62] By making the closed-universe, lawmaker-led quality of the prayers — itself indicative of entwinement — the thread woven into the

---

[52] *Id.* at 282–87 (majority opinion).

[53] *See id.* at 287–89.

[54] *Id.* at 279–80.

[55] *Id.* at 278 (quoting Lund v. Rowan County, 103 F. Supp. 3d 712, 723 (M.D.N.C. 2015)).

[56] *Id.* at 282 (quoting *Lund*, 103 F. Supp. 3d at 723).

[57] *Id.* at 281.

[58] *Id.*

[59] *Id.* at 289; *see also id.* at 289–90 ("[The commissioner] is the representative of the state, and he gives the invocation in his official capacity as a commissioner." *Id.* at 290.).

[60] *See id.* at 284.

[61] *See id.* at 287.

[62] *Id.*; *cf.* Lee v. Weisman, 505 U.S. 577, 587 (1992) ("A school official . . . decided that an invocation . . . should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.").

rest of the analysis, the Fourth Circuit placed the entwinement concern at the fore.[63]

This entwinement concern did not arise in *Marsh* and *Town of Greece* to nearly the same extent, because the government was one step removed from the prayer givers. As the *Lund* court put it: "In *Marsh*, the prayer-giver was paid by the state. In *Town of Greece*, the prayer-giver was invited by the state. But in Rowan County, the prayer-giver was the state itself."[64] In fact, *Town of Greece* specifically highlighted that its review would change if elected representatives were more involved, stating that "[t]he analysis would be different if town board members directed the public to participate in the prayers."[65] Combined with the other distinguishing elements, Rowan County's practice was thus disanalogous to historical traditions and Supreme Court precedent.

Without historical tradition and precedent to lead it, the court had little guidance for its analysis of the prayer practice. *Marsh* elaborated on only the "historical practice" test, with no mention of what to do should a practice differ from tradition.[66] *Town of Greece* acknowledged it could not address every situation,[67] but its instruction for cases outside its bounds was simply to conduct a "fact-sensitive" review,[68] while noting that general Establishment Clause values are still at play in legislative prayer cases.[69] It did not prescribe any of the three traditional Establishment Clause tests: the endorsement test, which asks whether the government has sent a message of "endorsement or disapproval of

---

[63] The court's argument that "the prayer-giver was the state itself," *Lund*, 863 F.3d at 281, hearkens to the doctrine of government speech. When the government itself is speaking, the Establishment Clause is the "only clearly-acknowledged limit on [it]." Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After* Summum, 19 WM. & MARY BILL RTS. J. 1, 4 (2010). This means that the government may not be able to say what a private speaker, such as an invited minister, may. Interestingly, Judge Agee's dissent acknowledged that "legislative prayer is government speech touching on religion," *Lund*, 863 F.3d at 302 (Agee, J., dissenting), citing a pre–*Town of Greece* Fourth Circuit case that said as much, *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008), but said the Supreme Court nonetheless applied a historical framework to it, *Lund*, 863 F.3d at 302–03 (Agee, J., dissenting). For more on government speech and the Establishment Clause, see generally *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); and Scott W. Gaylord, *Licensing Facially Religious Government Speech:* Summum*'s Impact on the Free Speech and Establishment Clauses*, 8 FIRST AMEND. L. REV. 315 (2010). *See also* Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

[64] *Lund*, 863 F.3d at 281.

[65] Town of Greece v. Galloway, 134 S. Ct. 1811, 1826 (2014) (plurality opinion).

[66] *See* Eric Rassbach, Town of Greece v. Galloway*: The Establishment Clause and the Rediscovery of History*, 2013–2014 CATO SUP. CT. REV. 71, 83 ("There is no effort in [*Marsh*] to delineate any broader, principled framework for deciding Establishment Clause cases.").

[67] *Town of Greece*, 134 S. Ct. at 1819.

[68] *Id.* at 1825 (plurality opinion) ("The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.").

[69] *Id.* at 1821–22 (majority opinion) (noting prayer content is not of concern unless it is "exploited to proselytize or advance any one, or to disparage any other, faith or belief" (quoting Marsh v. Chambers, 463 U.S. 783, 794–95 (1983))).

religion" through its actions;[70] the coercion test, which asks whether the government has coerced someone into "support[ing] or participat[ing] in religion";[71] or, most famously, the three-prong *Lemon*[72] test, which asks whether a government action (1) has a secular purpose, (2) does not have a principal or primary effect of advancing or inhibiting religion, and (3) does not result in undue entanglement between government and religion.[73]

With no guidance on how to review Rowan County's prayer practice, the Fourth Circuit conducted an analysis based on a collection of principles and values it drew from across establishment jurisprudence. These included nonpreference for any religion,[74] the prohibition on the government composing prayers,[75] accommodation of religion,[76] noncoercion,[77] avoiding "political division along religious lines,"[78] protecting religious minorities,[79] and encouraging ecumenical prayer that is welcoming to all.[80] But there was no overarching framework into which these principles were placed. Rather, the court went through each feature of the county's prayer practice and considered whether any establishment values were implicated. The difficulty with this approach is that such values can be implicated in multiple ways, and the lack of a framework makes balancing competing implications opaque, difficult to replicate, and unpredictable.[81]

This unanchored analysis ensuing from a lack of guidance demonstrates why current legislative prayer jurisprudence is not equipped to handle the full range of legislative prayer cases. As prayer practices become more and more dissimilar from Founding-era traditions, analogies run out, and courts will find themselves in situations similar to *Lund*. Therefore, when a prayer practice has no strong analogue in history or precedent, placing it within the framework of a doctrinal

---

70 Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

71 Lee v. Weisman, 505 U.S. 577, 587 (1992).

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

73 *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

74 *Lund*, 863 F.3d at 280 (quoting Larson v. Valente, 456 U.S. 228, 244 (1982)).

75 *Id.* at 281 (quoting *Lee*, 505 U.S. at 588).

76 *Id.* at 275 (quoting *Lynch*, 465 U.S. at 673). It is a principle of First Amendment jurisprudence that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions." *Lynch*, 465 U.S. at 673.

77 *Lund*, 863 F.3d at 275 (quoting *Lee*, 505 U.S. at 587).

78 *Id.* (quoting *Lemon*, 403 U.S. at 622); *see also id.* at 282.

79 *Id.* at 275; *see also id.* at 282.

80 *Id.* at 286.

81 *See, e.g.*, Scott W. Gaylord, *When the Exception Becomes the Rule:* Marsh *and Sectarian Legislative Prayer Post-*Summum, 79 U. CIN. L. REV. 1017, 1038–48 (2011) (reviewing the post-*Marsh* circuit split); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 976–77 (2010) (noting how lower courts have struggled to find ways to deal with concerns not addressed in *Marsh*).

test — whether endorsement, coercion, or *Lemon* — would help alleviate some of the issues seen in *Lund*.

There are several benefits to using a traditional test. First, a test would help curb the confusion among lower courts that stems from *Marsh* and *Town of Greece*[82] and is evidenced by *Lund*'s lengthy procedural history.[83] Second, using a standard test would provide better precedent. The *Lund* majority cautioned that "[t]his case involves one specific . . . confluence of circumstances. To extract global significance from such specificity is beyond a stretch."[84] Such narrowly cabined decisions — a result of the requisite "fact-sensitive" review that operates without any other overarching framework — do not provide guidance for district courts looking for help from courts of appeals.[85] Finally, using a traditional test would be a small step toward making Establishment Clause jurisprudence a more coherent whole. As it stands now, virtually no one would call this field a bastion of clarity; it is continuously lambasted for being confusing, complicated, fractured, and pointless.[86] While there are plenty of critiques of the traditional tests, using a test here would, at the very least, start pruning some of the outgrowth and make legislative prayer less of an outlier, thus helping courts inch toward a more coherent and streamlined jurisprudence.

It is true, of course, that the three doctrinal tests incorporate the very values and principles the *Lund* court uses in its seriatim analysis. It is also true that applying a test will not bring total clarity to legislative prayer issues. And the idea that the Supreme Court should apply standard Establishment Clause doctrine to legislative prayer, rather than using the historical carve-out, is not new.[87] But *Lund* illustrates why greater congruity is necessary in practice, and the difficulties that arise without it.

---

[82] *See* Eric J. Segall, *Mired in the* Marsh*: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 714 (2009) (calling the effects of *Marsh* "chaos").

[83] Indeed, there is even a split on commissioner-led prayer specifically: less than two months after *Lund*, the en banc Sixth Circuit held that it was not unconstitutional for county commissioners to offer exclusively Christian prayers before each public meeting. Bormuth v. County of Jackson, No. 15-1869, 2017 WL 3881973 (6th Cir. Sept. 6, 2017). The facts were substantially similar to *Lund*, though there was less evidence in the record of prayers that proselytized or elevated Christianity. *See id.* at *12.

[84] *Lund*, 863 F.3d at 290.

[85] Clearer guidance might also help quell the flood of legislative prayer litigation that has arisen since *Marsh*. *See* Lund, *supra* note 81, at 974–76.

[86] *See, e.g.*, Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting) ("The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provide no guidance."); *see also* Edwards v. Aguillard, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting) (referring to "our embarrassing Establishment Clause jurisprudence").

[87] *See, e.g.*, Sean Rose, *Will the Legislature Please Bow Their Heads? How "*Town of Greece v. Galloway*" Can Reset Legislative Prayer Jurisprudence . . . and Why It Is Necessary*, 15 RUTGERS J.L. & RELIGION 183, 184 (2013).