
Coates' Canons Blog: Prayer at Local Government Meetings: An Evolving Jurisprudence

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Is it legal for local governments to open board meetings with a prayer? It can be, depending upon how it is done. If not done correctly, the prayer practice may violate the Establishment Clause of the United States Constitution. Court decisions have emphasized that the analysis in prayer cases is very fact specific, and each new case turns on its own set of facts and conclusions. This blog is longer than usual because it replaces earlier posts that summarized the key Supreme Court cases on this issue, and adds a summary of the latest decisions from the Fourth Circuit Court of Appeals. That decision invalidated the prayer practice in Rowan County, North Carolina. While it's difficult to articulate a rule or framework that can be applied to every prayer practice or policy, I've attempted to identify the kinds of prayer practices that are legally acceptable and the kinds that are prohibited.

Supreme Court Cases

In 1983, the United States Supreme Court, in *Marsh v. Chambers*, 463 U.S. 783 (1983), upheld the Nebraska state legislature's practice of opening sessions with a prayer. The prayers were given by a chaplain who was paid with public funds and the prayers were addressed to the legislative body. The Supreme Court noted that the practice of opening sessions of the United States Congress with prayer had continued without interruption since the First Congress drafted the First Amendment, and a similar practice had been followed for more than a century in Nebraska and in many other states. Accordingly, in upholding the prayer practice, the Court placed great weight on the "unbroken history" of opening legislative sessions with prayer, a practice which had become "part of the fabric of our society." *Id.* at 792. The Court concluded: "This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id.* at 791.

The Court went on to determine whether the specific features of the Nebraska legislative prayers violated the Establishment Clause. The key facts were "first that a clergyman of only one denomination – Presbyterian – has been selected for 16 years; second, that the chaplain is paid at public expense; and third, that the prayers are in the Judeo-Christian tradition." *Id.* at 793. A footnote explained the nature of the prayers as follows: "Palmer [the Chaplain] characterizes his prayers as 'nonsectarian,' 'Judeo Christian,' and with 'elements of the American civil religion.' Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator." *Id.* at fn. 14. The Court had no qualms with either the length of the chaplain's tenure or the fact that he had been paid with public funds—payment with public funds was consistent with the historical practice. In regard to the Judeo-Christian tradition of the prayers, the Court held: "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to *proselytize or advance any one, or to disparage any other, faith or belief*. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 794-95 (emphasis added).

Two key questions remained unclear after *Marsh*. First, the case was widely interpreted as allowing only secular prayer, or prayers that did not predominately promote a particular religion, but the decision was not particularly clear on this point. Second, would *Marsh* apply to prayers offered at local government meetings? The prayers in *Marsh* were offered to the state legislative body. In contrast, the local government setting typically has the person offering the prayer facing members of the public who attend and sometimes have direct requests or other business with the board. In 2014, the United States Supreme Court addressed these questions in *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811 (2014). The Town of Greece, New York opened its board meetings with a prayer offered by clergy from various local churches. The town staff initially solicited participation from multiple congregations, but over time they came to rely on a list of potential participants that included only Christian clergy. Although the prayer practice was open to any religion, most of the town's congregations were Christian, and the prayers were predominately and explicitly Christian. Several citizens challenged the town's practice, arguing that the predominance of Christian prayers violated the Establishment Clause because it created an impression that the town endorsed a particular religion. They also alleged that the intimacy of the setting made them

feel coerced to join in the prayer.

The Supreme Court held that prayer at local government meetings, if conducted appropriately, “fits within the tradition long followed in Congress and the state legislatures,” as upheld in *Marsh*, resolving without reservation the question of whether *Marsh* applies in a local government setting. *Id.* at 1813. The Court also dispelled the notion that the constitution as interpreted in *Marsh* allows only nonsectarian prayer. Finally, the Court rejected the claim that the prayers were coercive to citizens attending the meetings, with a plurality relying on the fact that the principal audience for the opening prayer was the legislative body itself, and concluding that “in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.” *Id.* at 1827.

The key facts that appear to be important to the outcome are: 1) the prayer practice was open to all religions, 2) the prayers were delivered by invited clergy, 3) prayers were offered at the beginning of the meeting and met the purpose of solemnizing the work of the governing body, 4) the prayers did not proselytize or coerce participation by those attending the meeting, and 5) there was no evidence that attendees were or would be treated differently if they declined to attend or participate in the prayer portion of the meeting.

Rowan County Case

In 2013, three Rowan County residents sued the county over the commissioners’ practice of opening meetings with a prayer given exclusively by members of the board themselves. Between 2007 and 2013, 97% of the meetings were opened with sectarian, Christian prayers. No prayers from other faiths or other people were offered during that time. The plaintiffs objected to the prayers because, they said, the board’s practice caused them to feel excluded from the community. They alleged that they felt compelled to stand and that their opposition to the prayer hindered their ability to be effective advocates for issues that came before the board. Individual commissioners were quoted in news media about their commitment to continuing the sectarian prayers in the face of the legal challenge. The board had no formal policy regarding the prayer practice, but affidavits filed by board members indicated that citizens were free to leave the room for the prayer or come in after it, and that such actions would not affect citizens’ rights to participate in meetings.

While the Rowan County lawsuit was progressing, the Supreme Court issued its opinion in *Town of Greece*. As already noted, the Supreme Court has emphasized that Establishment Clause cases are very fact-intensive. The federal district judge analyzed the case by comparing the specific practices in Rowan County with the practices that were upheld in *Town of Greece*, and concluded that the Rowan County board’s practices were unconstitutional. The judge held that when prayers are offered by board members who are all Christian, the effect is an endorsement of that religion. In addition, when prayers are offered by the board members, the effect is more coercive on individuals attending meetings. The judge concluded that the practice of board members asking members of the audience to stand and join the board in prayer, as well as comments some members made to news media, contributed to an unconstitutionally coercive environment. *Lund v. Rowan County, N.C.*, 103 F. Supp. 3d 712 (2015), *rev’d and remanded sub nom. Lund v. Rowan County, N. Carolina*, 837 F.3d 407 (4th Cir. 2016), *as amended* (Sept. 21, 2016), *reh’g en banc granted*, 670 Fed. Appx. 106 (4th Cir. 2016) (unpublished), and *on reh’g en banc*, 863 F.3d 268 (4th Cir. 2017), and *aff’d sub nom. Lund v. Rowan County, N. Carolina*, 863 F.3d 268 (4th Cir. 2017)

In 2016, the Fourth Circuit Court of Appeals reversed the lower court’s decision. A divided three-judge panel held that the board member-led prayers in Rowan County were consistent with the standard in *Town of Greece* and did not violate the plaintiffs’ constitutional rights. The dissenting judge viewed the facts of the case as distinguishable from *Town of Greece*, however, concluding that, it is the “combination of the role of the commissioners, their instructions to the audience, their invocation of a single faith, and the local governmental setting that threatens to blur the line between church and state to a degree unimaginable in *Town of Greece*.” *Lund v. Rowan County, N. Carolina*, 837 F.3d 407, 435 (4th Cir. 2016) (Wilkinson, dissenting), *as amended* (Sept. 21, 2016), *reh’g en banc granted*, 670 Fed. Appx. 106 (4th Cir. 2016) (unpublished), and *on reh’g en banc*, 863 F.3d 268 (4th Cir. 2017).

The Fourth Circuit Court of Appeals subsequently granted a request to rehear this case “*en banc*” (meaning, by all of the judges, rather than just a three-judge panel). The Court issued its decision in July, 2017, reversing the previous decision and declaring Rowan County’s prayer practices unconstitutional. *Lund v. Rowan County, N. Carolina*, 863 F.3d 268 (4th Cir. 2017). The dissenting judge in the three-judge panel wrote the majority opinion, but the court was quite divided, with one separate concurring opinion and two separate dissenting opinions, one of which was joined by five of the fifteen

judges.

Fact-sensitive analysis: Identity of the prayer-giver

As in previous cases, the Fourth Circuit judges all agreed that Establishment Clause prayer cases are “fact sensitive.” The parties and judges in *Rowan County* all agreed on the facts, but there was sharp disagreement about what they meant. The key fact – and the crux of the disagreement among the judges – was whether the identity of the person giving the prayer matters. In *Marsh* and *Town of Greece*, prayers were offered by paid or invited clergy, and not by board members. The majority opinion in *Rowan County*, however, saw a significant difference between “legislative prayer” (prayer provided by a third party for the legislative body) and “lawmaker-led prayer” (prayer offered by members of the legislative body itself). The majority and dissents simply disagree about the legal significance of this distinction. The opinion holds:

Marsh and *Town of Greece* thus show a Court generally supportive of legislative prayer, careful to emphasize that sectarian references are permissible in proper context, but cautioning that the prayer opportunity not get out of hand. This case differs from *Marsh* and *Town of Greece* in two crucial respects that, in combination with other aspects of the Board’s prayers, give rise to an unprecedented prayer practice. First, whereas guest ministers delivered the prayers in those cases, the legislators themselves gave the invocations in Rowan County. Second, the prayer opportunity here was exclusively reserved for the commissioners, creating a “closed-universe” of prayer-givers.... *Lund*, 103 F.Supp.3d at 723. This case is therefore “more than a factual wrinkle on *Town of Greece*.” *Lund*, 837 F.3d at 431 (panel dissent). “It is a conceptual world apart.” *Id.*

Id. at 277. The main dissent argues, in contrast, that neither *Marsh* nor *Town of Greece* “attached particular significance to the identity of the speakers” and notes examples of states in which lawmakers offer prayers. *Id.* at 307 (Agee, dissenting).

Sectarian Prayers

Another key fact is the sectarian nature of the prayers. *Town of Greece* approved a prayer practice that resulted in the delivery of primarily Christian sectarian prayers and rejected the notion that *Marsh* should be read to prohibit sectarian prayer. In *Rowan County*, the sectarian prayers resulted from the fact that only board members led prayers and they were all of the same religion. Measuring Rowan County’s practice of offering exclusively Christian prayers against the practice upheld in *Town of Greece*, the majority found significant differences:

Compare the county’s rigid, restrictive practice with the more flexible, inclusive approach upheld in *Town of Greece*. Greece welcomed adherents of all faiths, allowing “any member of the public [the chance] to offer an invocation reflecting his or her own convictions.” *Id.* at 1826 (plurality opinion). Most of the guest ministers were Christian, owing to the fact that “nearly all of the congregations in town turned out to be Christian.” *Id.* at 1824 (majority opinion). To address complaints, however, the town “invited a Jewish layman and the chairman of the local Baha’i temple to deliver prayers” and granted a Wiccan priestess’s request to participate. *Id.* at 1817. By opening its prayer opportunity to all comers, the town cultivated an atmosphere of greater tolerance and inclusion.

Id. at 282. In contrast, the dissent insists, “The Court [in *Town of Greece*] explicitly disavowed any constitutional requirement that legislative prayers be nonsectarian to comply with the Establishment Clause...” *Id.* at 303.

The setting in which the prayer arises

The plaintiffs in the Rowan County case argued that the intimate setting of a local government meeting created a situation in which individuals may feel coerced to join in prayer. The record showed that board members often asked members of the audience to stand and join them in prayer. The majority noted:

Relative to sessions of Congress and state legislatures, the intimate setting of a municipal board meeting presents a heightened potential for coercion. Local governments possess the power to directly influence both individual and community interests. As a result, citizens attend meetings to petition for valuable rights and benefits, to advocate on behalf of cherished causes, and to keep tabs on their elected representatives—in short, to participate in democracy. The decision to attend local government meetings may not be wholly voluntary in the same way as the choice to participate in other civic or community functions...Like other local

governments, the Board exercises both legislative authority over questions of general public importance as well as a quasi-adjudicatory power over such granular issues as zoning petitions, permit applications, and contract awards...This is not to suggest that the commissioners made decisions based on whether an attendee participated in the prayers. But the fact remains that the Board considered individual petitions on the heels of the commissioners' prayers.

Id. at 287-88. The court recognized that the board's invitations to join in prayers made the plaintiffs feel compelled to stand so that they would not stand out, and it also noted that one person who spoke out against the Board's prayer practice was booed and jeered by her fellow citizens. *Id.* at 288.

Conclusion

In summary, the final Fourth Circuit decision holds that the combined effect of the following prayer practices violates the Constitution: Only board members deliver the prayers, the board members are all of the same religion, there is no opportunity for other faiths to be represented, and the board meetings occur in the intimate setting of a local government meeting. The majority concluded that these practices did not align with the approved practices of *Marsh* and the *Town of Greece*. The Fourth Circuit determined that these circumstances, in conjunction, created a "closed –universe" of prayer-givers and gave the perception that "Rowan County had taken sides on questions of faith." *Id.* at 284.

The Rowan County case is binding for all federal courts in the Fourth Circuit, which includes North Carolina. North Carolina local governments may want to review their prayer practices in light *Rowan County* and *Town of Greece*, even though they leave many questions regarding the constitutionality of legislative prayer practice unanswered. In the following sections, I have set out my sense of the current law on the major aspects of prayer at meetings.

Sectarian prayers

Town of Greece and *Marsh* approved practices that resulted in a predominance of sectarian (Christian) prayers. In each of those cases, however, the practice included opportunities for different faiths and beliefs to be represented. *Rowan County* holds that the sectarian nature of the prayers *is not* acceptable if the process is not open to other faiths and if only board members offer the prayers. No case requires there to be a balance of religions represented, but *Town of Greece* suggests that there should be at least an opportunity for all faiths to be represented. While the holding in *Town of Greece* noted that the predominance of Christian prayers reflected the majority of the population in the town, an important feature in the Court's holding was that the town's program was open to any faith, and that the town did, at least initially, reach out to all congregations.

Board members giving prayers

Neither of the relevant Supreme Court cases involved board members giving prayers. Although *Rowan County* rejected this practice, the opinion makes clear that there is not an absolute bar on legislators giving prayers:

The plaintiffs have never contended that the Establishment Clause prohibits legislators from giving invocations, nor did the district court so conclude. See *Lund*, 103 F.Supp.3d at 722 n.4 ("[T]he Commissioners' provision of prayers is not *per se* unconstitutional.... Under a different, inclusive prayer practice, Commissioners might be able to provide prayers...."). Like the plaintiffs and the district court, we "would not for a moment cast all legislator-led prayer as constitutionally suspect." *Lund*, 837 F.3d at 433 (panel dissent). Religious faith is "a source of personal guidance, strength, and comfort." *Id.* at 431. And legislative prayer's "solemnizing effect for lawmakers is likely heightened when they personally utter the prayer." *Id.* at 433. Accordingly, the Establishment Clause indeed allows lawmakers to deliver invocations in appropriate circumstances. Legislator-led prayer is not inherently unconstitutional.

Id. at 279–80. The court does not describe the specific circumstances under which board prayer would be acceptable, but we can deduce a few key components. It may be possible that board members could deliver prayers as long as there is a diversity of religious faiths. Such diversity might exist among the board members, but diversity more likely would occur if the board members are not the only ones offering prayers. It may also be possible that board members could be the exclusive prayer-givers if the prayers are non-sectarian.

Inviting people to stand or pray

Plaintiffs in these cases alleged that they felt coerced to join in the prayer practice because of the intimacy of the local government setting and the fact that board members or others giving prayers invited people to stand and pray. As noted earlier, in *Town of Greece* the court held that the clergy were simply using words they're accustomed to using when praying with their congregations, and that people were free to refrain from standing or praying and were not coerced to pray. The *Rowan County* opinion comes to a different conclusion. Because the opinion describes the *combination* of factors as the basis for the holding, it is difficult to determine whether this aspect is suspect without the other *Rowan County* factors present. Clearly though, the holding in *Town of Greece* still applies if third parties are offering prayers. If there is a process that allows for a diversity of faiths and beliefs, inviting people to rise or join may be allowed.

What types of prayers are not allowed

It is clear from *Town of Greece* that some types of prayers violate the Establishment Clause no matter who offers them. The prayers must not proselytize, and they must be consistent with the purpose of the setting – that is – the opening of a meeting. The court noted:

Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

Town of Greece, 134 S.Ct. at 1823. *Town of Greece* and *Rowan County* suggest that when courts adjudicate a challenge to legislative prayer, they should inquire “into the prayer opportunity as a whole, rather than into the contents of a single prayer.” In doing so, courts must conduct a “fact-sensitive review of the setting in which the prayer arises and the audience to whom it is directed” and also evaluate “the pattern of prayers over time.” *Rowan County* at 280-81 (citing *Town of Greece*, 134 S.Ct. at 1824).

Reviewing prayers in advance

Can a local government require prayer givers to submit their prayers in advance? This would seem to be a reasonable practice to avoid prayers that cross the line into proselytizing or disparaging non- or different-believers. This raises a challenging issue for local governments who open their meetings with prayer. Courts have made clear that some types of prayers are not acceptable, but at the same time they've noted that government becomes inappropriately entangled with religion when it gets into the business of approving or editing proposed prayers.

[I]t is not normally government's place to rewrite, to parse, or to critique the language of particular prayers. And it is always possible that members of one religious group will find that prayers of other groups (or perhaps even a moment of silence) are not compatible with their faith. Despite this risk, the Constitution does not forbid opening prayers. But neither does the Constitution forbid efforts to explain to those who give the prayers the nature of the occasion and the audience.

Town of Greece, 134 S.Ct. at 1840. So it's not entirely clear how a government body can ensure that prayer content is acceptable. Certainly the body has authority to reject members or others who have given unacceptable prayers. The prayers are government speech, not an exercise of any First Amendment right. But it's possible that the government may be limited to an advance warning and an after-the-fact assessment rather than an approval process.

Here is an example of a guideline for prayer-givers from a North Carolina city:



Prior to commencement of the business of City Council, an invocation may be offered. Such invocation may include a non-sectarian prayer, directed to the members of the Council, and providing a time of reflection and encouragement. The prayer should not be used to proselytize or advance any one faith or belief, nor should it be used to disparage or attack any other faith or belief. The invocation should be seen as an opportunity to convey a message of the community's shared values and ideals, derived from our rich American religious heritage.

Prayer policies

Local governments who engage in prayer should consider adopting a policy setting out their prayer practices. Policies might include the following information:

- A statement setting out the purpose of the prayer. Examples of purposes are “to solemnize the work of the body” and “to invite lawmakers to reflect upon shared ideals and common ends before they embark on the business of governing.”
- An explanation of the types of prayers that are allowed and a statement that those offering prayers shall not proselytize and shall not proselytize or advance any one, or disparage any other, faith or belief.
- A statement that no one is required to participate and that members of the public are free to join the meeting after the prayer or leave the meeting during the prayer.
- A statement that members of the public will not be treated differently based on whether they participate in the prayer.
- A description of the process the unit uses chooses to select prayer-givers.

Rebecca Badgett, Local Government Legal Research Associate, contributed to this blog post.

Links

- www.law.cornell.edu/supremecourt/text/463/783
- en.wikipedia.org/wiki/Town_of_Greece_v._Galloway
- www.ca4.uscourts.gov/Opinions/Published/151591A.P.pdf