

RECENT CASES

CONSTITUTIONAL LAW — ESTABLISHMENT CLAUSE — FOURTH CIRCUIT HOLDS THAT LOCAL GOVERNMENT MAY RESTRICT THE LEADING OF ITS INVOCATIONS TO REPRESENTATIVES OF JUDEO-CHRISTIAN RELIGIONS. — *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir.), cert. denied, 126 S. Ct. 426 (2005).

Over one hundred years ago, the Supreme Court accepted the notion that “this is a Christian Nation.”¹ This view has been reiterated more recently in such places as the official platform of the Republican Party of Texas² and the speeches of a senior intelligence officer in the Bush Administration.³ The idea that America is a Christian nation — or, perhaps, a Judeo-Christian nation — raises constitutional questions in light of the Establishment Clause. Recently, in *Simpson v. Chesterfield County Board of Supervisors*,⁴ the Fourth Circuit held that a county board that invited different religious leaders to lead invocations prior to public board sessions could restrict participation to representatives of Judeo-Christian religions.⁵ In doing so, the court misapplied Supreme Court precedent regarding legislative prayer and thus failed to recognize that excluding all but Judeo-Christian religious representatives violates the Establishment Clause.

Chesterfield County, Virginia, is governed by a Board of Supervisors.⁶ Since 1984, the Board’s public meetings have included a “non-sectarian invocation.”⁷ Rather than relying upon a single chaplain, the Board’s policy is to invite different local religious leaders to provide the invocations.⁸ Every December, the Board’s clerk sends an invitation addressed to the “religious leader” of each of several hundred local congregations listed in the clerk’s records.⁹ The clerk schedules those who reply to give an invocation at a particular board session on a “first-come, first-serve basis.”¹⁰ In 2002, Cynthia Simpson, a resident of Chesterfield County, requested that the Board’s clerk add her to the list of invitees.¹¹ Simpson described herself as a “witch” and a “spiri-

¹ *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

² Cathy Young, Op-Ed., *GOP’s ‘Christian Nation’*, BOSTON GLOBE, July 12, 2004, at A11.

³ Dahlia Lithwick, Op-Ed., *Chipping Away at the Wall*, N.Y. TIMES, Aug. 22, 2004, § 4, at 9.

⁴ 404 F.3d 276 (4th Cir.), cert. denied, 126 S. Ct. 426 (2005).

⁵ *Id.* at 278, 285.

⁶ *Id.* at 278.

⁷ *Id.*

⁸ *Id.* at 279.

⁹ *Id.* The clerk’s records of congregations are derived mainly from the phone book. *Id.*

¹⁰ *Id.*

¹¹ *Id.*

tual leader” of a local Wiccan group known as the Broom Riders Association.¹² Simpson received a reply from the County attorney, who informed her that she was ineligible to be added to the list because her proposed invocation was inconsistent with the Board’s policy, which limited the invocations to those “consistent with the Judeo-Christian tradition.”¹³

After the Board reviewed and reaffirmed this policy, Simpson brought suit in the U.S. District Court for the Eastern District of Virginia, alleging that her exclusion from the Board’s list violated the Establishment Clause by impermissibly advancing Judeo-Christianity.¹⁴ The district court granted Simpson’s motion for summary judgment, concluding that “the general principle that prohibits the endorsement or preference of one religious faith or group of beliefs over others to the extent that the ‘nonadherents’ fairly perceive their exclusion as disapproval of their religious choice is relevant and controlling in this case.”¹⁵ While noting that divergent analytical frameworks have emerged from the Supreme Court’s Establishment Clause jurisprudence, the court concluded that the Board’s exclusionary policy violated the clause under “any . . . analytical model.”¹⁶

The Fourth Circuit reversed. Writing for a unanimous panel, Chief Judge Wilkinson¹⁷ held that the Board’s policy does not violate the Establishment Clause. The court framed the issue as a choice between two different lines of Supreme Court precedent.¹⁸ On the one hand, there was *Lemon v. Kurtzman*,¹⁹ which introduced a three-prong test

¹² *Id.* at 280.

¹³ *Id.* (quoting the Chesterfield County attorney) (internal quotation mark omitted). The Board’s stated policy is that the invocations “must be non-sectarian with elements of the American civil religion,” which the Board had consistently applied to allow only representatives of Judeo-Christian religions. *Simpson v. Chesterfield County Bd. of Supervisors*, 292 F. Supp. 2d 805, 807 (E.D. Va. 2003) (quoting Memorandum in Support of Defendant’s Motion for Summary Judgment ex.A) (internal quotation mark omitted). In addition to Jewish and Christian leaders, on one occasion an Islamic representative gave the invocation. *Id.*

¹⁴ *Simpson*, 404 F.3d at 280. Simpson also asserted claims under the Free Speech, Free Exercise, and Equal Protection Clauses. *Simpson*, 292 F. Supp. 2d at 806. The district court granted the Board’s summary judgment motion on these claims. *Id.* at 823.

¹⁵ *Simpson*, 292 F. Supp. 2d at 817. The Fourth Circuit affirmed the district court’s decision that Simpson’s Free Speech, Free Exercise, and Equal Protection claims were not viable. *Simpson*, 404 F.3d at 288.

¹⁶ *Simpson*, 292 F. Supp. 2d at 817.

¹⁷ Judge Wilkinson was joined by Judges Niemeyer and Williams.

¹⁸ See *Simpson*, 404 F.3d at 280.

¹⁹ 403 U.S. 602 (1971). It is somewhat surprising that the court would consider applying *Lemon* because many of the current Supreme Court Justices have criticized it. See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) (comparing *Lemon* to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried”).

for Establishment Clause violations,²⁰ and *Larson v. Valente*,²¹ which held that “denominational preferences” subject a government policy to strict scrutiny.²² On the other hand, there was *Marsh v. Chambers*,²³ which held that legislative prayer does not violate the Establishment Clause.²⁴ The court concluded that it was constrained to apply *Marsh* to this case for three reasons. First, *Simpson* was like *Marsh* in that it dealt specifically with legislative prayer.²⁵ Second, the Supreme Court decided *Marsh* after *Lemon* and *Larson* and had declined to apply either precedent to the legislative prayer at issue.²⁶ Third, prior Fourth Circuit decisions demonstrated an intent to apply *Marsh* to the issues in the present case.²⁷ For these reasons, the court concluded that the Supreme Court has “made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines.”²⁸

The court then applied *Marsh* to the Board’s legislative prayer policy. In *Marsh*, the Supreme Court stated that the content of legislative prayer would be free from judicial scrutiny as long as it did not “prose-lytize or advance any one, or . . . disparage any other, faith or belief.”²⁹ In reviewing the content of the Board’s invocations, the *Simpson* court emphasized that the Board’s legislative prayer had “described divinity in wide and embrative terms.”³⁰ The court then commended the Board “for its attempt to foster inclusiveness in invocations” while avoiding “the divisiveness the Establishment Clause seeks rightly to avoid.”³¹

The court found that the Board’s selection process did not violate the Establishment Clause. The court noted that in *Marsh*, the Supreme Court did not object to the Nebraska legislature’s selection of a Presbyterian chaplain to give its invocations because the choice of any minister might seem to reflect some denominational preference.³² The

²⁰ *Lemon*, 403 U.S. at 612–13 (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” (citation omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970))).

²¹ 456 U.S. 228 (1982).

²² *See id.* at 246–47.

²³ 463 U.S. 783 (1983).

²⁴ *Id.* at 791–93.

²⁵ *Simpson*, 404 F.3d at 280–81.

²⁶ *Id.* at 281.

²⁷ *Id.* at 282 (citing *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004) (holding a town council’s legislative prayer that referenced Jesus Christ unconstitutional under *Marsh*)).

²⁸ *Id.* at 281.

²⁹ *Marsh*, 463 U.S. at 794–95.

³⁰ *Simpson*, 404 F.3d at 284. The court gave numerous examples of these “wide and embrative terms,” all of which explicitly reflect a monotheistic viewpoint. *See id.*

³¹ *Id.*

³² *Id.* at 285 (citing *Marsh*, 463 U.S. at 793).

court reasoned that if selecting one representative from one denomination was constitutionally permissible, then the “more inclusive” practice of the Board must also fall within the boundaries set by the Establishment Clause.³³ The court also reasoned that, unlike the Nebraska legislature in *Marsh*, the Board is not even responsible for selecting the individuals who give its invocations because it has a “first-come, first-serve” policy.³⁴

Judge Niemeyer issued a brief concurrence to argue that the Establishment Clause requires a distinction between “the government’s own prayer” and “government prescriptions or proscriptions of prayer *for the people*” and that the standard of judicial review of the government’s own prayer should be more deferential.³⁵ Because, on his view, the purpose of the Board’s invocations was “to serve the [B]oard,” the Board’s policy is subject only to this deferential standard.³⁶

The court’s analysis was impeded by its misguided conviction that *Marsh* carved out a special exception to Establishment Clause jurisprudence for all aspects of legislative prayer. In fact, *Marsh* only carved out a narrow exception to the *Lemon* test for certain aspects of legislative prayer, based on the fact that legislative prayer is a long-standing historical practice.³⁷ The *Marsh* Court did not exempt every aspect of legislative prayer — including the selection of prayer givers — from more widely applicable Establishment Clause scrutiny.

The key error in the court’s *Marsh* analysis is its failure to distinguish between three different aspects of legislative prayer for which the Supreme Court has provided different standards: first, the *act* of

³³ *Id.*

³⁴ *Id.* at 285–86 (“The County has no ability to dictate selection; the clergy itself controls it by choosing to respond or not.”). Even if the Board expresses no preference among those who respond, however, the County clerk is responsible for choosing which religious groups receive invitations. Consequently, the Board excluded Simpson and other adherents of polytheistic faiths because the first-come, first-serve policy does not apply to them. See *Simpson v. Chesterfield County Bd. of Supervisors*, 292 F. Supp. 2d 805, 817 (E.D. Va. 2003).

³⁵ See *Simpson*, 404 F.3d at 288–89 (Niemeyer, J., concurring).

³⁶ *Id.* at 290.

³⁷ See Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach*, 72 CORNELL L. REV. 905, 906 (1987) (“[T]he Court’s opinion in *Marsh* can be understood as simply creating a limited exception based on history to the application of the *Lemon* test.”); Jon Veen, Note, *Where Do We Go from Here? The Need for Consistent Establishment Clause Jurisprudence*, 52 RUTGERS L. REV. 1195, 1212–13 (2000). The holding in *Marsh* was based in large part on the fact that in 1789 Congress authorized the appointment of paid chaplains just three days before reaching final agreement on the wording of what would become the First Amendment. See *Marsh*, 463 U.S. at 788. Unsurprisingly, this reliance on historical practice is not without criticism. See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854, 2885 n.27 (2005) (Stevens, J., dissenting) (noting that the same Congress that passed the First Amendment also passed laws, such as the Alien and Sedition Act, that violate the Court’s present understanding of the Free Speech Clause); *Marsh*, 463 U.S. at 814 n.30 (Brennan, J., dissenting) (noting that Congress reaffirmed racial segregation one week after proposing the Fourteenth Amendment).

legislative prayer, second, the *selection process* for the legislative prayer giver, and third, the *content* of legislative prayer. The Court in *Marsh* first concluded that the act of legislative prayer itself does not violate the Establishment Clause.³⁸ The Court then concluded that the selection of the prayer giver does not violate the Establishment Clause unless it “stem[s] from an impermissible motive.”³⁹ Finally, the Court concluded that judicial review of the content of legislative prayer should be extremely minimal.⁴⁰

The *Simpson* court confused *Marsh*'s different standards for the various aspects of legislative prayer and concluded that the same minimal standard of judicial review applicable to the content of legislative prayer is applicable to the selection process for the prayer giver.⁴¹ Though the court never fully addressed whether the Board's selection process involved an impermissible motive in the context of legislative prayer, it nevertheless found that the County “has followed the standards . . . of *Marsh*.”⁴² *Marsh* itself provided little guidance as to what would constitute an impermissible motive,⁴³ but the *Simpson* court's cursory examination of the selection process failed to consider how the Supreme Court's broader Establishment Clause jurisprudence might inform this kind of analysis. Indeed, the impermissible motives language in *Marsh* seems to reflect explicitly the “secular legislative

³⁸ *Marsh*, 463 U.S. at 792 (holding that opening legislative sessions with prayer is not “an ‘establishment’ of religion or a step toward establishment”).

³⁹ *Id.* at 793–94. Some might consider the promotion of prayer itself to be an impermissible motive given the Establishment Clause, but the majority in *Marsh* clearly rejected this view. *See id.* at 792.

⁴⁰ *Id.* at 794–95 (“The content of [legislative] prayer is not of concern to judges, where . . . 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.”). The Court in *Marsh* also addressed whether it was permissible to pay the chaplain from public funds, *see id.* at 794, but that issue was not relevant in *Simpson* because the invocations were provided by volunteers.

⁴¹ *See Simpson*, 404 F.3d at 286–87.

⁴² *Id.* at 287.

⁴³ The Court in *Marsh* disposed of the selection process issue briefly, finding that the Nebraska legislature's appointment of a Presbyterian chaplain for a sixteen-year period was “because his performance and personal qualities were acceptable to the body appointing him” and thus involved no “impermissible motive” that would make the selection of the chaplain unconstitutional. *Marsh*, 463 U.S. at 793–94. The Court has elaborated on what constitutes an impermissible motive or purpose in other Establishment Clause cases, *see, e.g.,* *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2739 (2005) (holding that Ten Commandments displays in county courthouses were motivated by an impermissible purpose), but the only federal case aside from *Simpson* that has directly examined *Marsh*'s impermissible motives language in the context of legislative prayer is *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998). In *Snyder*, the Tenth Circuit explained that “under *Marsh* . . . there is no ‘impermissible motive’ when a legislative body or its agent chooses to reject a government-sanctioned speaker because the tendered prayer falls outside the long-accepted genre of legislative prayer.” *Id.* at 1234. The court elaborated that this “long-accepted genre” was broader than the Judeo-Christian tradition, though the genre often reflected “a Judeo-Christian ethic.” *Id.* Thus, had the Fourth Circuit reached the opposite result in *Simpson*, it would not have been inconsistent with the Tenth Circuit's analysis in *Snyder*.

purpose” prong of the *Lemon* test in the context of the selection process of a legislative prayer giver.

Had the court interpreted and applied *Marsh* in light of the more widely applicable standards for scrutinizing legislative purpose, it would have found that the Board’s selection process was based on the impermissible motive of favoring Judeo-Christian religious beliefs over others. The Supreme Court has maintained that “[t]he simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.”⁴⁴ There is little doubt that the Board was motivated to exclude Simpson because it disfavored her religious beliefs.⁴⁵ In contrast with the practice at issue in *Marsh*, Chesterfield County has an avowed policy that grants invitations to lead its invocations based not on a person’s “performance” or “personal qualities,” but rather on a person’s status as a representative of the favored class of Judeo-Christian religions.

Without explicitly tying its analysis to the impermissible motives language in *Marsh*, the *Simpson* court viewed the Board’s motives in its selection process not as an expression of a preference for the Judeo-Christian tradition, but rather as a legitimate attempt to foster inclusiveness.⁴⁶ Although the court was correct to say that “*Marsh*’s caution against ‘impermissible motives’ does not fasten on local governments a limitation to a prayer-giver from one religious view,”⁴⁷ it should have recognized that the notion of “impermissible motives” encompasses the wholesale exclusion of prayer givers representing certain religious views.⁴⁸ Instead, the court repeatedly emphasized the “broad” and “inclusive” nature of the Board’s legislative invocation

⁴⁴ County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 615 (1989).

⁴⁵ This disfavor was stated explicitly in the Board’s letter to Simpson. See *Simpson v. Chesterfield County Bd. of Supervisors*, 292 F. Supp. 2d 805, 808 (E.D. Va. 2003). Furthermore, news accounts of the dispute quoted one Board member making disparaging comments such as, “I hope she’s a good witch like Glenda” and “There is always Halloween.” *Simpson*, 404 F.3d at 286 n.4.

⁴⁶ See *Simpson*, 404 F.3d at 287 (“[T]o make the greater inclusiveness of the Chesterfield policy the very basis of its invalidation would achieve a particularly perverse result.”).

⁴⁷ *Id.* (emphasis omitted).

⁴⁸ Cf. James Madison, Detached Memoranda (n.d.), reprinted in 5 THE FOUNDERS’ CONSTITUTION 103 (Philip B. Kurland & Ralph Lerner eds., 1987). Madison condemned the practice of employing congressional chaplains. *Id.* at 104. At a time when Catholics were a persecuted religious minority in America, Madison wondered:

Could a Catholic clergyman ever hope to be appointed a Chaplain? To say that his religious principles are obnoxious or that his sect is small, is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers[] or that the major sects have a right to govern the minor.

Id.

policy⁴⁹ and the fact that the Board had “achieved diversity” by including a “wide cross-section” of religious leaders.⁵⁰

From the viewpoint of religions outside the Judeo-Christian tradition, however, the Board’s policy is more exclusive than inclusive. As more and more Judeo-Christian sects are included, it becomes clearer which religions are being excluded; accordingly, it becomes harder to believe that the selection of prayer givers is based on a legitimate motive, such as personal or professional qualities, rather than the impermissible motive of religious belief.⁵¹ Despite the court’s urging that “[t]he Judeo-Christian tradition is . . . not a single faith but an umbrella covering many faiths,”⁵² limiting eligibility to Judeo-Christianity excludes in terms of religious diversity far more than it includes.⁵³

The court in *Simpson* not only misapplied *Marsh* on a doctrinal level, but also failed to distinguish the policy effects of its own holding from those of *Marsh*. The effect of the *Marsh* holding was to enable legislative bodies to engage in a form of prayer that acknowledges their own beliefs, so long as they do not advance those beliefs or disparage any others.⁵⁴ In contrast, the effect of *Simpson* is to allow a majority of a legislative body to limit the ability of members of a religious minority to acknowledge their own beliefs.⁵⁵ Thus, while *Marsh* enabled religious expression, *Simpson* limits it.

⁴⁹ See, e.g., *Simpson*, 404 F.3d at 285 (“[T]he selection . . . practice here is in many ways more inclusive than that approved by the *Marsh* Court.”).

⁵⁰ See, e.g., *id.* (“Chesterfield not only sought but achieved diversity.”).

⁵¹ This situation is comparable to a child who is the only one not invited to a classmate’s party. As the number of invitations increases, the conscious exclusion of one child becomes more conspicuous both to the excluded child and to his or her peers.

⁵² *Simpson*, 404 F.3d at 286. The fact that the Judeo-Christian tradition includes multiple sects does not necessarily mean that government endorsement of it is not an establishment of religion. James Madison, one of the key figures in the framing of the Establishment Clause, was particularly afraid of the possibility that “two [sects might] combine together, and establish a religion to which they would compel others to conform.” MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 9 (1978) (quoting 1 ANNALS OF CONG. 731 (Joseph Gales ed., 1834)).

⁵³ See *Simpson v. Chesterfield County Bd. of Supervisors*, 292 F. Supp. 2d 805, 808 (E.D. Va. 2003) (noting the large number of faiths outside the Judeo-Christian tradition). Millions of Americans belong to these excluded religions, and many of these religions are among the fastest growing in America. See GRADUATE CTR. OF THE CITY UNIV. OF N.Y., AMERICAN RELIGIOUS IDENTIFICATION SURVEY (2001), available at http://www.gc.cuny.edu/faculty/research_briefs/aris/aris_index.htm (estimating that the Hindu population grew 237% and the Buddhist population grew 170% in the United States between 1990 and 2001).

⁵⁴ See *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983).

⁵⁵ For example, imagine a hypothetical county with a population that is one-third Christian, one-third Jewish, and one-third Hindu. Although the Board contains many Hindus, Christians and Jews make up the majority of the Board. This majority could establish a policy that invites only representatives of Judeo-Christian religions to lead its invocations, which would be upheld under *Simpson*. While the Christians and Jews on the Board would be free to acknowledge their beliefs, this policy would prevent the substantial number of Hindus on the Board from being able

Although a proper application of *Marsh* would have significantly constrained the Board's ability to select prayer givers, the court could have still allowed the Board broad discretion in its selections while continuing to pursue its desire to have representatives of multiple faiths participate. For example, the Board could limit prayer givers to paid clergy (to ensure professional conduct), representatives of denominations with a specified minimum membership (to ensure the religion has an established presence in the local community), representatives of organizations listed in the phone book (for ease of administration), or representatives of religious organizations that qualify for federal income tax exemptions (as a convenient, viewpoint-neutral filtering device).⁵⁶ And just as the Board requests that Christian leaders refrain from mentioning Jesus Christ, it could impose similar requirements on non-Christian religious leaders. In adopting such policies, the Board would not be forced to choose between its established right to have legislative prayer and the possibility of being forced to provide a pulpit for members of fringe cults.

Because the *Simpson* court concluded that legislative prayer involves a different substantive standard from other Establishment Clause issues, the direct implications of the case should be limited to the relatively narrow arena of legislative prayer. Still, the Fourth Circuit has extended *Marsh* in a way that improperly reduces the scrutiny of legislative prayer. Even if legislative prayer is permissible, the court's holding in *Simpson* goes too far by endorsing a government policy that openly limits those who may lead such prayers to Judeo-Christians. The sheer number of Christians in America may make it a Christian nation de facto, but courts should emphatically reject the idea that America is a Christian nation de jure. This distinction would recognize that allowing legislative bodies to "invoke Divine guidance . . . is simply a tolerable acknowledgement of beliefs widely held among the people of this country,"⁵⁷ but it would not go so far as to allow those legislative bodies to preclude those outside the Judeo-Christian tradition from invoking their own sources of guidance.

to acknowledge their own beliefs. Furthermore, by clearly disfavoring Hinduism, the policy would harm Hindu citizens as well.

⁵⁶ See I.R.C. § 501(c)(3) (2000). Tax-exempt status still involves the government making a judgment call as to which religions are worthy of the status and which are not, but IRS evaluation is intended to be viewpoint neutral. See, e.g., *W. Catholic Church v. Comm'r*, 73 T.C. 196, 210 & n.29, 215 (1979) (identifying a purported religious organization's failure to conduct religious services and the fact that it had only five members as relevant factors in upholding revocation of tax-exempt status), *aff'd in an unpublished order*, 631 F.2d 736 (7th Cir. 1980).

⁵⁷ *Marsh*, 463 U.S. at 792.