1-1-2012

*Joyner v. Forsyth County Board of Commissioners*: The Constitutionality of Sectarian Legislative Prayer

Katherine Lewis Parker

Follow this and additional works at: [http://scholarship.law.unc.edu/falr](http://scholarship.law.unc.edu/falr)

Part of the First Amendment Commons

**Recommended Citation**


Available at: [http://scholarship.law.unc.edu/falr/vol10/iss2/5](http://scholarship.law.unc.edu/falr/vol10/iss2/5)

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in First Amendment Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
JOYNER V. FORSYTH COUNTY BOARD OF COMMISSIONERS:
THE CONSTITUTIONALITY OF SECTARIAN LEGISLATIVE PRAYER

KATHERINE LEWIS PARKER *

I. INTRODUCTION

At approximately 7:30 p.m. on a December evening in 2007, the Forsyth County, North Carolina Board of Commissioners convened their regular monthly public board meeting. As had been the practice for years, the Chair of the Board called a religious leader from the community to the podium to give the opening invocation on behalf of the Board. As Chair Gloria Whisenhunt called Pastor Robert Hutchens to the podium, she asked the members of the public in the audience to stand. Pastor Hutchens began:

*Ms. Parker, Legal Director for the American Civil Liberties Union of North Carolina Legal Foundation, served as lead counsel for the Plaintiffs in Joyner v. Forsyth County. As Legal Director of the ACLU-NCLF, she is past-chair of the Civil Rights Section of the North Carolina Advocates for Justice, as well as the Constitutional Rights and Responsibilities Section Council of the North Carolina Bar Association. She is also a member of the Board of Directors for North Carolina Prisoner Legal Services. Before joining the ACLU-NCLF, Ms. Parker worked for five years for the law firm of Holland & Knight in Tallahassee and Jacksonville, Florida, as a Media and Commercial Litigation Associate. Ms. Parker is a cum laude graduate of the University of Georgia for both her undergraduate degree and her law degree. During law school, her law review Note, "Fit to Be Tied? Fourth Amendment Analysis of the Hog-Tie Restraint Procedure," was published in the Georgia Law Review. After law school, Ms. Parker clerked for the Honorable John F. Nangle, United States District Judge for the Southern District of Georgia.

3. Id.
Before we pray, I would like to say my appreciation to the ones that serve here on the Board. I’m a lifelong resident of Forsyth County, grew up in Lewisville, lived in Winston-Salem, and the last two years, I live [sic] in Kernersville, and I appreciate your service to me and also the stand the Board took as a whole allowing me, a minister of the Gospel of the Lord Jesus Christ, to be able to pray as the New Testament instructs. And I appreciate that.

May we pray. Heavenly Father, tonight we are so grateful for the privilege to pray that is made possible by Your Son and His intercessory work on the Cross of Calvary. And Lord, we think about even a week from tomorrow, Lord, we’ll remember that Virgin Birth, and how He was born to die. And we’re so grateful tonight that we can look in the Bible and see how You instituted government. And it’s even ordained by You tonight that these Commissioners will gather here tonight and conduct the business of this County. And we certainly, tonight, want to remember to pray for wisdom for each of them. For Mrs. Whisenhunt, as she chairs the Board, and each member that tonight, they would humbly look to Thee for guidance and for divine intervention in these matters. And each issue that’s on the agenda tonight, we pray that it would be handled carefully, with much thought and wisdom, Lord, as to what You would have them do.

As not only citizens of this County, but of this great country, Lord, we do want to remember our President tonight, and our Congress, Lord, and pray that all three branches of our government would be led by Thee. And that we would continue to stand with Your chosen people—the people of Israel. And Lord, we think about our military, serving
around the world, not only in Iraq and Afghanistan, but military personnel all over the globe, away from their families at this time of year. We pray that You would be with them, and put a hedge of protection about them. And Lord, continue to be with this City and this County. Lord, protect us from crime and influences of evil, Lord, that we know would hinder the citizens. And we remember on a cold night like tonight those that are homeless and those in need here in our County.

And again, we humbly ask You to guide our Commissioners tonight. For we do make this prayer in Your Son Jesus' name, Amen.  

Two long-time Winston-Salem residents and retirees, Janet Joyner and Connie Blackmon, were in the audience that night. Ms. Joyner and Ms. Blackmon, who regularly attended County Commission meetings to address and follow matters of local importance, previously and repeatedly objected to the County about the prevalence of sectarian references in the board’s opening prayers. The overtly sectarian nature of Pastor Hutchens’s prayer, like the other sectarian references to which they have been subjected at Board meetings, made Ms. Joyner and Ms. Blackmon feel not only unwelcome and offended in a government meeting, but also “compelled” and “coerced” by their government into accepting Christianity. Yet, despite the overtly sectarian and proselytizing prayer given by Pastor Hutchens at the December 17, 2007, meeting, the County invited him to return as an official prayer-giver on December 15, 2008, when he again offered a sectarian prayer.

On July 29, 2011, in Joyner v. Forsyth County, the Fourth Circuit Court of Appeals agreed with Ms. Joyner and Ms. Blackmon, concluding that Forsyth County’s prayer policy and practice crossed the
constitutional line and unconstitutionally advanced Christianity in violation of the Establishment Clause of the First Amendment to the United States Constitution. The Fourth Circuit's decision upheld a January of 2010 ruling by U.S. District Chief Judge James Beaty of the Middle District of North Carolina that the Forsyth County prayer policy violated the Establishment Clause of the First Amendment. The Fourth Circuit decision also upheld Judge Beaty's order that the County must end or change its current prayer policy.

Writing the 2-1 majority opinion, Judge J. Harvie Wilkinson III explained that the Fourth Circuit's decisions on legislative prayer, as well as decisions of the United States Supreme Court, "approv[e] legislative prayer only when it is nonsectarian in both policy and practice." On January 17, 2012, the United States Supreme Court denied the County's petition for a writ of certiorari.

This article will discuss the Joyner v. Forsyth County Board of Commissioners case, and the constitutionality of sectarian legislative prayer in general.

II. BACKGROUND FACTS

The Forsyth County Board of Commissioners typically holds public meetings twice per month. The Board opens each meeting with a prayer, which, per the Board's longstanding practice, is delivered by an invited clergy member. During the prayers, members of the audience customarily stand, at the request of the Board Chair, and bow their heads. With a few exceptions, the prayers usually refer explicitly to "Jesus Christ." The Board maintained this prayer practice for years

---

9. Id. at 349.
10. Id. at 345.
11. Id. at 355.
12. Id. at 348.
14. Joyner, 653 F.3d at 343.
15. Id.; Joint Appendix, supra note 2, at 143 ¶ 10, 284–85.
16. Joyner, 653 F.3d at 343; Joint Appendix, supra note 2, at 126 ¶ 4, 127 ¶ 5.
17. Joyner, 653 F.3d at 343; Joint Appendix, supra note 2, at 479.
without any written policy. On March 30, 2007, after several unsuccessful requests that the Board modify its invocation practice to permit only non-sectarian prayer, the American Civil Liberties Union of North Carolina and the Winston-Salem Chapter of Americans United for Separation of Church and State, on behalf of Ms. Joyner and Ms. Blackmon, filed a lawsuit in the federal court for the Middle District of North Carolina, challenging the constitutionality of the Board’s unwritten policy and practice of repeatedly sponsoring sectarian prayer.

On May 14, 2007, the Board adopted the proposed “Policy Regarding Opening Invocations Before Meetings of the Forsyth County Board of Commissioners” (“Policy”). The Policy codified the Board’s previously unwritten practice of authorizing invited clergy members to open the Board’s public meetings with sectarian prayer for the purported purpose of “solemnizing its proceedings.”

A. Selecting Prayer-Givers

Under the Policy, the Forsyth County Board of Commissioners was required to recruit, “select[,]” and then assign prayer-givers for each meeting. Only clergy affiliated with a local congregation could serve as prayer-givers. To reach these clergy, the Policy directed the Board’s Clerk, as part of his or her official duties, to expend County time and resources “compil[ing] and maintain[ing] a database (the ‘Congregations List’) of the religious congregations with an established presence in the local community of Forsyth County.” The Clerk then mailed invitations addressed to the “religious leader” of each congregation on the Congregations List on or about December 1st of each calendar year.

18. Joyner, 653 F.3d at 343; Joint Appendix, supra note 2, at 143 ¶ 12, 188–89, 284–85.
20. Joyner, 653 F.3d at 344; Joint Appendix, supra note 2, at 165–71.
22. Joint Appendix, supra note 2, at 169 ¶ 4, 281–82.
23. Id. at 169 ¶ 4.
24. Id.
25. Id.
Those who responded were scheduled by the Clerk on a "first-come, first-serve[d] basis." In total, employees in the Clerk's office spent between thirty minutes to five hours each week securing a prayer-giver for each meeting.

Though the Clerk updated the Congregations List each November, currently at least 95% (more than 600 out of 635) of the churches and religious leaders on the Congregations List were identified on the list as being affiliated with a Christian denomination or as non-denominational Christian. Importantly, the Clerk had not secured a single non-Christian prayer-giver to deliver the invocation after the Policy's adoption through the date of the injunction in November of 2009. Moreover, not every citizen who requested access was permitted to give the opening invocation at Board meetings. Nor was everyone who requested access included on the Congregations List. Rather, the Policy's requirement that the prayer-giver only be a religious leader from an established congregation excluded many belief systems and individuals in the county.

B. Delivery of Prayers

Prayers conducted under the written Policy operated in much the same way they did before the Policy was adopted. Although the Policy stated that invocations would be delivered before meetings and were intended for the benefit of Board members only, in practice, the prayers took place after the meeting officially began, they were addressed to and involved the audience, and they were included as part of the official

26. Id. at 170.
27. Id. at 229; see also Joyner v. Forsyth Cnty., 653 F.3d 341, 343 (4th Cir. 2011) (describing the process); Joint Appendix, supra note 2, at 147–49 ¶ 34, 169 ¶ 4, 207 (describing the process).
28. See Joint Appendix, supra note 2, at 147–49 ¶ 34, 169 ¶ 4, 231 (discussing the policy of updating lists), 651–99 (listing potential prayer-givers).
29. Joyner, 653 F.3d at 353; see also Joint Appendix, supra note 2, at 479, 651–99, 854–56 (providing lists of possible prayer-givers and of those prayer-givers who participated in the meetings).
30. Joint Appendix, supra note 2, at 201–05.
31. Id.
32. Id. at 201–206, 217–18, 353–55.
33. See Joyner, 653 F.3d at 344.
recording of the County’s meetings. Indeed, although the Policy expressly required that the “prayer shall not be listed or recognized as an agenda item,” the agenda displayed at meetings—a different version than the one posted in advance on the County’s website—listed the name of the prayer-giver and the church that he or she represented. This version of the agenda was enlarged and projected onto a screen so that “everyone . . . in the audience [could] see.”

Consistent with the displayed agenda, the prayers occurred after the Board and audience formally gathered for the public meetings, at around “7:31” p.m. or “two” p.m.—a few minutes after the meetings’ official 7:30 p.m. start time. The Board Chair called the invited clergy member to the podium, and then, facing the audience, the Chair asked those present to stand for the invocation and the Pledge of Allegiance. Using a microphone provided by the Board, the clergy member then gave the invocation while the standing Commissioners and audience members bowed their heads. The prayer typically began with a call to action, such as “Let us pray,” “Please pray with me,” “Let us bow,” “Join me as we pray together,” or “Let us bow our heads in prayer,” directed at the Board and the public in attendance. During the invocation, only the invited prayer-giver could address the audience; an uninvited person attempting to speak into the microphone would have been asked to wait until the public comment period.

34. Joint Appendix, supra note 2, at 269, 479.
35. Id. at 169 ¶ 2.
36. See id. at 195–98.
38. Id. at 210–11.
39. Joyner v. Forsyth Cnty., 653 F.3d 341, 343 (4th Cir. 2011); Joint Appendix, supra note 2, at 211–12.
40. Joint Appendix, supra note 2, at 127 ¶ 5.
41. See id. at 127 ¶ 5, 143–44 ¶¶ 14–16, 248, 479.
42. Id. at 206, 286, 299–300 (noting that “security may ask you to take a seat”).
C. The Invocation's Content

The Board had a long history of authorizing sectarian prayer at its meetings: From November, 2003 through May 14, 2007, approximately 68% of the invocations offered at Board meetings were sectarian; and 100% of those sectarian prayers were decidedly Christian in that they repeatedly invoked Jesus Christ. This practice of permitting sectarian prayers continued under the Board’s written Policy. Indeed, the Policy banned the Commissioners from barring such prayers, providing that “[n]either the Board nor the [Board’s] Clerk shall engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered by an invocational speaker.” As a result, sectarian prayer became even more prevalent at Board meetings after the Policy was enacted: nearly 80% of the prayers delivered at Board meetings between May 14, 2007 and December 15, 2008, were sectarian, all referring to one particular deity—Jesus Christ. Specifically, out of thirty-three post-Policy prayers, at least twenty-six (or approximately 79%) were sectarian.

D. The Board’s Meeting on December 17, 2007

Both Ms. Joyner and Ms. Blackmon attended the Board meeting on December 17, 2007, at which Pastor Hutchens offered the prayer set forth earlier in this article. Ms. Joyner was interested in the Board’s discussion and decision on one of the agenda items and intended to speak on the matter during the Public Hearing portion of the meeting. Most of the audience and the Board stood for the invocation and bowed their heads. As a result of Whisenhunt’s direction, as well as the audience’s response, Ms. Joyner and Ms. Blackmon felt compelled to stand for the

43. Id. at 60–61, 63, 479.
44. Joyner, 653 F.3d at 344.
45. Id.; Joint Appendix, supra note 2, at 146 ¶ 28, 151 ¶ 50, 170 ¶ 7.
46. Joyner, 653 F.3d at 344.
47. Id.; Joint Appendix, supra note 2, at 479.
48. See supra notes 1–4 and accompanying text.
50. Joint Appendix, supra note 2, at 254.
invocation and bow their heads, and did stand.\textsuperscript{51} As Ms. Blackmon was struggling with whether to bow her head in order to conform, she noticed that another audience member turned around and looked at Ms. Joyner and Ms. Blackmon during the invocation.\textsuperscript{52} Ms. Blackmon felt compelled and coerced to bow her head, even though she preferred not to do so.\textsuperscript{53} As noted above, the sectarian nature of Pastor Hutchens’s prayer made Ms. Joyner and Ms. Blackmon feel not only unwelcome and offended in a government meeting, but also “compelled” and “coerced” by their government into accepting Christianity.\textsuperscript{54} Yet, despite that overtly sectarian prayer, the County invited Pastor Hutchens to return as an official prayer-giver on December 15, 2008, when he again offered a sectarian prayer.\textsuperscript{55}

\section*{III. Analysis}

On July 29, 2011, the Fourth Circuit affirmed the Middle District of North Carolina’s ruling that the Forsyth County Board of Commissioners’ prayer policy “violate[d] the Establishment Clause by advancing and endorsing Christianity to the exclusion of other faiths.”\textsuperscript{56} Judge Wilkinson, writing for the majority, concluded:

\begin{quote}
The district court’s ruling accords with both Supreme Court precedent and our own. Those cases establish that in order to survive constitutional scrutiny, invocations must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide. Sectarian prayers must not serve as the gateway to citizen participation in the affairs of local government. To have them do so runs afool of the promise of public neutrality among faiths that
\end{quote}

\textsuperscript{51} Joyner, 653 F.3d at 344–45; Joint Appendix, supra note 2, at 124 ¶ 6–8, 127 ¶ 6, 184, 254–55.
\textsuperscript{52} Joint Appendix, supra note 2, at 124 ¶ 7.
\textsuperscript{53} Id. at ¶¶ 6–8.
\textsuperscript{54} Joyner, 653 F.3d at 345; Joint Appendix, supra note 2, at 124–25 ¶ 10–14, 127 ¶ 9, 181, 183–85, 253–55.
\textsuperscript{55} Joint Appendix, supra note 2, at 312, 479.
\textsuperscript{56} Joyner, 653 F.3d at 342.
resides at the heart of the First Amendment’s religion clauses.\textsuperscript{57}

In arriving at this decision, the Court explained that this case is not one “about the Establishment Clause in general, but about legislative prayer in particular.”\textsuperscript{58} The Court called this distinction “critical.”\textsuperscript{59}

A. Marsh v. Chambers and Legislative Prayer

The United States Supreme Court established in \textit{Marsh v. Chambers}\textsuperscript{60} that the Establishment Clause permits a legislative body to invoke divine guidance before engaging in public business.\textsuperscript{61} The Fourth Circuit has repeatedly confirmed that \textit{Marsh} provides the applicable standard for testing the constitutionality of legislative prayers, rather than the standard Establishment Clause test set forth in \textit{Lemon v. Kurtzman}.\textsuperscript{62} The Fourth Circuit explained that “\textit{Marsh}, in short, has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines.”\textsuperscript{63} Thus, “the mainline body of Establishment Clause case law provides little guidance” in legislative prayer cases.\textsuperscript{64}

However, under \textit{Marsh}, the practice of legislative prayer is not without limits.\textsuperscript{65} The Supreme Court’s subsequent decision in \textit{Allegheny County v. ACLU},\textsuperscript{66} clarified its holding in \textit{Marsh}.\textsuperscript{67} \textit{Allegheny} explained that the prayers in \textit{Marsh} did not “have the effect of affiliating the

\textsuperscript{57} \textit{Id}. at 342–43.
\textsuperscript{58} \textit{Id}. at 345.
\textsuperscript{59} \textit{Id}.
\textsuperscript{60} 463 U.S. 783 (1983).
\textsuperscript{61} \textit{Id}. at 792.
\textsuperscript{63} \textit{Simpson}, 404 F.3d at 281.
\textsuperscript{64} \textit{Id}. (quoting Snyder v. Murray City Corp., 159 F.3d 1227, 1232 (10th Cir. 1998)).
\textsuperscript{65} \textit{See} Allegheny Cnty. v. ACLU, 492 U.S. 573, 603–04 (1989).
\textsuperscript{66} \textit{Id}.
\textsuperscript{67} \textit{See id}. (noting that “\textit{Marsh} plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today”).
government with any one specific faith or belief . . . because the particular chaplain had ‘removed all references to Christ.’”

*Allegheny* instructs:

The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause. Whatever else the Establishment Clause may mean... it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).

The *Allegheny* decision underscores the conclusion that only nonsectarian legislative prayer is permissible under the Establishment Clause.

1. The Fourth Circuit’s Interpretation of *Marsh v. Chambers*

   a. *Wynne v. Town of Great Falls*

      According to the Fourth Circuit, legislative prayer is only permissible “when it is nonsectarian in both policy and practice.” This idea was first set forth in *Wynne v. Town of Great Falls*, in which the Fourth Circuit held that the legislative prayers in question in that case violated the Establishment Clause because the prayers “‘frequently’

---

68. *Id.* at 603 (quoting *Marsh v. Chambers*, 463 U.S. 783, 793 (1983)).

69. *Id.* at 604–05. The Court distinguishes the “specifically Christian” symbol in *Allegheny* from the “more general religious references, like the legislative prayers in *Marsh*” and notes that “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.” *Id.* at 603.


71. 376 F.3d 292 (4th Cir. 2004).
contained references to ‘Jesus Christ’ and thus promoted one religion over all others, dividing the Town’s citizens along denominational lines."\footnote{72}

In Wynne, a town citizen who was Wiccan brought suit to prohibit the town “from engaging in prayers that specifically invoke[d] Jesus Christ during monthly council meetings.”\footnote{73} Prior to bringing suit, the plaintiff had formally lodged an objection at a council meeting regarding the practice of referring to Jesus in legislative prayers.\footnote{74} The plaintiff requested “that the prayer’s references be limited to ‘God’ or, instead, that members of different religions be invited to give prayers.”\footnote{75} The Mayor refused to take plaintiff’s suggestion, and plaintiff was subjected to significant harassment and ostracism, both by the townspeople and by the town council itself, as a result of her opposition to the sectarian prayers.\footnote{76} The district court granted judgment to plaintiff after a bench trial, finding that the town had violated the Establishment Clause and permanently enjoining the town council “from invoking the name of a specific deity associated with any one specific faith or belief in prayers given at Town Council meetings.”\footnote{77} The Fourth Circuit affirmed.\footnote{78}

In distinguishing the unconstitutional prayers in Wynne from the constitutional prayers in Marsh, the Fourth Circuit noted that “[i]n Marsh, the approved prayer was characterized as ‘nonsectarian’ and ‘civil’; indeed, the chaplain had affirmatively ‘removed all references to Christ.”\footnote{79} In contrast, the prayers in Wynne “crossed [the] line,” by “‘exploit[ing]’ the ‘prayer opportunity’” to affiliate the Government with one specific faith or belief in preference to others.\footnote{80}

The Fourth Circuit in Wynne stressed the importance of distinguishing between sectarian and nonsectarian legislative prayer by

\footnotesize{72. \textit{Id.} at 298–99.  
73. \textit{Id.} at 294.  
74. \textit{Id.} at 295.  
75. \textit{Id.}  
76. \textit{Id.} at 294–96.  
77. \textit{Id.} at 296.  
78. \textit{Id.} at 302.  
80. \textit{Id.} (quoting Marsh, 463 U.S. at 794).}
citing to language from both the Marsh and Allegheny cases.\textsuperscript{81} The Wynne court noted that Marsh emphasized that the legislative prayer at issue there did not attempt ""to proselytize or advance any one, or to disparage any other, faith or belief.""\textsuperscript{82} The Wynne court then cited to Allegheny, decided six years after Marsh, and stated that the Court in Allegheny ""explained that Marsh ‘recognized that not even the ‘unique history’ of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.’""\textsuperscript{83} Rather, ""while Marsh may have found that history can ‘affect the constitutionality of nonsectarian references to religion by the government,’ the Court had never held that ‘history can[] legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.’""\textsuperscript{84} The Wynne court emphasized that ""the Allegheny Court clarified that it only upheld the prayer in Marsh against Establishment Clause challenge because the Marsh prayer did not violate this nonsectarian maxim—‘because the particular chaplain had ‘removed all references to Christ.’""\textsuperscript{85} The Fourth Circuit further maintained, ""Thus, we must reject the Town Council’s contention that the Marsh Court’s approval of a nonsectarian prayer ‘within the Judeo-Christian tradition’ equates to approval of prayers like those challenged here, which invoke the exclusively Christian deity—Jesus Christ.""\textsuperscript{86}

b. Simpson v. Chesterfield County Board of Supervisors

In Simpson v. Chesterfield County Board of Supervisors,\textsuperscript{87} the Fourth Circuit reiterated that Marsh authorizes only non-sectarian prayers.\textsuperscript{88} Simpson upheld a County’s practice of inviting religious leaders to begin meetings with invocations because the County was

\begin{itemize}
  \item \textsuperscript{81} Id. at 297 (quoting Allegheny Cnty. v. ACLU, 492 U.S. 573, 603 (1989)).
  \item \textsuperscript{82} Id. (quoting Marsh, 463 U.S. at 794–95).
  \item \textsuperscript{83} Id. (quoting Allegheny, 492 U.S. at 603).
  \item \textsuperscript{84} Id. (quoting Allegheny, 492 U.S. at 603).
  \item \textsuperscript{85} Id. at 299 (quoting Allegheny, 492 U.S. at 603 (quoting Marsh, 463 U.S. at 793 n.14)).
  \item \textsuperscript{86} Id. at 300.
  \item \textsuperscript{87} Simpson v. Chesterfield Cnty. Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005).
  \item \textsuperscript{88} Id.
\end{itemize}
found not to have advanced any one religion to the detriment of others. 89

Significantly, Chesterfield County’s policy “track[ed] the language of
Marsh, stat[ing] that each ‘invocation must be non-sectarian with
elements of the American civil religion and must not be used to
proselytize or advance any one faith or belief or to disparage any other
faith or belief.”” 90

In Simpson, a county resident who was Wiccan sued the county
board of supervisors after the board excluded the plaintiff from a list of
local religious leaders available to provide non-sectarian prayers prior to
public sessions of the county board meetings. 91 Specifically, the plaintiff
challenged the board’s practice of restricting potential prayer-givers to
representatives of Judeo-Christian and monotheistic religions. 92 The
district court granted the plaintiff’s motion for summary judgment on her
Establishment Clause claim, but the Fourth Circuit reversed. 93 In
reversing, the Fourth Circuit held that under Marsh, legislative prayers
are constitutionally acceptable when they fit broadly within the Judeo-
Christian tradition. 94 The Fourth Circuit focused on the substance of the
invocations themselves, rather than the selection of clergy. 95 In focusing
on the invocations, the court held that the Establishment Clause was not
violated because “there [was] no indication that the prayer opportunity
[was] exploited to proselytize or advance any one, or to disparage any
other, faith or belief.” 96 The court noted that the county, “seeking to
avoid the slightest hint of sectarianism, revised its invitation letter to the
clergy” and began directing clergy “to avoid invoking the name of Jesus
Christ.” 97

The Simpson court rejected the plaintiff’s argument that the
selection of clergy bore any constitutional significance, citing to the fact
that the Supreme Court in Marsh upheld a practice where the sole prayer-

89. Id. at 278.
90. Id. (emphasis added).
91. Id. at 280.
92. Id.
93. Id. at 280, 288.
94. Id. at 283.
95. Id. at 286.
96. Id. at 283 (quoting Marsh v. Chambers, 463 U.S. 783, 794–95 (1983)).
97. Id. at 279.
giver was a Presbyterian minister. Rather, the Fourth Circuit in Simpson noted that what matters is the content of the prayer, not the identity of the prayer-giver. According to the Simpson court, even though Marsh means that "the Establishment Clause does not scrutinize legislative invocations with the same rigor that it appraises other religious activities," it does require "that a divine appeal be wide-ranging, tying its legitimacy to common religious ground." The Fourth Circuit explained:

In private observances, the faithful surely choose to express the unique aspects of their creeds. But in their civic faith, Americans have reached more broadly. Our civic faith seeks guidance that is not the property of any sect. To ban all manifestations of this faith would needlessly transform and devitalize the very nature of our culture. When we gather as Americans, we do not abandon all expressions of religious faith. Instead, our expressions evoke common and inclusive themes and forswear, as Chesterfield has done, the forbidding character of sectarian invocations.

Simpson concluded that "the content of the invocations given at County Board meetings has not 'crossed the constitutional line.'" As clarified in Simpson:

Wynne was concerned that repeated invocation of the tenets of a single faith undermined our commitment to participation by persons of all faiths in public life. For ours is a diverse nation not only in matters of secular viewpoint but also in

98. Id. at 285.
99. See id. at 286.
100. Id. at 287.
101. Id.
102. Id. at 284 (quoting Wynne v. Town of Great Falls, 376 F.3d 292, 298 (4th Cir. 2004)); see also Wynne, 376 F.3d at 299 ("Regardless of the context or applicable 'test,' one 'command of the Establishment Clause' is absolutely 'clear[]': 'one religious denomination cannot be officially preferred over another.'" (quoting Larson v. Valente, 456 U.S. 228, 244 (1982) (alterations in the original) (emphasis added))).
matters of religious adherence. Advancing one specific creed at the outset of each public meeting runs counter to the credo of American pluralism and discourages the diverse views on which our democracy depends.\footnote{Simpson, 404 F.3d at 283.}

In other words, Judge Wilkinson, in \textit{Simpson}, emphasized the importance of avoiding sectarianism in legislative prayer, in favor of striving for more inclusiveness.

c. \textit{Turner v. City Council of Fredericksburg}

The Fourth Circuit reaffirmed these principles in \textit{Turner v. City Council of Fredericksburg},\footnote{534 F.3d 352 (4th Cir. 2008).} where it confronted a city council member’s claim that the Fredericksburg City Council violated the First Amendment when it prohibited him from invoking Jesus’ name during opening invocations.\footnote{Id. at 353.} The district court in \textit{Turner} ruled against the council member, concluding that Supreme Court and Fourth Circuit precedent require that legislative prayers be non-sectarian.\footnote{Turner v. City Council of Fredericksburg, No. 3:06CV23, 2006 WL 2375715, at *1–3 (E.D. Va. Aug. 14, 2006).} Although the council member attempted to distinguish \textit{Wynne} as barring only “frequent references to Jesus Christ to the exclusion of all other deities,” but permitting “isolated references to Jesus,”\footnote{Id. at *4.} the court rejected that argument, explaining:

Councilor Turner’s adaptation of \textit{Wynne}, would render the Establishment Clause inapplicable as long as [sectarian] prayer did not exceed a certain unspecified number or percentage of prayers. Despite his suggestion, \textit{Wynne} does not direct this Court to conduct a quantitative analysis of the number and percentage of references to a specific deity. The \textit{Wynne} court concluded that the Christian prayers at issue violated the rule of...
Marsh and Allegheny, by "affiliating" the government with the Christian religion. Wynne did not restrict the number of invocations, rather it "enjoin[ed] the Town Council from invoking the name of a specific deity associated with any one specific faith or belief in prayers given at Town Council meetings . . . " Councilor Turner's invocations of the name of Jesus Christ, whether they are sporadic or frequent violates the prohibition against sectarian legislative prayer. On appeal, the Fourth Circuit affirmed, holding that the City of Fredericksburg's "decision to provide only nonsectarian legislative prayers places it squarely within the range of conduct permitted by Marsh and Simpson."

d. Joyner v. Forsyth County Board of Commissioners

With its recent opinion in Joyner, the Fourth Circuit has again held that sectarian legislative prayers impermissibly advance one religion over others in violation of the Establishment Clause. Repeatedly citing Marsh and Allegheny, as well as Simpson and Wynne, the court emphasized the importance of the actual content of the prayers, noting that "both the Supreme Court and this circuit have been careful to place clear boundaries on invocations." The Fourth Circuit continued:

That is because prayer in governmental settings carries risks. The proximity of prayer to official government business can create an environment in which the government prefers—or appears to prefer—particular sects or creeds at the expense of

108. Id. at *4–5 (quoting Wynne v. Town of Great Falls, 376 F.3d 292, 302 (4th Cir. 2004)). See also Allegheny Cnty. v. ACLU, 492 U.S. 573, 608 n.56 (1989) (rejecting the notion that "temporary acts of favoritism for a particular sect do not violate the Establishment Clause").

109. Turner, 534 F.3d at 356 ("The restriction that prayers be nonsectarian in nature is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith.").


111. Id. at 347.
others . . . More broadly, while legislative prayer has the capacity to solemnize the weighty task of governance and encourage ecumenism among its participants, it also has the potential to generate sectarian strife. Such conflict rends communities and does violence to the pluralistic and inclusive values that are a defining feature of American public life . . . . The cases thus seek to minimize these risks by requiring legislative prayers to embrace a non-sectarian ideal. That ideal is simply this: that those of different creeds are in the end kindred spirits, united by a respect paid higher providence and by a belief in the importance of religious faith.112

The court concluded that the December 17, 2007 prayer set forth in the introduction of this article “clearly crossed the constitutional line.”113 Citing to prayers found unconstitutional in Wynne, which “ended with a solitary reference to Jesus Christ,” the court noted that “[t]he prayer here went further.”114 The court concluded that the prayer on December 17, 2007 was “hardly unusual,” highlighting that “[a]lmost four-fifths of the prayers” contained sectarian references.115

The court rejected the County’s argument that its policy was neutral and therefore its practice was constitutional.116 The court stated, “Take-all-comers policies that do not discourage sectarian prayer will inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein.”117 Consequently, the Fourth Circuit concluded that the County’s policy “falls short.”118

112. Id.
113. Id. at 349.
114. Id.
115. Id.
116. Id. at 353 (noting that it is not enough “when the County was not in any way proactive in discouraging sectarian prayer in public settings”).
117. Id. at 354.
118. Id.
2. Case Law Outside of the Fourth Circuit

Many other courts around the country have disallowed all sectarian references in legislative prayers. In Hinrichs v. Bosma,\(^{119}\) the Seventh Circuit declined to stay the district court's ruling that found that the Indiana House of Representatives violated the Establishment Clause by permitting opening legislative prayers that "repeatedly and consistently advance the beliefs that define the Christian religion: the resurrection and divinity of Jesus of Nazareth."\(^{120}\) This was the case even though invocations were also given by a Jewish rabbi and a Muslim imam.\(^{121}\) The court in Hinrichs emphasized the Supreme Court's language in Marsh, which noted that the chaplain's prayers were "nonsectarian."\(^{122}\) The Hinrichs court concluded that "we [read] Marsh as hinging on the nonsectarian nature of the invocations at issue there."\(^{123}\) The court found that a majority of the prayers given were "identifiably Christian."\(^{124}\)

Similarly, in Bacus v. Palo Verde Unified School District,\(^{125}\) the Ninth Circuit struck down a school board's practice of always beginning its meetings with an invocation "in the name of Jesus."\(^{126}\) The Ninth Circuit held that the prayers did not disparage other religious beliefs or proselytize for Christianity, but they did "advance" Christianity and were therefore improper.\(^{127}\)

However, the Eleventh Circuit in Pelphrey v. Cobb County\(^{128}\) upheld a prayer policy quite similar to the one struck down in Joyner.\(^{129}\)

\(^{119}\) Hinrichs v. Bosma, 440 F.3d 393 (7th Cir. 2006), overruled by Hinrichs v. Speaker of the H.R. of the Ind. Gen. Assemb., 506 F.3d 584, 585 (7th Cir. 2007) (finding that the appellants lacked standing).

\(^{120}\) Hinrichs v. Bosma, 400 F. Supp. 2d 1103, 1104 (S.D. Ind. 2005).

\(^{121}\) Hinrichs, 440 F.3d at 395.

\(^{122}\) Id. at 398.

\(^{123}\) Id. at 399.

\(^{124}\) Id. at 395.

\(^{125}\) 52 F. App'x 355 (9th Cir. 2002).

\(^{126}\) Id. at 356–57.

\(^{127}\) Id. at 357.

\(^{128}\) 547 F.3d 1263 (11th Cir. 2008).

\(^{129}\) See id. at 1266 (noting two county commissions had the "long tradition of opening their meetings with a prayer offered by volunteer clergy or other members of the community").
Pelphrey is distinguishable from Joyner through the fact that, while a majority of prayer-givers in Pelphrey were Christian and included sectarian references in their prayers, leaders of several different faiths had come forth and references to deities other than Jesus Christ were in the record. Further, the Pelphrey opinion substantially relied on a single footnote in Snyder v. Murray. In that footnote, the Tenth Circuit, in Snyder opined that because “all prayers ‘advance’ a particular faith or belief in one way or another,” the Establishment Clause prohibits only the “more aggressive form of advancement, i.e., proselytization.” In Wynne, however, the Fourth Circuit specifically rebuffed the Snyder footnote, concluding that it rested on a misreading of Marsh:

Both [the] premise and conclusion are wrong. Not “all prayers” “advance” a particular faith.” Rather, nonsectarian prayers, by definition, do not advance a particular sect or faith. Moreover, as explained in the text above, Marsh prohibits prayers that “proselytize or advance” a particular faith, not just prayers that proselytize a particular faith. Thus, we find this statement from the Snyder court unpersuasive, and inconsistent with the plain language of Marsh.

However, the majority in Joyner concluded that the Pelphrey court “adopted the same approach we did in Wynne and Simpson: it determined as a threshold matter whether the invocations exploited the opportunity for legislative prayer.” The Joyner court noted that advancement of a particular faith “did not take place in Pelphrey, where the ‘diverse references in the prayers, viewed cumulatively, did not advance a single faith.’” The Fourth Circuit in Joyner distinguished the invocations in

130. Id.
131. See id. at 1273–74 (quoting Snyder v. Murray City Corp., 159 F.3d 1227, 1233–34, 1234 n.10 (10th Cir.1998) (en banc)).
132. 159 F.3d 1227.
133. Id. at 1234 n.10 (citing Marsh v. Chambers, 463 U.S. 783, 793 n.14, 794–95 (1983)).
134. Wynne v. Town of Great Falls, 376 F.3d 292, 301 n.6 (4th Cir. 2004).
136. Id. (quoting Pelphrey v. Cobb Cnty., 547 F.3d 1263, 1277 (11th Cir. 2008)).
Pelphrey from those in Joyner because in the present case, “Almost four-fifths of the prayers delivered after the adoption of the policy referenced Jesus Christ. None of the prayers mentioned any other deity. And at no time after the adoption of the policy did a non-Christian religious leader come forth to give a prayer.”  

3. The Meaning of “Sectarian” Prayer

One issue that arises in legislative prayer cases is the meaning of “sectarian” prayer. The Supreme Court recognized that authorizing legislative prayers worked an exception in Establishment Clause jurisprudence, which was justified only because of the “unique history” of such prayers. To avoid trampling on the interests of religious minorities, however, as explained in Allegheny, the Court has viewed this exception as exceedingly narrow. Excluding identifiably sectarian invocations safeguards the appeal of legislative prayer as “wide-ranging, tying its legitimacy to common religious ground.” And it ensures that individuals of other faiths will not feel excluded by their own government. 

The term “sectarian” has been defined in various Supreme Court and Fourth Circuit opinions. Further, the Fourth Circuit decisions on

---

137. Id. The dissent in Joyner concludes that the Joyner majority opinion and Pelphrey are in “direct conflict.” Id. at 364 (Niemeyer, J., dissenting). 
141. See Allegheny, 492 U.S. at 595 (rejecting “any notion that this Court will tolerate some government endorsement of religion . . . [because] any endorsement . . . ‘sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’” (emphasis added) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring))). 
142. See, e.g., Lee v. Weisman, 505 U.S. 577, 588 (1992) (defining “sectarian” prayer as one that “uses ideas or images identified with a particular religion”). Additionally, as Wynne noted: 

The prayers sponsored by the Town Council have invoked a deity in whose divinity only those of the Christian faith believe. This is not a . . . ‘nonsectarian prayer’ without
legislative prayer give guidance to cities and counties as to what language crosses "the constitutional line." 143 For example, in Wynne, the Fourth Circuit affirmed a district court order enjoining a Town Council "from invoking the name of a specific deity associated with any one specific faith or belief in prayers given at Town Council meetings." 144 In Simpson, this court acknowledged that the County's practice of directing Christian clergy "to avoid invoking the name of Jesus Christ" met the non-sectarian requirement. 145 In Turner, the court authorized the city to "continue its current practice of offering the official prayer to a non-denominational 'God,' without invoking the name of a specifically Christian (or other denominational) deity." 146 Acknowledging and barring these references does not violate the Supreme Court's warning against "parsing" a prayer. 147 Finally, there is a difference between the terms "Christian" and "Judeo-Christian." 148

'explicit references . . . to Jesus Christ, or to a patron saint'—references that can 'foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral.'

Wynne v. Town of Great Falls, 376 F.3d 297, 300 (4th Cir. 2004) (quoting Lee, 505 U.S. at 588, 589); see also Lee, 505 U.S. at 641 (Scalia, J., dissenting) (defining sectarian prayer as one "specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)").

144. Wynne, 376 F.3d at 302 (internal quotation marks omitted).
145. Simpson, 404 F.3d at 279, 284.
147. See Allegheny Cnty. v. ACLU, 492 U.S. 573, 609 (1989) ("'[T]he myriad, subtle ways in which Establishment Clause values can be eroded' necessitates 'careful judicial scrutiny' of 'government practices that purport to celebrate or acknowledge events with religious significance[.]'" (quoting Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)); Joyner, 653 F.3d at 352 (noting that, in Wynne, the court did not "'pars[e]' the details of particular prayers" when noting the "frequency" of reference to Christian-specific deities); Wynne, 376 F.3d at 298 n.4 (observing that "a recognition that the prayers often included an invocation to Jesus Christ does not constitute the 'parsing' referred to in Marsh").
148. See Joyner, 653 F.3d at 348 ("We found unpersuasive the council's arguments that its references to Jesus Christ fell within Marsh's approval of a prayer in the Judeo-Christian tradition, for the prayers referenced Christ—'a deity in whose
B. Government Speech v. Private Speech

One of the common arguments proffered by advocates of sectarian legislative prayer is that this type of prayer constitutes private speech, protected by the free speech and free exercise clauses of the First Amendment. The Fourth Circuit and all other courts to reach the issue have concluded that prayers delivered by invited clergy at legislative meetings are “government speech subject . . . to the proscriptions of the Establishment Clause.” Indeed, as noted by the Fourth Circuit in Turner (in which Justice Sandra Day O’Connor was sitting by designation), there is not “a single case in which legislative prayer was treated as individual or private speech.” Indeed, even the cases outside of the Fourth Circuit that rule differently on the constitutionality of all divinity only those of the Christian faith believe.” (quoting Wynne, 376 F.3d at 299–300); Simpson, 404 F.3d at 286 (noting that “Judeo-Christian” refers to several religious traditions and may even include Islam); Wynne, 376 F.3d at 299–300 (rejecting “the Town Council’s contention that the Marsh Court’s approval of a nonsectarian prayer ‘within the Judeo-Christian tradition’ equates to approval of prayers like those challenged here, which invoke the exclusively Christian deity—Jesus Christ”).

149. Simpson, 404 F.3d at 288 (internal quotation marks omitted).

150. Turner, 534 F.3d at 355. In the trial court’s opinion in Joyner, Magistrate Judge Sharp noted:

The Court concludes . . . that binding Fourth Circuit precedent presents a formidable obstacle for Defendant in its attempt to establish that legislative prayer is private speech. In Turner [], the court of appeals noted that the plaintiff had not “cited a single case in which a legislative prayer was treated as individual or private speech.

Joyner v. Forsyth Cnty., No. 1:07CV243, 2009 WL 3787754, at *5 (M.D.N.C. Nov. 9, 2009); see also Allegheny, 492 U.S. at 600 (noting that “the Establishment Clause does not limit only the religious content of the government’s own communications” but also “prohibits the government’s support and promotion of religious communications by religious organizations”); Simpson, 404 F.3d at 288 (holding that legislative prayers constitute government speech—even when given by community members rather than government officials—because the purpose of the invocations “is simply that of a brief pronouncement of simple values presumably intended to solemnize the [government meeting and is] not intended for the exchange of views or other public discourse [or] for the exercise of one’s religion”.


sectarian legislative prayer consistently view legislative prayer as government-sponsored speech.151

Courts often employ a four-factor test to determine whether speech at issue is government speech, as opposed to private speech, analyzing:

(1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech.152

With regard to the first factor, in Joyner, the County conceded that the purpose of the prayers was to “solemnize proceedings of the Forsyth County Board of Commissioners.”153 The prayers were offered after the Board and the citizens formally gathered together for the meeting, the Chair invited the audience to stand for both the invocation and the Pledge of Allegiance, and the prayer was included on the official County recording of the meeting.154

With regard to the second factor, i.e., the degree of editorial control exercised by the government or private entities over the content of the speech, the prayer-givers in Joyner were invited by the Board to pray on their behalf.155 Further, the Policy required that the Board determine who offered prayers at the beginning of its meetings, and not

151. See, e.g., Pelphrey v. Cobb Cnty., 547 F.3d 1263, 1275 (11th Cir. 2008) (“The prayers of the commissions are governed by Marsh.”); Doe #2 v. Tangipahoa Parish Sch. Bd., 631 F. Supp.2d 823, 835 (E.D. La. 2009) (explaining that Marsh provided the pertinent standard because it is applicable to all “government-sponsored prayer in opening legislative sessions”).

152. Turner, 534 F.3d at 354 (internal quotation marks omitted).


154. Joint Appendix, supra note 2, at 146 ¶ 29, 169 ¶¶ 1–2, 195–99, 220–22, 232–36, 298–99, 311–12; Joyner, 2009 WL 3787754, at *2, 5; see also Turner, 534 F.3d at 354 (noting that the first factor weighs in favor of government speech where the prayer is delivered at the opening of the meeting along with the Pledge of Allegiance after the prayer-giver is called on by the Mayor).

everyone requesting access is included automatically on the Congregations List. Indeed, the County has made clear that only religious leaders from established congregations will be permitted to offer prayer.\textsuperscript{156}

With regard to the third factor, the Fourth Circuit in\textit{ Simpson} concluded that the practice of inviting outside prayer-givers did not convert legislative prayer into private speech.\textsuperscript{157} Finally, under the fourth factor, the government retains the ultimate responsibility for the content of the speech in question. For example, in\textit{ Joyner}, at the time the prayer was offered, an uninvited speaker would not have been permitted to take the microphone and begin speaking about any issue—such a speaker would have been asked to sit down.\textsuperscript{158} Consequently, "[a]fter considering these factors, the Court conclude[d] that [Forsyth County’s] invocation prayers [we]re government speech."\textsuperscript{159}

III. CONCLUSION

As noted by the Fourth Circuit, Forsyth County’s prayer policy "resulted in sectarian invocations meeting after meeting that advanced Christianity and that made at least two citizens feel uncomfortable, unwelcome, and unwilling to participate in the public affairs of Forsyth County."\textsuperscript{160} The court elaborated:

\begin{itemize}
  \item 156. Joint Appendix, \textit{supra} note 2, at 201–06, 217–18, 353–55.
  \item 158. Joint Appendix, \textit{supra} note 2, at 206, 286, 299–300; see also, Hinrichs v. Bosma, 400 F. Supp.2d 1103, 1114 (S.D. Ind. 2005), \textit{overruled by} Hinrichs v. Speaker of the H.R. of the Ind. Gen. Assemb., 506 F.3d 584, 599–600 (7th Cir. 2007) (finding that the appellants lacked standing and holding that prayers offered at the beginning of sessions of the Indiana legislature were government speech, even though they were frequently given by clergy having no government connection, where the Speaker of the House controlled access to the podium and had denied the intent to create any kind of public forum); \textit{Simpson}, 404 F.3d at 288 (finding that the prayers given by invited outside prayer-givers constituted government speech where the purpose of the invocation “is not intended for the exchange of views or other public discourse”).
  \item 159. \textit{Joyner}, 2009 WL 3787754, at *5.
  \item 160. \textit{Joyner} v. Forsyth Cnty., 653 F.3d 341, 354 (4th Cir. 2011).
\end{itemize}
To be sure, citizens in a robust democracy should expect to hear all manner of things that they do not like. But the First Amendment teaches that religious faith stands on a different footing from other forms of speech and observance. Because religious belief is so intimate and so central to our being, government advancement and effective endorsement of one faith carries a particular sting for citizens who hold devoutly to another. This is precisely the opposite of what legislative invocations should bring about. In other words, whatever the Board's intentions, its policy, as implemented, has led to exactly the kind of "divisiveness the Establishment Clause rightly seeks to avoid."

In so holding the Fourth Circuit in *Joyner v. Forsyth County* confirmed what most courts in the country have concluded—that sectarian legislative prayer is unconstitutional under the First Amendment to the United States Constitution. The Supreme Court's denial of *certiorari* underscores the finality and consistency of this conclusion.

---