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## Between a Rock and a Hard Place: The Struggle to Analyze School Board Prayer and a New Method of Establishment Clause Analysis

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## **BETWEEN A ROCK AND A HARD PLACE: THE STRUGGLE TO ANALYZE SCHOOL BOARD PRAYER AND A NEW METHOD OF ESTABLISHMENT CLAUSE ANALYSIS**

### ABSTRACT

*The constitutionality of public school board prayer under the First Amendment Establishment Clause has vexed lower federal courts for over two decades. With only an inconsistent string of Supreme Court cases to rely upon, lower courts have been forced to choose between competing doctrines and frameworks that embody different interests and were designed for different circumstances.*

*Nowhere is this struggle more aptly displayed than in the current split between the Fifth Circuit in *American Humanist Association v. McCarty* and the Ninth Circuit in *Freedom From Religion Foundation v. Chino Valley Unified School Board*. The Fifth Circuit argued that the school board prayer of the Birdville Independent School District is constitutional because it falls under the Supreme Court's legislative prayer doctrine. Relying on the long tradition of opening American legislatures with prayer dating back to the Founding Era, the doctrine upholds such prayers in other state-based gatherings. Conversely, the Ninth Circuit struck down Chino Valley's school board prayer, arguing that the school board is too intertwined with the school day and student life, and therefore the prayer should be analyzed under school prayer caselaw, using either the Lemon or coercion tests that struck down all such prayers at public school events.*

*This Comment argues that neither of these approaches is appropriate alone to address the constitutionality of school board prayers challenged under the Establishment Clause. School board meetings are similar to state legislative sessions in that they mostly involve adults who are voluntarily present and can make their own judgments about whether to attend or listen to the prayer. But public school boards are undeniably intertwined with the public school day and sometimes do involve students who are young and impressionable, along with other participants who have no real choice but to appear at the meeting, necessarily implicating coercion concerns. However, school boards are much less student-centered than other regular school activities where the risk of coercion is heightened. Adopting one of these Establishment Clause approaches for this unique and variable setting, as the Fifth and Ninth Circuits have done, leads to unsatisfactory analysis and ultimately fails to capture all the concerns inherent in this unique setting.*

*This Comment proposes an original balancing test—one that protects parties against religious coercion and respects traditional practices—that draws on and sequences two Supreme Court approaches to the Establishment Clause. Under this test, the coercive effect of the prayer policy should first be measured to prevent blatantly coercive practices from constitutional approval solely because they have a longstanding history. Then, where a practice passes this initial threshold, any coercive effect will be balanced against the history and tradition of acknowledging prayer and religious heritage in public life. This test more fully encapsulates the concerns inherent in the school board setting, honors our tolerance of some religious acknowledgment in public life, unifies elements of previously disparate Establishment Clause precedent, and is based on recent Supreme Court jurisprudence.*

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## INTRODUCTION

“If you could bow your heads and join me in a prayer,” requests Birdville High School student Kaiya Harris-Stephens as she stands at a lectern at the front of the Birdville Administration Building boardroom.<sup>1</sup> Beside her stands a classmate who just finished leading the standing audience of adults and students in the U.S. and Texas Pledges of Allegiance.<sup>2</sup> In front of her, raised above the crowd on a wood-paneled platform flanked by flags, stand the members of the Birdville Independent School District Board.<sup>3</sup> At every monthly meeting, the Board invites student volunteers to open the public session with the Pledge of Allegiance and a student expression.<sup>4</sup> For Ms. Harris-Stephens’s student expression, the Board members and audience respectfully bow their heads in unison and listen to her prayer, which requests that the “Heavenly Father” provide protection and guidance in the coming school year.<sup>5</sup> The audience and Board unanimously conclude the prayer with an “Amen” before sitting down to proceed with the remaining agenda.<sup>6</sup>

Over one thousand miles away, the residents of the Chino Valley Unified School District similarly gather approximately eighteen times per year for their public school board meetings.<sup>7</sup> After being led in the U.S. Pledge of Allegiance by an elementary school student, the Board President often introduces a local religious leader to lead the assembly in prayer.<sup>8</sup> On one occasion, Pastor Lehman of the Gateway Community Church, a Christian congregation, instructed the

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<sup>1</sup> *Jul 25, 2019 Regular Board Meetings*, BIRDVILLE INDEP. SCH. DIST. (July 25, 2019), <https://birdvilleisdtx.new.swagit.com/videos/38351> (items D & E at 2:15).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Am. Humanist Ass’n v. McCarty*, 851 F.3d 521, 524 (5th Cir. 2017).

<sup>5</sup> *Jul 25, 2019 Regular Board Meetings*, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1138 (9th Cir. 2018).

<sup>8</sup> *See* Chino Valley Unified Sch. Dist. Bd. Videos, *SBM 2016 01 07*, YOUTUBE (Mar. 17, 2016), <https://www.youtube.com/watch?v=QhBOPx7FYws&feature=youtu.be>.

audience to seek the wisdom to obtain favor from the Lord.<sup>9</sup> Immediately following the collective “Amen,” students from the Cal Aero Preserve Academy band performed in a student showcase that nearly always follows the invocation.<sup>10</sup> The Board and audience listened to the performance, congratulated the students, and continued to the rest of the business before the Board.<sup>11</sup>

These scenes from the Birdville Independent School District and Chino Valley Unified School District board meetings demonstrate the next frontier in the decades-long struggle to faithfully interpret and apply the Establishment Clause of the U.S. Constitution.<sup>12</sup> School boards are generally charged with administering and governing the public school education of thousands of students. Similar to a legislature, these boards vote on proposals, set policy, craft budgets, and oversee school personnel and performance. However, more than a mere administrative body, school boards are deeply intertwined with the school day and necessarily affect every student in their jurisdictions. As a consequence, students regularly attend board meetings to perform, receive recognition, and petition and engage the democratic body that makes decisions on their behalf. This mixture of elements has proven legally difficult. Indeed, when it comes to the best way to classify and analyze prayers offered at the beginning of public school board meetings, federal circuit courts are split.<sup>13</sup>

Prayer that occurs at the direction, promotion, or encouragement of a government body such as a school board naturally raises Establishment Clause concerns. However, the unique characteristics of the school board invokes two competing Establishment Clause principles: (1) the desire of public bodies to solemnify meetings and honor the best of our religious traditions; and (2) the necessity of protecting impressionable students from government-sponsored religious coercion. Opponents who bring Establishment Clause challenges to school board prayer practices argue that they are the equivalent of unconstitutional school prayer. Conversely, proponents of these policies insist that they qualify as constitutional legislative prayer. The result of these competing viewpoints is a divided federal circuit struggling to articulate why one of these approaches necessarily triumphs over the other.

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<sup>9</sup> *Id.* Pastor Lehman is introduced at 2:07.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; see *Chino Valley*, 896 F.3d at 1138.

<sup>12</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

<sup>13</sup> See *infra* Part II.A–C.

This struggle is evident in the current split between the Fifth and Ninth Circuits. The Fifth Circuit, in analyzing the Birdville Independent School District's prayer policy, held that the school board is similar to a meeting of the legislature.<sup>14</sup> Consequently, the court held that Supreme Court precedent permits such prayer at a school board meeting because it is a part of our history, following in the tradition and spirit of legislative prayer.<sup>15</sup> The Fifth Circuit rooted this approach in *Marsh v. Chambers*, in which the Supreme Court declined to apply the *Lemon* test to the Nebraska state legislature's practice of opening each session with a prayer from an appointed and paid chaplain.<sup>16</sup> Instead, the Court upheld the practice for the sole reason that legislative prayer is "deeply embedded in the history and tradition of this country."<sup>17</sup> The Court reinforced this approach in *Town of Greece v. Galloway* when considering the prayer practice at the public meetings of the Town of Greece, New York.<sup>18</sup> There, the Court emphasized the need to analyze the Establishment Clause "by reference to historical practices and understandings."<sup>19</sup> Accordingly, the Court upheld the prayer practice on the basis of history alone, eschewing conventional Establishment Clause precedent and tests.<sup>20</sup>

Unlike state legislature and town council meetings, however, school board meetings sometimes do include both students and adults; they also take place on public school premises within earshot of other students.<sup>21</sup> Further, there is no robust, longstanding history of prayers at school board meetings. Perhaps because of this, only the Fifth Circuit has adopted the purely historical approach—one employed sporadically but increasingly—to the constitutionality of these school board prayers.

Meanwhile, after reviewing Chino Valley's prayer policy, the Ninth Circuit held that the school board setting is inherently different than that of the legislative setting.<sup>22</sup> The court reasoned that, given its entanglement with the

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<sup>14</sup> *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 526 (5th Cir. 2017).

<sup>15</sup> *Id.* at 527–28.

<sup>16</sup> *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983). The *Lemon* test considers whether the challenged policy (1) has a legitimate secular purpose, (2) has the primary effect of advancing or inhibiting religion, and (3) fosters excessive entanglement between government and religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>17</sup> *Marsh*, 463 U.S. at 786.

<sup>18</sup> 572 U.S. 565 (2014).

<sup>19</sup> *Id.* at 576 (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part)).

<sup>20</sup> *Id.* at 575 ("The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause.").

<sup>21</sup> *See infra* Part III.A.

<sup>22</sup> *Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1145

school day, the school board is best analyzed using the Supreme Court's school prayer cases and the *Lemon* test.<sup>23</sup> This approach is rooted in the Supreme Court's original concerns of government sponsorship of religion, the individual nature of faith, and the preservation of secular education in public schools.<sup>24</sup> Recently, in both *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*, the Court stressed that school-sponsored prayers effectively coerced impressionable young students into religious participation, contrary to the purpose of Establishment Clause.<sup>25</sup> However, while the school board is operated by school authorities and intertwined with the education of students, as the Ninth Circuit recognizes, it is far less student-centered than the public school during the school day.

Neither of these approaches fits the unique context of the public school board meeting. Instead, this Comment introduces an original balancing test to analyze the constitutionality of prayer in this blended setting.<sup>26</sup> Given the Court's decades-long turn towards a historical Establishment Clause approach and recent instruction in *American Legion v. American Humanist Association*<sup>27</sup> to "look[] to history for guidance,"<sup>28</sup> a new tailored approach anchored in more recent and relevant precedent is the most appropriate mechanism for addressing prayer at a school board setting.<sup>29</sup> This approach follows Justice Kavanaugh's

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(9th Cir. 2018).

<sup>23</sup> *Id.* at 1148.

<sup>24</sup> *See id.* at 1149 (explaining the *Lemon* test requires a governmental practice to (1) have "a secular legislative purpose;" (2) have a "primary effect . . . that neither advances nor inhibits religion;" and (3) "not foster 'an excessive entanglement with religion'" (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971))).

<sup>25</sup> *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000).

<sup>26</sup> *See infra* Part III.

<sup>27</sup> 139 S. Ct. 2067, 2081–82, 2089 (2019) (holding that a nearly one-hundred-year-old cross commemorating America's fallen soldiers in World War I was presumptively constitutional after eschewing traditional Establishment Clause tests and instead considering the monument's constitutionality in light of history and tradition).

<sup>28</sup> *Id.* at 2087 (citation omitted).

<sup>29</sup> The Court in *American Legion* also opined that "[t]he passage of time gives rise to a strong presumption of constitutionality," and that "[w]here categories of monuments, symbols, and practices with a longstanding history follow in [the tradition of tolerance, inclusivity, and nondiscrimination], they are likewise constitutional." *Id.* at 2085, 2089. A concurring opinion and at least one lower court have questioned how longstanding or established something must be for this presumption to apply. *Id.* at 2102 (Gorsuch, J., concurring) ("How old must a monument, symbol, or practice be to qualify for this new presumption?"); *Woodring v. Jackson County*, 986 F.3d 979, 994 (7th Cir. 2021) ("[W]e are unable to conclude, as a threshold matter, that the County's nativity scene is 'longstanding' or 'established,' such that *American Legion's* presumption could attach."). As discussed *infra* in Part III.A, this Comment assumes arguing that *American Legion's* presumption of constitutionality does not apply because of this lack of guidance or clarifying precedent, the unique nature of the school board (which inherently raises other important concerns such as coercion), and the fact that school board prayer does not trigger the concerns which led the Court to reject the *Lemon* test in that case. It instead takes the more general

concurrence in *American Legion*, in which he concludes that the Court is now applying “a history and tradition test” under which prayer policies will be upheld “[i]f the challenged government practice is not coercive *and* . . . is rooted in history and tradition.”<sup>30</sup> Given that the school board is entwined with the school day and students, this Comment’s proposed test uses coercion as the threshold to prevent truly coercive practices from gaining constitutional approval simply because they are longstanding. Where a prayer practice is not so coercive to fail at the outset, it will then be balanced against the accepted history and tradition of prayer at the school board and our tolerance of religious acknowledgment in public life more generally to determine if it is constitutional. This proposed test is based on recent Court precedent and more accurately encompasses the elements and concerns inherent in the school board setting.

This Comment proceeds in three parts. Part I discusses the development of the two Establishment Clause approaches used in the circuit split—the school prayer jurisprudence and the legislative prayer doctrine—to demonstrate how school board prayer does not fit into either. Part II reviews the struggle of lower courts for over two decades to analyze school board prayer and concludes with an analysis of the recent and contrary Fifth and Ninth Circuit opinions. Finally, Part III explains why no approach to school board prayer to date has been satisfactory, presents a new test balancing history and coercion, and applies that test to the Fifth and Ninth Circuit split.

## I. BACKGROUND: THE TWO RELEVANT ESTABLISHMENT CLAUSE APPROACHES

Lower courts, including the Ninth and Fifth Circuits, have relied primarily on two distinct approaches to the Establishment Clause: one approach analyzing unconstitutional school prayer and another approach considering constitutional legislative prayer. Section A discusses the Court’s school prayer jurisprudence, including the original principles that first animated the Court to reject prayer in public schools. This section concludes with a discussion of the Court’s recent focus on the coercive effect of school prayer. Section B traces the Court’s development of the legislative prayer doctrine from *Marsh v. Chambers* to *Town of Greece v. Galloway*, recounts the subsequent turn towards historical consideration when deciding Establishment Clause conflicts, and concludes with the limited application of that approach in lower courts.

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instruction of the Court that history, whether alone or with other factors, must now be considered in any Establishment Clause analysis. *Am. Legion*, 139 S. Ct. at 2081–85.

<sup>30</sup> *Am. Legion*, 139 S. Ct. at 2092–93 (Kavanaugh, J., concurring).

### A. School Prayer

Recognizing the importance of secular education,<sup>31</sup> the Supreme Court has resisted the presence of religion in the public school classroom.<sup>32</sup> Cases spanning the last three-quarters of a century reveal numerous principles that served as the basis for invalidating religious instruction in public schools. Recently, however, the Court has turned its school-prayer analysis away from these earlier principles and towards one based on the idea of coercion, a standard appropriate in analyzing settings associated with the school day and the impressionable student body.<sup>33</sup>

Subsection one details three main principles that served as the foundation of earlier school prayer cases: (1) the government cannot direct or sponsor religion in public schools; (2) interdependence should be avoided to protect government and religion from each other; and (3) schools that serve a secular rather than sectarian purpose should be protected. Subsection two discusses the emergence of coercion analysis in *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*, followed by an identification of factors to be considered in a coercion analysis in subsection three.

#### 1. Animating Principles in Early School Prayer Cases

The first principle is that government cannot direct or sponsor religion in public schools. This principle exists as a broader concern of the Establishment Clause and the First Amendment, informing jurisprudence even before many school-prayer cases.<sup>34</sup> Best summarized by the Court in its first school prayer

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<sup>31</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”); see also THOMAS JEFFERSON, *Notes on Virginia*, in THE WRITINGS OF THOMAS JEFFERSON 204, 206 (Albert Ellery Bergh ed., 1907) (arguing public education is where the “principal foundations of future order will be laid,” ensuring that the people remain “the safe . . . [and] ultimate . . . guardians of their own liberty”).

<sup>32</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987) (“The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.”); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 216–17 (1948) (Frankfurter, J., concurring) (“[T]he public school must keep scrupulously free from entanglement in the strife of sects.”).

<sup>33</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that clergy-led prayer at a public school’s graduation ceremony violates the Constitution because the Establishment Clause “guarantees that government may not coerce anyone to support or participate in religion or its exercise”); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (holding that student-led prayer at a public school’s football game violates the Establishment Clause because the “government may not coerce anyone to support or participate in religion or its exercise” (quoting *Lee*, 505 U.S. at 587)).

<sup>34</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

case, *Engel v. Vitale*, “it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government.”<sup>35</sup> Government involvement in religion is thought to be insidious for a number of reasons, chief among them the protection of minority groups.<sup>36</sup> Minority religious groups tend to become the targets of oppression when the government places its weight behind a particular creed, as “governmentally established religions and religious persecutions go hand in hand.”<sup>37</sup> Indeed, it was our forebearers’ experience with the official church establishment of Europe that compelled them to leave their homes for the distant shores of what would become the United States.<sup>38</sup>

The Court relied on this principle in *School District of Abington Township v. Schempp*, where the school broadcasted prayers to its classrooms over the loudspeaker or through the homeroom teacher.<sup>39</sup> Here, the Court concluded that the “majority [cannot] use the machinery of the State to practice its beliefs,”<sup>40</sup> and that government power should not be used to either assist or hinder religion so as to avoid the union of government and religion.<sup>41</sup> This concern holds true even where the government does not compose the prayer and only “intend[s] to characterize prayer as a favored practice” in the course of the school day.<sup>42</sup>

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nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”)

<sup>35</sup> 370 U.S. 421, 425 (1962).

<sup>36</sup> *Id.* at 431 (“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”).

<sup>37</sup> *Id.* at 432. The Court also notes that throughout history when government has allied itself with religion, the “inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.” *Id.* at 431.

<sup>38</sup> *Id.* at 425 (“It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.”). Through “bitter personal experience,” the people understood the dangers of the government “placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services,” as it often results in “shackl[ing] men’s tongues to make them speak only the religious thoughts that government wanted them to speak.” *Id.* at 429, 435.

<sup>39</sup> 374 U.S. 203, 207–08 (1963).

<sup>40</sup> *Id.* at 226.

<sup>41</sup> *Id.* at 222; see also *McCullum v. Bd. of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) (arguing separation requires abstaining from “fusing functions of Government and of religious sects, not merely to treat them all equally”). Although the decision in *McCullum* was based primarily on the financial support of the government, Frankfurter’s concurrence focused on the “approval and supervision of the superintendent” required for the religious groups to come into the school and the fact that the religious program was “patently woven into the working scheme of the school.” *Id.* at 226, 227.

<sup>42</sup> *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (holding the Alabama law providing for a moment of silence for meditation “or voluntary prayer” unconstitutional); cf. *Zorach v. Clauson*, 343 U.S. 306, 308–09, 315 (1952) (holding the released time program, in which students could leave school to attend religious institutions for instruction, constitutional because it neither took place on school grounds nor employed public funds in its implementation).

The Court also considers financial backing of religion as part of the principle of religious sponsorship.<sup>43</sup> Of concern is the “utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.”<sup>44</sup> In *McCollum v. Board of Education*, the Court invalidated a program allowing religious instructors to provide religious instruction to those students whose parents consented, concerned by the use of “tax-supported property for religious instruction.”<sup>45</sup>

The second principle the Court has emphasized in early school-prayer cases is that government and religion should operate in separate spheres because intermingling threatens the sanctity of both.<sup>46</sup> To intertwine the two “tends to destroy government and to degrade religion”<sup>47</sup> by “inject[ing] political and party prejudices into a holy field . . . [,] substitut[ing] force for prayer, hate for love, and persecution for persuasion.”<sup>48</sup> Similarly, the Court has insisted that faith is individual in nature and that belief is fostered and flourishes when it is “the product of free and voluntary choice by the faithful.”<sup>49</sup> This principle exists as a part of the broader freedom of conscience, where the individual retains the “freedom to choose his own creed [that] is the counterpart of his right to refrain from accepting the creed established by the majority.”<sup>50</sup> Although “religion has closely been identified with our history and government,”<sup>51</sup> the spirituality of man is “withdr[awn] from the sphere of legitimate legislative concern.”<sup>52</sup> Otherwise, deeply personal decisions regarding religion would be “subjected to the pressures of government for change each time a new political administration is elected to office.”<sup>53</sup>

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<sup>43</sup> See, e.g., *Schempp*, 374 U.S. at 229 (Douglas, J., concurring) (“The most effective way to establish any institution is to finance it . . .”).

<sup>44</sup> *McCollum*, 333 U.S. at 210; see also *Schempp*, 374 U.S. at 229 (Douglas, J., concurring) (“[The Establishment Clause] also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone.”).

<sup>45</sup> *McCollum*, 333 U.S. at 207–08, 209.

<sup>46</sup> See, e.g., *id.* at 212 (“[B]oth religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”); see also *Schempp*, 374 U.S. at 259 (Brennan, J., concurring) (“It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.”).

<sup>47</sup> *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

<sup>48</sup> *Zorach v. Clauson*, 343 U.S. 306, 320 (1952) (Black, J., dissenting).

<sup>49</sup> *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); see also *Zorach*, 343 U.S. at 319 (Black, J., dissenting) (“The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells.”).

<sup>50</sup> *Jaffree*, 472 U.S. at 51, 52.

<sup>51</sup> *Schempp*, 374 U.S. at 212.

<sup>52</sup> *Id.* at 234 (Brennan, J., concurring).

<sup>53</sup> *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

Finally, our society has recognized the need to educate young citizens and considers the public school a “most vital civic institution for the preservation of a democratic system of government.”<sup>54</sup> Rather than “putting the Bible and Testament into the hands of the children,”<sup>55</sup> public school serves the function of “assimilat[ing] a heritage common to all American groups and religions.”<sup>56</sup> While exposure to a diversity of ideas is an important aspect of education,<sup>57</sup> the Court has recognized a difference between scholarly curiosity and religious instruction where students’ beliefs may sharply diverge.<sup>58</sup> While public education should honor history and tradition,<sup>59</sup> ultimately, the Court stresses the avoidance of conflict in this realm.<sup>60</sup> This is especially true in the mandatory school setting, where children are required to attend.<sup>61</sup>

In early school prayer cases, coercion is largely ignored or deemed a non-issue by a majority of the Court.<sup>62</sup> Even in a concurrence or dissent where

<sup>54</sup> *Schempp*, 374 U.S. at 230 (Brennan, J., concurring); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (“America’s public schools are the nurseries of democracy.”); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (“The public school is at once the symbol of our democracy and the most pervasive means of promoting our common destiny.”).

<sup>55</sup> JEFFERSON, *supra* note 31, at 204; *see also* *Everson v. Bd. of Educ.*, 330 U.S. 1, 24 (1947) (Jackson, J., dissenting) (“The assumption is that, after the individual has been instructed in worldly wisdom, he will be better fitted to choose his religion.”).

<sup>56</sup> *Schempp*, 374 U.S. at 242 (Brennan, J. concurring).

<sup>57</sup> *See* *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (“To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry.”).

<sup>58</sup> *See, e.g., Schempp*, 374 U.S. at 241 (Brennan, J., concurring) (“[There is a] religious diversity among the population which our public schools serve.”); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (“Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.”).

<sup>59</sup> *See* *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (noting that encouraging or cooperating with religious instruction outside of the public school follows the “best of our traditions”); *Aguillard*, 482 U.S. at 606 (Powell, J., concurring) (“As a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation’s religious heritage.”); *McCullum*, 333 U.S. at 236 (Jackson, J., concurring) (“I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind.”).

<sup>60</sup> *McCullum*, 333 U.S. at 216–17 (Frankfurter, J., concurring) (arguing the “strife of sects” should be avoided in the public school because it is the area in which “conflicts are most easily and most bitterly engendered”).

<sup>61</sup> *See* *Schempp*, 374 U.S. at 223 (emphasizing that the prayer occurred as a “prescribed . . . part of the curricular activities of students who are required by law to attend school”).

<sup>62</sup> While Justice Frankfurter’s concurrence in *McCullum* acknowledged that the religious program put “obvious pressure upon children to attend” and created a “feeling of separatism,” he largely grounded his analysis on the financial support and sponsorship by the government. 333 U.S. at 227. In *Engel v. Vitale*, the Court ignored any coercive effect that the policy may have in requiring children to recite prayers and instead focused on the government’s composition and dictation of prayer. *McCullum*, 370 U.S. 421, 435 (1962). In concurrence, Justice Douglas went as far as to say that there is “no element of compulsion or coercion” present.

coercion is analyzed, it is often only legal coercion that is considered as opposed to other social pressures.<sup>63</sup> Beginning in the 1980s, the Court began to more explicitly acknowledge, even if only in passing, that religion in the school not only presents traditional Establishment Clause concerns like those detailed above, but that the setting of the school and the audience of impressionable young children make coercion a relevant factor.<sup>64</sup> It was not until *Lee v. Weisman*<sup>65</sup> and *Santa Fe Independent School District v. Doe*<sup>66</sup> that the Court firmly brought coercion analysis to the forefront.<sup>67</sup>

## 2. *Lee, Santa Fe, and the Rise of Coercion Analysis*

The controversy in *Lee* centered around the graduation ceremony held by Nathan Bishop Middle School, a public school in Providence, Rhode Island.<sup>68</sup> The ceremony took place on school grounds and students entered the venue as a group at “the direction of teachers and school officials.”<sup>69</sup> The Providence

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*Id.* at 438 (Douglas, J., concurring). In *Schempp*, although the Court found that students were compelled to stand in unison and recite the prayer, it still concluded that the Free Exercise Clause, rather than the Establishment Clause, is concerned with coercion. *Schempp*, 374 U.S. at 223. Justice O’Connor in *Allegheny* even concluded that “this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.” County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 628 (1989) (O’Connor, J., concurring in part and concurring in the judgement).

<sup>63</sup> See *McColum*, 333 U.S. at 232–33 (Jackson, J., concurring) (arguing that even though a student who does not participate may be forced to “set himself apart as a dissenter, which is humiliating,” without legal compulsion the issue of coercion is immaterial); *Schempp*, 374 U.S. at 289, 290, 292, 299 (Brennan, J., concurring) (acknowledging the coercive pressure on “impressionable children” to conform, which places them in a “cruel dilemma” of either participating against their conscience or “profess[ing] publicly his disbelief,” putting him in a “class by himself” (quoting *Herold v. Par. Bd. of Sch. Dirs.*, 68 So. 116, 121 (La. 1915))); see also *Zorach*, 343 U.S. at 324 (Jackson, J., dissenting) (arguing the released time program coerced students to attend religious instruction because otherwise the classroom “serves as a temporary jail for a pupil who will not go to Church”).

<sup>64</sup> See *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) (holding that a posted Ten Commandments in a classroom may “induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments”); *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O’Connor, J., concurring in the judgement) (noting the coercive choice forced upon students in deciding either to participate or compromise their beliefs as a part of the Endorsement test). In *Aguillard*, the majority emphasized that “[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.” *Aguillard*, 482 U.S. at 584. However, the majority used a traditional *Lemon* analysis to strike down the statute rather than rely on this coercion analysis. *Id.* at 585.

<sup>65</sup> 505 U.S. 577 (1992).

<sup>66</sup> 530 U.S. 290 (2000).

<sup>67</sup> For an argument on “the centrality of coercion” in Establishment Clause analysis, see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) (arguing the Court arbitrarily removed coercion as an element of the Establishment Clause and “[r]ecognition of the centrality of coercion” in Establishment Clause analysis would lead to better reasoned opinions).

<sup>68</sup> *Lee*, 505 U.S. at 581.

<sup>69</sup> *Id.* at 583.

School Committee permitted principals to invite local clergy to give an invocation at these ceremonies, with the guidance that the benediction be inclusive and non-sectarian.<sup>70</sup> In the presence of their families and the community, students were directed to stand for the Pledge of Allegiance and then remain standing for the invocation to come.<sup>71</sup> Once challenged, the District Court and the First Circuit Court of Appeals struck the practice down, applying the *Lemon* test to conclude that it violated the Establishment Clause.<sup>72</sup>

The Court, led by Justice Kennedy, began by emphasizing that the Constitution minimally stands for the proposition that “government may not coerce anyone to support or participate in religion or its exercise.”<sup>73</sup> While much of the Court’s analysis relies on the control and involvement of the State over the selection of clergy and the prayer given,<sup>74</sup> similar to past Court decisions, the determinative factor became the “subtle coercive pressures” that exist in a secondary school setting where the State makes choices regarding religious exercises in which students feel compelled to participate.<sup>75</sup> Important to the Court was the perception by the students that the prayer bears the “imprint of the State,” thus “inducing a participation [the student] might otherwise reject.”<sup>76</sup>

This coercion concern exists distinctly in the public school setting, where students may perceive the State as placing its weight behind a particular religious tenet, even if only subtly.<sup>77</sup> Whereas a consenting adult may more effectively resist or separate the prayer from the government activity,<sup>78</sup> students are “susceptible to pressure from their peers towards conformity,” and nonconformers must either participate against their conscience or dissent publicly in front of their friends, community, and government.<sup>79</sup> Ultimately, the Court found that this policy amounted to the State taking advantage of the

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<sup>70</sup> *Id.* at 581. Prayers from these graduation ceremonies included phrases such as “O God, we are grateful to You” and “We give thanks to You, Lord,” and typically ended with an “Amen.” *Id.* at 582.

<sup>71</sup> *Id.* at 583.

<sup>72</sup> *Weisman v. Lee*, 728 F. Supp. 68, 71 (D.R.I. 1990); *Weisman v. Lee*, 908 F.2d 1090, 1094 (1st Cir. 1990). In a dissent, Judge Campbell of the First Circuit voted to uphold the policy based on *Marsh v. Chambers. Lee*, 908 F.2d at 1099 (Campbell, J., dissenting).

<sup>73</sup> *Lee*, 505 U.S. at 580, 587.

<sup>74</sup> *Id.* The Court claims that the choice of invocation is “attributable to the State” and the potential for divisiveness stemming from this choice is obvious. *Id.*

<sup>75</sup> *Id.* at 588.

<sup>76</sup> *Id.* at 590.

<sup>77</sup> *See id.* at 593 (finding it reasonable for a school-aged child to perceive the State as forcing her to “pray in a manner her conscience will not allow”).

<sup>78</sup> *Id.* at 597 (differentiating the school setting from the prayer setting in *Marsh*, where adults could enter and leave at will).

<sup>79</sup> *Id.* at 590–93 (holding that students forced to make this choice are in an “untenable position”).

pressures students faced in this setting to compel their participation in a religious exercise.<sup>80</sup> According to the Court, the Constitution protects students from having to forfeit participation in an occasion that is practically obligatory.<sup>81</sup>

This coercion-based analysis marked a dramatic shift away from earlier Establishment Clause analysis in the public school setting, a notion recognized by those justices concurring and dissenting.<sup>82</sup> The Court's majority rested its Establishment Clause conclusions on the basis that the school setting is unique because of the control and influence the government exerts over susceptible, young students who, by virtue of their youth, will feel pressure, even indirectly, to conform to religious exercises they perceive the State directing.<sup>83</sup> Admitting that there may be a place for religion in public schools,<sup>84</sup> the Court still recognized that the public school is unique from other contexts and requires an analysis distinct from other Establishment Clause cases.<sup>85</sup>

Less than a decade later, the Court set aside any doubt that coercion is now a relevant, if not dominant, factor in this area of Establishment Clause jurisprudence. At issue in *Santa Fe Independent School District v. Doe* was the policy allowing student elections to determine if an invocation would be held at football games and, if so, who would deliver the message.<sup>86</sup> The School District distinguished this policy from the one at issue in *Lee v. Weisman* by arguing that athletic events are not essentially mandatory or significant and this is purely private student speech.<sup>87</sup> The Supreme Court rejected this argument, finding the invocation to be "authorized by a government policy . . . on government property at government-sponsored school-related events."<sup>88</sup> The football games are a selective access forum instead of a purely public one because only one student is chosen for the season to deliver the invocation and subject to school

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<sup>80</sup> *Id.* at 594.

<sup>81</sup> *Id.* at 596.

<sup>82</sup> *See id.* at 604 (Blackmun, J., concurring) (arguing coercion has never been required to find that the government has violated the Establishment Clause); *id.* at 622 (Souter, J., concurring) (recounting early history to argue that unconstitutional practices under the Establishment Clause are not limited to just those that are coercive); *id.* at 636, 640 (Scalia, J., dissenting) (remarking that historically only legal coercion has mattered, whereas any analysis of psychological coercion is less concrete than "interior decorating").

<sup>83</sup> *Id.* at 587 (majority opinion).

<sup>84</sup> *Id.* at 598–99 ("[T]here will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.").

<sup>85</sup> *Id.* at 597.

<sup>86</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 297 (2000). The policy was originally titled "Prayer at Football Games" but was changed to reference messages, statements, and invocations at football games. *Id.* at 297–98.

<sup>87</sup> *Id.* at 300, 302, 311.

<sup>88</sup> *Id.* at 302.

regulations.<sup>89</sup> Although the school was less involved in the event than the one in *Lee*, students would still “unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval.”<sup>90</sup>

Just as in *Lee*, the Court imbued its analysis of government control of the prayer with the coercive effect on students.<sup>91</sup> Although students here are less obliged to attend a football game than a graduation ceremony, “immense social pressure” still exists and students cannot be forced to choose between “attending these games and avoiding personally offensive religious rituals.”<sup>92</sup> Regardless, those students who voluntarily attend still face coercive pressure to participate in the religious act.<sup>93</sup> Even though this policy was technically established by a vote of the student body, it nevertheless “subject[s] students of minority views to constitutionally improper messages.”<sup>94</sup>

*Lee* and *Santa Fe* affirm that coercion must be considered when analyzing the effect of a prayer policy in connection with the public school. If coercion is a factor in a graduation ceremony and a football game—events attenuated from the normal school day and classroom—then surely it must also be a factor in analyzing the school board.

### 3. *Factors to Consider in Coercion Analysis*

*Lee* and *Santa Fe* reveal four factors that influence the Court when considering the coercive effect of a prayer policy. In situations involving the school day and students, such as the school board meeting, these factors are important in determining if coercion is present.

The first factor is the extent to which the government controls or is involved in selecting the speaker or crafting the message, even where it appears that the government is trying to be neutral. In both *Lee* and *Santa Fe*, the Court stressed the degree of influence the government holds over the prayer policy.<sup>95</sup> However, unlike earlier cases, in which this principle is rooted in the apprehension of

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<sup>89</sup> *Id.* at 303. A selective access forum is one in which the government limits and regulates both the speaker and message, in contrast to a purely public forum in which the public can speak indiscriminately. *Id.*

<sup>90</sup> *Id.* at 308. The Court reached this conclusion because the board allowed an invocation, regulated the message, encouraged the message to be a prayer, and used school property to broadcast the prayer. *Id.* at 307–08.

<sup>91</sup> *Id.* at 310.

<sup>92</sup> *Id.* at 311–12.

<sup>93</sup> *Id.* at 312.

<sup>94</sup> *Id.* at 316; see *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.”).

<sup>95</sup> *Lee v. Weisman*, 505 U.S. 577, 588 (1992); *Santa Fe*, 530 U.S. at 307–08.

financial backing or dependency, here the concern is that the students are coerced to conform because they perceive the religious exercise as endorsed, conducted, and overseen by the government and its officials.<sup>96</sup>

The second factor is the setting in which the prayer occurs. Similar to the first factor, a prayer that occurs on school property or at a school-sponsored event may be perceived as being “stamped with [the] school’s seal of approval.”<sup>97</sup> Even off-campus settings less attenuated with the school day, such as a graduation ceremony, football game, or other school-sponsored activity, may sufficiently “[bear] the imprint of the State and thus put school-age children who object[] in an untenable position.”<sup>98</sup> Additionally, the degree to which the student is compelled to attend the event is considered, although the event need not be mandatory to trigger coercion concerns, and includes situations where “absence would require forfeiture of . . . intangible benefits.”<sup>99</sup>

The third factor is the process or procedure by which the prayer occurs. As an example, the prayer in *Lee* immediately followed the Pledge of Allegiance while students were already standing.<sup>100</sup> The order of events can contribute to the coercive effect on the student, forcing the student to distinguish themselves from the ceremony and sit while all others continue to stand or otherwise be thought to be a participant in the religious exercise against their conscience. The more deliberately a student must distinguish themselves by breaking from the flow of events or the degree to which the student has “no real alternative which would have allowed her to avoid the fact or appearance of participation,” the more prescient the coercive effect.<sup>101</sup>

Finally, flowing from the third factor, the fourth factor is the degree to which the student may be compelled to conform. This final factor is a culmination of the other three and considers all of the circumstances surrounding the prayer to determine if the student faces peer and public pressure to conform to the religious exercise.<sup>102</sup> Where a student must “profess publicly his disbelief,” face

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<sup>96</sup> *Lee*, 505 U.S. at 597 (noting students are “left with no alternative but to submit” to the “state-imposed character of an invocation” because “[a]t a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students”).

<sup>97</sup> *Santa Fe*, 530 U.S. at 308.

<sup>98</sup> *Lee*, 505 U.S. at 590.

<sup>99</sup> *Id.* at 589, 595 (stating students, for all “practical purposes, are obliged to attend” graduation ceremonies); *Santa Fe*, 530 U.S. at 311 (stating although football games are in some ways voluntary, students still feel “immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event”).

<sup>100</sup> *Lee*, 505 U.S. at 583.

<sup>101</sup> *Id.* at 588.

<sup>102</sup> *See id.* at 593.

the “understandable reluctance to be stigmatized,” and exclude themselves to avoid participation, effectively putting the student “in a class by himself,” the coercive effect is high.<sup>103</sup>

### *B. The Legislative Prayer Doctrine*

While the Court has largely deemed school prayer unconstitutional, it has taken a far more deferential stance regarding prayer at public government meetings. Indeed, unlike public school prayer, an invocation at the beginning of a legislative session is largely supported by history. However, the jurisprudence invoking the Court’s legislative prayer doctrine demonstrates the struggle to weigh the competing Establishment Clause principles of avoiding government-sponsored religious indoctrination and acknowledging our religious history. On the one hand, as Justice O’Connor wrote, “[w]e live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all.”<sup>104</sup> On the other hand, as the Court noted in 1952, “[w]e are a religious people whose institutions presuppose a Supreme Being.”<sup>105</sup> The struggle to respect the multitude of religious beliefs that exist in the American populace while also appropriately paying homage to our history without veering too close to establishing a religion has created much litigation and strife.<sup>106</sup>

This section analyzes the longstanding history of legislative prayer in subsection one, the legislative prayer doctrine and history-based analysis in *Marsh v. Chambers* in subsection two, the Court’s attempt to refine *Marsh* in subsection three, and the unanimous preclusion of *Marsh*’s analysis in other settings in subsection four. Subsection five analyzes the Court’s recent turn in *Van Orden v. Perry*<sup>107</sup> toward an Establishment Clause approach based in history and tradition, followed by the further endorsement of *Marsh*’s approach in *Town of Greece v. Galloway* in subsection six. Subsection seven concludes with the continued reluctance of lower courts to apply this pure historical test to other scenarios.

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<sup>103</sup> Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 289, 290, 292 (1963) (Brennan, J., concurring).

<sup>104</sup> County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 627 (1989) (O’Connor, J., concurring in part and concurring in the judgement).

<sup>105</sup> Zorach v. Clauson, 343 U.S. 306, 313 (1952).

<sup>106</sup> Engel v. Vitale, 370 U.S. 421, 429 (1962) (“The First Amendment . . . stand[s] as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say . . .”).

<sup>107</sup> Van Orden v. Perry, 545 U.S. 677 (2005).

### 1. *The History of Legislative Prayer*

Legislative prayer has its origins in the Continental Congress.<sup>108</sup> Following independence and the ratification of the Constitution, the members of the First Congress continued the practice.<sup>109</sup> This timeline proved to be strong evidence for the Court in *Marsh* that “the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment.”<sup>110</sup> For the most part, chaplains have served in the House of Representatives and the Senate since the First Congress.<sup>111</sup> Indeed, when litigation in *Marsh* began in 1980, “[t]he Legislature of each of the fifty States and of the Federal Government [began] each day with an opening prayer.”<sup>112</sup>

Prior to *Marsh*, the Court recognized that “there are many manifestations in our public life of belief in God” that do not run afoul of the Establishment Clause.<sup>113</sup> Justice Jackson put it aptly:

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<sup>108</sup> On the Continental Congress’s second meeting day, the delegates resolved to open the following day’s session with a prayer, despite dissent from delegates Jay and Rutledge. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 26 n.1 (Worthington Chauncey Ford ed., Gov’t Printing Off. 1904) (1774). Accordingly, on September 6, 1774, Anglican Reverend Duch gave a prayer, which delegate Samuel Ward of Rhode Island described as “one of the most sublime, catholic, well-adapted prayers I ever heard.” *Id.* at 27 n.1. Reverend Duch opened other sessions of the Continental Congress, was eventually appointed the official chaplain and required to attend sessions daily, and was compensated “for the devout and acceptable manner in which he discharged his duty during the time he officiated as chaplain.” 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 13 (Worthington Chauncey Ford ed., Gov’t Printing Off. 1905) (1775); 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 530 (Worthington Chauncey Ford ed., Gov’t Printing Off. 1906) (1776); 6 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 887 (Worthington Chauncey Ford ed., Gov’t Printing Off. 1906) (1776).

<sup>109</sup> Both the House of Representatives and the Senate elected their first chaplains during the First Congress. H.R. JOURNAL, 1st Cong., 1st Sess. 26 (1789); S. JOURNAL, 1st Cong., 1st Sess. 16 (1789). A statute was subsequently passed on September 22, 1789, providing payment for the chaplains. CONG. JOURNAL, 1st Cong., 1st Sess. 71 (1789). Three days later, on September 25, the text of the First Amendment was finalized and submitted for ratification to the states. JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 81 (4th ed. 2016).

<sup>110</sup> *Marsh v. Chambers*, 463 U.S. 783, 788 (1983).

<sup>111</sup> See IDA A. BRUDNICK, HOUSE AND SENATE CHAPLAINS: AN OVERVIEW 1 (2011), <https://crsreports.congress.gov/product/pdf/R/R41807>.

<sup>112</sup> *Colo v. Treasurer & Receiver Gen.*, 392 N.E.2d 1195, 1197 (Mass. 1979).

<sup>113</sup> *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962) (noting that requiring students to read historical texts and study works with religious references may be fine as “[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State . . . has sponsored”); see also *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (“Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (“We are a religious people whose institutions presuppose a Supreme Being.”).

Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences.<sup>114</sup>

The prevalence of religious influence in our history and culture means it practically cannot, and perhaps properly should not, be eradicated from all facets of our public life.<sup>115</sup> The trouble, however, is determining where acknowledgement of religion turns from benign recognition to endorsement, advancement, and establishment.<sup>116</sup>

## 2. *The Legislative Prayer Doctrine and Marsh v. Chambers*

In *Marsh v. Chambers*, the Court upheld the Nebraska unicameral legislature’s traditional practice of appointing a chaplain to “attend and . . . open with prayer each day’s sitting of the Legislature.”<sup>117</sup> At the time suit was filed, the chaplain for the Nebraska legislature had been in his role for sixteen years and was paid \$319.75 out of the general state funds “for each month the legislature [was] in session.”<sup>118</sup> In certain years, copies of select prayers were compiled into a book and printed at the expense of the state.<sup>119</sup> State Senator Ernest Chambers filed suit against Frank Marsh, the State Treasurer of Nebraska, alleging this practice violated the Establishment Clause.<sup>120</sup>

The Court began by emphatically stating that legislative prayer is “deeply embedded in the history and tradition of this country.”<sup>121</sup> Indeed, the practice

<sup>114</sup> *McCullum v. Bd. of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

<sup>115</sup> *See Zorach*, 343 U.S. at 312 (“Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government.”); *Comm. for Pub. Educ. & Religion Liberty v. Nyquist*, 413 U.S. 756, 760 (1973) (“It has never been thought either possible or desirable to enforce a regime of total separation . . . .”); *see also Colo.*, 392 N.E.2d at 1201 (“The complete obliteration of all vestiges of religious tradition from our public life is unnecessary to carry out the goals of non-establishment and religious freedom set forth in our State and Federal Constitutions.”).

<sup>116</sup> *See Chambers v. Marsh*, 504 F. Supp. 585, 587 (D. Neb. 1980) (“The turmoil over the proper interplay between government and religion in America antedates the Constitution and has been continual throughout the Republic’s history. . . . When the spheres have overlapped, sparks have often flown.”).

<sup>117</sup> *Id.* at 586.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). *But see* Nicholas C. Roberts, *The Rising None: Marsh, Galloway, and the End of Legislative Prayer*, 90 *IND. L.J.* 407, 412 (2015) (arguing the history recounted by the

has existed since the Founding without overwhelming the “principles of disestablishment and religious freedom.”<sup>122</sup> The First Congress that crafted the First Amendment in 1789 also hired two chaplains at taxpayer expense to continue the Continental Congress’s practice of opening each session with prayers.<sup>123</sup> Indeed, the “actions [of the Founders] reveal their intent” that legislative prayer does not threaten an establishment of religion.<sup>124</sup>

Further, the Court found it important that the legislative prayer was offered to adults who are not “readily susceptible to ‘religious indoctrination.’”<sup>125</sup> As to the concerns of the lower courts regarding the longevity of the one-denomination chaplain and the use of public funds to publish his prayers,<sup>126</sup> the Supreme Court answered only by stating that the historical background of legislative prayer was enough to outweigh those concerns.<sup>127</sup> According to the Court, so long as “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 Establishment Clause is satisfied.<sup>128</sup> The Court concluded that the “unambiguous and unbroken history of more than 200 years” leaves no doubt that legislative prayer “has become part of the fabric of our society” and is merely a “tolerable acknowledgment of beliefs widely held among the people of this country,” rather than a fateful step towards the establishment of religion.<sup>129</sup>

Perplexed by Chief Justice Burger’s undermining of the three-part test he had crafted just over a decade earlier in *Lemon*, Justice Brennan dissented, concluding that *Marsh* must be “carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.”<sup>130</sup> The practice simply could not be upheld under any of the three prongs of *Lemon*.<sup>131</sup> Indeed, despite having written in *Lemon* that “[e]very

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Court in *Marsh* is skewed and does not present the full historical landscape).

<sup>122</sup> *Marsh*, 463 U.S. at 786.

<sup>123</sup> See *supra* note 108 and accompanying text.

<sup>124</sup> *Marsh*, 463 U.S. at 790.

<sup>125</sup> *Id.* at 792 (quoting *Tilton v. Richardson*, 403 U.S. 672, 686 (1971)).

<sup>126</sup> *Chambers v. Marsh*, 675 F.2d 228, 234 (8th Cir. 1982). Important to the court was the fact that one minister of one faith had given the invocation for almost two decades, demonstrating that the practice advanced and gave preference to only one religious viewpoint. *Id.* However, the court refused to hold that “invocations alone are unconstitutional,” hypothesizing that even paid chaplains may not violate the Establishment Clause. *Id.* at 235.

<sup>127</sup> *Marsh*, 463 U.S. at 792.

<sup>128</sup> *Id.* at 794–95.

<sup>129</sup> *Id.* at 792.

<sup>130</sup> *Id.* at 796 (Brennan, J., dissenting); see Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach*, 72 CORNELL L. REV. 905, 906 (1987) (“By the mid-1980’s, with Chief Justice Burger spearheading the attack, this three-part test appeared headed for obsolescence.”).

<sup>131</sup> *Marsh*, 463 U.S. at 796–99.

analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years,”<sup>132</sup> the Chief Justice made no reference to his unifying Establishment Clause theory, instead relying on history alone to uphold the Nebraska legislature’s practice.<sup>133</sup>

The *Marsh* Court left much uncertain. When are history and tradition enough to forgo the *Lemon* analysis? Is this analysis limited only to the unique situation of legislative prayer?<sup>134</sup> Does the sectarian content of the prayer matter? In failing to provide a coherent analysis rooted in precedent, the Court opened the door for speculation and discretion as to when and where *Marsh*’s logic might apply.

### 3. Allegheny Refines Marsh

Six years after *Marsh*, in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, the Court sought to clarify its approach to the constitutionality of religious ceremonies and symbols in public settings.<sup>135</sup> At issue was a crèche (Nativity display) located in the Allegheny County Courthouse and a Chanukah Menorah at the City-Council Building.<sup>136</sup> The crèche sat near the prominent grand staircase, included traditional figures associated with the birth of Jesus Christ, and was surrounded by poinsettias<sup>137</sup> and an evergreen tree topped with an angel bearing the phrase, “Gloria in Excelsis Deo!”<sup>138</sup> Meanwhile, the Chanukah Menorah sat next to a forty-five-foot Christmas tree outside at a secondary entrance to the courthouse campus.<sup>139</sup> The ACLU filed suit, seeking to enjoin the county from displaying both the crèche and the Chanukah Menorah.<sup>140</sup>

In a fractured opinion that produced four separate concurrences, the Court upheld the display of the Menorah but ruled that the crèche violated the Establishment Clause.<sup>141</sup> Writing for the plurality, Justice Blackmun refused to apply the low “proselytizing” standard set in *Marsh*,<sup>142</sup> instead opting for an

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<sup>132</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>133</sup> *Marsh*, 463 U.S. at 790–94.

<sup>134</sup> See *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (upholding tax exemptions for church property partially because it was an “unbroken practice”).

<sup>135</sup> *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

<sup>136</sup> *Id.* at 580, 582.

<sup>137</sup> Poinsettias are red and green flowers traditionally associated with Christianity.

<sup>138</sup> *Allegheny*, 492 U.S. at 580.

<sup>139</sup> *Id.* at 587.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 578–79.

<sup>142</sup> *Id.* at 608; see *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983) (“[T]here is no indication that the

endorsement test based on Justice O'Connor's concurrence in *Lynch v. Donnelly*.<sup>143</sup>

To the plurality, the Chanukah Menorah and Christmas tree were merely representative symbols associated with the holiday season, "which [have] attained a secular status in our society."<sup>144</sup> Conversely, the prominent crèche was deemed to "demonstrat[e] the government's endorsement of Christian faith" by promoting religious communication through a specific creed.<sup>145</sup> Justice Blackmun refused to apply *Marsh*, arguing that legislative prayer was the exception because of its "unique history."<sup>146</sup> Curiously, Justice Blackmun cited a footnote from *Marsh*<sup>147</sup> as proof of its limited application, arguing that the Nebraska prayer practice was only constitutional because the chaplain had "removed all references to Christ" and was more general, whereas the crèche was a symbol specifically associated with Christianity.<sup>148</sup>

In his dissent, Justice Kennedy derided the plurality's hairsplitting, contending that neither of the displays posed any real threat of coercion or establishment of religion.<sup>149</sup> Instead, he believed that "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in society."<sup>150</sup> Indeed, "[a]ny approach less sensitive to our heritage would border on latent hostility toward religion."<sup>151</sup> Absent the risk of proselytizing, government accommodation for religion that is "passive and symbolic" hardly infringes on religious liberty, even where one specific faith is spotlighted.<sup>152</sup>

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prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.").

<sup>143</sup> *Allegheny*, 492 U.S. at 593–94 ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring))).

<sup>144</sup> *Id.* at 616.

<sup>145</sup> *Id.* at 612.

<sup>146</sup> *Id.* at 603 (quoting *Marsh*, 463 U.S. at 791).

<sup>147</sup> *Id.* (citing *Marsh*, 463 U.S. at 793 n.14 ("[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, [the chaplain] removed all references to Christ after a 1980 complaint from a Jewish legislator." (citations omitted))).

<sup>148</sup> *Id.* at 603.

<sup>149</sup> *Id.* at 662 (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>150</sup> *Id.* at 657.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 662.

Justice Kennedy advocated for a much broader reading of *Marsh* as a rule rather than an exception, arguing that the boundaries of the Establishment Clause should be “determined by reference to historical practices and understandings.”<sup>153</sup> To do otherwise would be to require “[o]bsessive, implacable resistance to all but the most carefully scripted and secularized” and cast the Court in the role of secular arbiter.<sup>154</sup> Under Justice Kennedy’s lenient proselytization standard derived from *Marsh*,<sup>155</sup> acts and symbols that may be sectarian are not problematic, even if they retain their religious significance, so long as they present no realistic risk of proselytizing or coercing citizens to adhere to a particular faith or creed.<sup>156</sup> While only a dissent in this case, Justice Kennedy’s approach would become increasingly prevalent and capture a majority of the Court in the coming decades.<sup>157</sup>

#### 4. *Lower Courts Found Harmony in Precluding Marsh in Non-Legislative Settings*

It is notable that no federal court of appeals upheld a practice under the principles of *Marsh* outside of the setting of prayer in a legislature.<sup>158</sup> Whether it was a county judge opening court with prayer,<sup>159</sup> a supper prayer read in front of cadets at a public military institution,<sup>160</sup> religious monuments,<sup>161</sup> longstanding

<sup>153</sup> *Id.* at 669, 670 (“I take it as settled law that, whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence.”).

<sup>154</sup> *Id.* at 677–78.

<sup>155</sup> *Id.* at 661, 664. Justice Kennedy argues that government speech about religion is not “*per se suspect*,” and offers an example of a year-round display that would violate his standard and “place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.” *Id.* at 661. However, unlike the example, the displays at issue here did not “represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion.” *Id.* at 664.

<sup>156</sup> *Id.* at 662.

<sup>157</sup> *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (“Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”); *Town of Greece v. Galloway*, 572 U.S. 565, 590 (2014) (finding that “exposing constituents to prayer they would rather not hear and in which they need not participate” does not constitute coercion); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2093 (2019) (“[D]isplaying religious memorials . . . on public land is not coercive and is rooted in history and tradition.”).

<sup>158</sup> *See Wynne v. Town of Great Falls*, 376 F.3d 292, 302 (4th Cir. 2004) (“[I]n the more than twenty years since *Marsh*, the Court has never found its analysis applicable to any other circumstances; rather, the Court has twice specifically refused to extend the *Marsh* approach to other situations. Similarly, we and our sister circuits have steadfastly refused to extend *Marsh*.” (citations omitted)).

<sup>159</sup> *N.C. C.L. Union v. Constangy*, 751 F. Supp. 552, 554 (W.D.N.C. 1990), *aff’d sub nom. N.C. C.L. Union Legal Found. v. Constangy*, 947 F.2d 1145 (4th Cir. 1991) (“There is no evidence in this case of any such 200 year-old ‘unambiguous and unbroken history.’”).

<sup>160</sup> *Mellen v. Bunting*, 327 F.3d 355, 369–71 (4th Cir. 2003).

<sup>161</sup> *Card v. City of Everett*, 520 F.3d 1009, 1014 (9th Cir. 2008) (finding *Marsh* to be an “exception to

state holidays,<sup>162</sup> or prayer at a school board meeting,<sup>163</sup> the exclusively historical analysis of *Marsh* without the application of any other Establishment Clause test was deemed inapplicable to other situations. One court even refused to apply *Marsh* to legislative prayer that was not longstanding, demonstrating the consensus regarding *Marsh*'s limited applicability.<sup>164</sup>

Lower courts limited *Marsh* for two main reasons. First, courts saw *Marsh* as applicable only in the narrow context of legislative prayer,<sup>165</sup> emphasizing *Allegheny*'s characterization that *Marsh* does not stand for the proposition that “all accepted practices 200 years old and their equivalents are constitutional today.”<sup>166</sup> Second, *Marsh* was based on a specifically longstanding and unique history, and few other acts or practices have a similar pedigree to justify removing them from traditional Establishment Clause analysis.<sup>167</sup> These factors led courts to recognize *Marsh*'s validity but not to impermissibly expand its function.<sup>168</sup>

### 5. *The Turn Towards History in Van Orden v. Perry*

Even before *Marsh*, the Court insisted that religion “has been closely identified with our history and government” and holds an exalted place in our society.<sup>169</sup> Although church and state are generally thought to be separate, “the

normal Establishment Clause jurisprudence” and refusing to apply its logic to a granite monument of the ten commandments).

<sup>162</sup> *Cammack v. Waihee*, 932 F.2d 765, 772 (9th Cir. 1991) (“We are reluctant to extend a ruling explicitly based upon the ‘unique history’ surrounding legislative prayer to such a different factual setting.” (citations omitted)).

<sup>163</sup> *See Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 377 (6th Cir. 1999); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 275 (3d Cir. 2011).

<sup>164</sup> *Soc’y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 930 (Utah 1993) (refusing to apply *Marsh* because the city council meetings at issue involved greater public participation and the prayer practice was not observed from 1911 to 1979).

<sup>165</sup> *Mellen*, 327 F.3d at 369–71; *see also Card*, 520 F.3d at 1014 (“*Marsh* is a narrow opinion that should be construed as carving out an exception to normal Establishment Clause jurisprudence due to the ‘unique history’ of legislative prayer.”).

<sup>166</sup> *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989).

<sup>167</sup> *E.g., Mellen*, 327 F.3d at 370 (“In fact, public universities and military colleges, such as VMI, did not exist when the Bill of Rights was adopted. We are therefore unable to apply *Marsh*'s reasoning to the evaluation of the constitutionality of the supper prayer.” (citations omitted)).

<sup>168</sup> *See Snyder v. Murray City Corp.*, 159 F.3d 1227, 1232 (10th Cir. 1998) (“Although the Court relied solely—and to the exclusion of its traditional establishment tests—on a historical analysis to justify the practice of legislative prayers in *Marsh*, since that decision the Court has repeatedly avoided applying *Marsh*'s mode of historical analysis.”); *Wynne v. Town of Great Falls*, 376 F.3d 292, 302 (4th Cir. 2004) (“[I]n the more than twenty years since *Marsh*, the Court has never found its analysis applicable to any other circumstances; rather, the Court has twice specifically refused to extend the *Marsh* approach to other situations. Similarly, we and our sister circuits have steadfastly refused to extend *Marsh*.” (citations omitted)).

<sup>169</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212 (1963); *see also Zorach v. Clauson*, 343

Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.”<sup>170</sup> While *Marsh* marks the first time the Court relied on history alone to uphold a practice, the Court has acknowledged the role of religion in American public life since the Founding.<sup>171</sup> Indeed, American history, often cited by the Court, is replete with examples of constitutional religious acknowledgment in the executive,<sup>172</sup> legislative,<sup>173</sup> and judicial<sup>174</sup> branches, local municipalities,<sup>175</sup> celebrated historical documents,<sup>176</sup>

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U.S. 306, 313 (1952) (“We are a religious people whose institutions presuppose a Supreme Being.”).

<sup>170</sup> *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring); *see also Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962) (noting that requiring students to read historical texts and study works with religious references may be fine as “[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State . . . has sponsored”); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (“Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”); *Engel*, 370 U.S. at 446 (Stewart, J., dissenting) (arguing the fears of sixteenth-century England are less relevant than the “history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government”).

<sup>171</sup> *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (“There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”).

<sup>172</sup> *See id.* at 677 (recounting the history of Presidents proclaiming a National Day of Prayer); *Lee v. Weisman*, 505 U.S. 577, 633–36 (1992) (Scalia, J., dissenting) (recounting the religious references in almost every Presidential inaugural address as well as the “tradition of Thanksgiving Proclamations—with their religious themes of prayerful gratitude to God—[which] has been adhered to by almost every President”); *Engel*, 370 U.S. at 446 (1962) (Stewart, J., dissenting) (“Each of our Presidents, from George Washington to John F. Kennedy, has upon assuming his Office asked the protection and help of God.”); *see also, e.g.*, Abraham Lincoln, U.S. President, Second Inaugural Address (Mar. 4, 1865), in *AMERICAN ORATIONS: STUDIES IN AMERICAN POLITICAL HISTORY*, 125, 127–128 (Alexander Johnston & James A. Woodburn eds., 1898) (“Both read the same Bible, and pray to the same God . . . . The Almighty has His own purposes . . . . With malice toward none, with charity for all, with firmness in the right as God gives us to see the right . . . .”); Abraham Lincoln, U.S. President, The Gettysburg Address (Nov. 19, 1863), in *AMERICAN ORATIONS* at 123, 124 (“[T]his nation, under God, shall have a new birth of freedom . . . .”); Letter from Abraham Lincoln, U.S. President, to Lydia Bixby (Nov. 21, 1864), in *ABRAHAM LINCOLN AND HIS BOOKS* 69 (William E. Barton, 1920) (“I pray that our Heavenly Father may assuage the anguish of your bereavement . . . .”).

<sup>173</sup> *See Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (“The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.”); *see also Lynch*, 465 U.S. at 677 (“Congress has long provided chapels in the Capitol for religious worship and meditation.”).

<sup>174</sup> *See Lee*, 505 U.S. at 635 (Scalia, J., dissenting) (“[T]his Court’s own sessions have opened with the invocation ‘God save the United States and this Honorable Court’ since the days of Chief Justice Marshall.”); *see also Lynch*, 465 U.S. at 677 (“The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments.”); *Van Orden*, 545 U.S. at 688 (noting that depictions of the Ten Commandments adorn the south frieze, east façade, and metal gates of the Supreme Court building, as well as the doors of the Courtroom).

<sup>175</sup> *See Town of Greece v. Galloway*, 572 U.S. 565, 591 (2014) (describing the Town of Greece’s ceremonial prayer as “a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define”).

<sup>176</sup> *See THE DECLARATION OF INDEPENDENCE* paras. 1, 6 (U.S. 1776) (referencing the “equal station to

government landmarks,<sup>177</sup> and other practices associated with American tradition and culture.<sup>178</sup>

In *Van Orden v. Perry*, the Court began to turn towards *Marsh*'s historical analysis, relying on a record of religious acknowledgment to uphold a monolith of the Ten Commandments located on the grounds of the Texas State Capitol.<sup>179</sup> Similar to *Marsh*, the Court found the *Lemon* test “not useful in dealing with the sort of passive monument” at issue.<sup>180</sup> Instead, the Court relied on the “role the Decalogue plays in America’s heritage,” along with the history of government acknowledgment of religion to find the display constitutional.<sup>181</sup> The emphasis the Court placed on history in its Establishment Clause analysis directly echoed Kennedy’s dissent in *Allegheny County* and signaled how the Court might approach future Establishment Clause cases.

#### 6. *Embracing Marsh and History in Town of Greece v. Galloway*

In the 2014 case of *Town of Greece v. Galloway*, Justice Kennedy’s approach in his *Allegheny* dissent carried the majority of the Court in upholding prayers at town council meetings.<sup>182</sup> Prior to 1999, the town of Greece, New York, opened each of its town board meetings with a moment of silence.<sup>183</sup> However, at the turn of the millennium, “the town began inviting local clergy to offer . . . prayers[s]” right after the Board’s recitation of the Pledge of Allegiance.<sup>184</sup> While the town did not have a formal policy governing or

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which . . . Nature’s God” entitles people and calling for the “protection of divine Providence”); Emancipation Proclamation (Jan. 1, 1863) (“I invoke the considerate judgment of mankind, and the gracious favor of Almighty God.”).

<sup>177</sup> See *Lynch*, 465 U.S. at 676 (“Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith.”); *Van Orden*, 545 U.S. at 689 (noting that in the U.S. Capitol building and other government buildings, there are multiple religious statutes and references).

<sup>178</sup> See *Lynch*, 465 U.S. at 676 (detailing the religious references in our national motto (“In God We Trust”) and pledge of allegiance (“One nation under God”)); see also CNBC Television, *Invocation Delivered at Joe Biden’s Inauguration*, YOUTUBE (Jan. 20, 2021), <https://www.youtube.com/watch?v=fAaPkCpGBAk> (“Gracious and merciful God, at this sacred time we come before you in need.”).

<sup>179</sup> *Van Orden*, 545 U.S. at 681–82.

<sup>180</sup> *Id.* at 686; see also *id.* at 699 (Breyer, J., concurring) (noting “this Court’s other tests” cannot “readily explain the Establishment Clause’s tolerance . . . of the prayers that open legislative meetings,” invocations of “the Deity in the public words of public officials,” nor “the public references to God on coins, decrees, and buildings.”).

<sup>181</sup> *Id.* at 686–90 (majority opinion).

<sup>182</sup> *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (“[T]he Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’” (quoting *County of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 670 (1969))).

<sup>183</sup> *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012).

<sup>184</sup> *Id.*

restricting the prayers, between 1999 and 2010 nearly all the prayers were by Christian clergy,<sup>185</sup> and often in overtly religious terms.<sup>186</sup> Plaintiffs filed suit alleging that the prayer practice violated the Establishment Clause because the “persistently sectarian—and almost exclusively Christian—prayers” had the effect of aligning the town with the Christian faith.<sup>187</sup>

The Supreme Court, led by Justice Kennedy, reversed the Second Circuit’s holding, finding that the prayer practice was constitutional.<sup>188</sup> Following *Marsh*, Justice Kennedy ignored *Lemon* and other Establishment Clause tests<sup>189</sup> and upheld the town council prayers in light of the history and tradition of legislative prayer.<sup>190</sup> For Kennedy, *Marsh* stands for the proposition that the Establishment Clause must be understood “by reference to historical practices and understandings.”<sup>191</sup> Under this analysis, prayer offered to a legislature does not need to be “nonsectarian or ecumenical,”<sup>192</sup> contrary to Justice Blackmun’s interpretation of *Marsh* in *Allegheny County*.<sup>193</sup> Government need not act as “censors of religious speech,” nor “mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.”<sup>194</sup>

Further, the Court found that the town council prayers carried little risk of coercion. The prayer was meant primarily for the lawmakers, similar to *Marsh*.<sup>195</sup> Moreover, the audience who might overhear the prayers consisted mostly of adults who “can tolerate and perhaps appreciate a ceremonial prayer

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<sup>185</sup> *Id.* Although the town invited a few non-Christians to deliver the prayer in 2008, the speakers were once again entirely Christian after the record for litigation was closed in 2009. *Id.* Prior to 2008, the chaplain list kept by the town Board “contained only Christian organizations and clergy.” *Id.* at 24.

<sup>186</sup> *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 206 (W.D.N.Y. 2010) (“Blessed are you Lord, God of all creation, whose goodness fills our hearts with joy. . . . Strengthen us with your grace and wisdom, for you are God forever and ever. May the Lord bless you and keep you.”).

<sup>187</sup> *Id.* at 209.

<sup>188</sup> *Town of Greece v. Galloway*, 572 U.S. 565, 591–92 (2014).

<sup>189</sup> *Id.* at 575 (“The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause.”); see also WITTE & NICHOLS, *supra* note 109, at 159 tbl.8.1 (mapping the plethora of Establishment Clause approaches employed by the Court).

<sup>190</sup> *Town of Greece*, 572 U.S. at 575 (“As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.”).

<sup>191</sup> *Id.* at 576 (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgement in part and dissenting in part)).

<sup>192</sup> *Id.* at 578, 580 (“*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content.”).

<sup>193</sup> *County of Allegheny*, 492 U.S. at 603 (arguing the Court in *Marsh* only found the Nebraska chaplain’s prayer constitutional because most sectarian content had been removed).

<sup>194</sup> *Id.* at 581.

<sup>195</sup> *Id.* at 583.

delivered by a person of a different faith,” unlike public school children.<sup>196</sup> Ultimately, the only constraint on legislative prayer that the Court offered would be present if the “practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion . . . [and does not] elevate the purpose of the occasion,” even if the practice has a longstanding history.<sup>197</sup> For only the second time since *Marsh*, the Court relied on the history and tradition of a practice alone to uphold it. However, the Court did not explain when history alone justifies a practice or what it means for the future of other Establishment Clause tests. That task was again left to the lower courts.

### 7. *Pure Historical Analysis Still Limited to the Legislative Setting*

Since *Town of Greece*, lower courts have mainly disputed how sectarian a legislative prayer or prayer giver may be.<sup>198</sup> However, similar to the decisions following *Marsh*, lower courts have mostly abstained from applying this purely historical approach to settings outside of the legislative session for lack of the uniquely longstanding history of legislative prayer.<sup>199</sup> Even as courts begin to grapple with the purely historical approach and presumption of constitutionality

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<sup>196</sup> *Id.* at 584; *see also* *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (arguing because the “prayers bore the imprint of the State,” they “put school-age children who objected in an untenable position”); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000) (holding, as in *Lee*, “the ‘degree of school involvement’ makes it clear that the pregame prayers bear ‘the imprint of the State and thus put school-age children who objected in an untenable position’” (citations omitted)).

<sup>197</sup> *Town of Greece*, 572 U.S. at 583.

<sup>198</sup> *Compare* *Fields v. Speaker of Pa. H.R.*, 936 F.3d 142, 147 (3d Cir. 2019) (holding that the legislature’s policy of only allowing theistic speakers to offer prayer is permissible), *and* *Bormuth v. County of Jackson*, 870 F.3d 494, 497–98 (6th Cir. 2017) (upholding a practice in which county commissioners delivered prayer on a rotating basis, often in sectarian terms, after finding support in history and tradition), *with* *Lund v. Rowan County*, 863 F.3d 268, 281 (4th Cir. 2017) (refusing to purely apply *Town of Greece* to the town Board’s prayer policy because board members were the prayer-givers, making it “elbow-deep in the activities banned by the Establishment Clause—selecting and prescribing sectarian prayers”).

<sup>199</sup> *See* *Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1143 (9th Cir. 2018) (refusing to apply the purely historical approach to the School Board’s prayer policy and instead applying *Lemon*); *Devaney v. Kilmartin*, 88 F. Supp. 3d 34, 50 (D.R.I. 2015) (refusing to uphold the ringing of church bells under *Town of Greece* based solely on history and tradition); *Smith v. Jefferson Cnty. Bd. of Sch. Comm’rs*, 788 F.3d 580, 588 (6th Cir. 2015) (applying the endorsement test to the school district’s contract with a religious school because “the pure historical approach is of limited utility” and thus finding *Town of Greece* inapplicable). *But see* *Am. Humanist Ass’n v. McCarty*, 851 F.3d 521, 529 (5th Cir. 2017) (upholding the school district’s invocation policy under *Town of Greece* as legislative prayer); *Woodring v. Jackson County*, 986 F.3d 979, 995 (7th Cir. 2021) (using the purely historical approach from *Town of Greece* even after determining that *American Legion*’s presumption of constitutionality did not apply); *Freedom From Religion Found. v. Mack*, 4 F.4th 306, 315–17 (5th Cir. 2021) (issuing a stay of the district court’s order, which applied *Lemon* to strike down a judge’s use of a chaplain to open court proceedings, arguing that *Town of Greece* was more applicable).

for longstanding monuments, symbols, and practices prescribed in *American Legion*,<sup>200</sup> many, if not most, Establishment Clause cases, such as those involving school board prayer discussed below, lack such a decisive history or established pedigree to be upheld by history alone.

As demonstrated recently in *American Legion*, the Court has indicated it is ready to eschew traditional tests in favor of an approach that considers, at least in part, history and tradition.<sup>201</sup> *Town of Greece* should not be directly transposed onto other settings because legislative prayer has a unique pedigree which spares it from traditional Establishment Clause analysis. Additionally, as argued below, when and how *American Legion*'s "presumption of constitutionality for monuments, symbols, and practices" with a longstanding history applies is far from clear.<sup>202</sup> Regardless, the undeniable command from the Court is that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"<sup>203</sup> Indeed, consideration of history, while not necessarily the sole criterion, is undoubtedly an essential factor in any Establishment Clause analysis moving forward.

## II. SCHOOL BOARD PRAYER

Litigation surrounding school board prayer since *Marsh* has left lower courts vexed. On the one hand, the function and organization of the public school board is similar to a meeting of the legislature where prayer is constitutional. On the other hand, the public school board is deeply intertwined with the school day and students regularly attend meetings, implicating the precedent of unconstitutionally coercive school prayer set out in *Lee* and *Santa Fe*. These

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<sup>200</sup> See *Woodring*, 986 F.3d at 996 (upholding the display of a nativity scene because it fit within historical tradition); *Freedom From Religion Found. v. County of Lehigh*, 933 F.3d 275, 284 (3d Cir. 2019) (upholding the county's seal containing Christian imagery because it fit "comfortably within a long tradition"); *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1331 (11th Cir. 2020) (upholding the Bayview Park cross after concluding that it was an "established" monument, thus qualifying for *American Legion*'s presumption of constitutionality); *Perrier-Bilbo v. United States*, 954 F.3d 413, 426 (1st Cir. 2020) (upholding the use of "so help me God" in a naturalization oath).

<sup>201</sup> *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion) ("While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, . . . we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."); *id.* at 2093 (Kavanaugh, J., concurring) (arguing "[i]f the challenged government practice is not coercive and if it . . . is rooted in history and tradition," then the practice is constitutional); see *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed.").

<sup>202</sup> *Am. Legion*, 139 S. Ct. at 2082 (plurality opinion); *id.* at 2102 (Gorsuch, J., concurring in the judgement) ("How old must a monument, symbol, or practice be to qualify for this new presumption?").

<sup>203</sup> *Id.* at 2087 (plurality opinion) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)); see also *Lynch*, 465 U.S. at 673 ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees.").

conflicting doctrines have resulted in divergent lower court approaches attempting to fit the school board prayer context into either one of these pre-existing frameworks.

In section A, this Part will first detail the early, divergent school board prayer cases. Section B will detail the Fifth Circuit's rejection of traditional tests and application of *Marsh* and *Town of Greece*'s purely historical approach for legislative prayer to uphold the school board prayer practice in *American Humanist Association v. McCarty*. Finally, section C will discuss the Ninth Circuit's rejection of *Marsh* and use of coercion analysis paired with the *Lemon* test in *Freedom From Religion Foundation v. Chino Valley Unified School District*.

#### A. *Between a Rock and a Hard Place: The Early School Board Prayer Cases*

Prayers and clerical involvement in local school board meetings date back to the early nineteenth century in at least eight different states.<sup>204</sup> But it was not until 1999 that the Sixth Circuit Court of Appeals became the first appellate court to address an Establishment Clause challenge to this practice. At issue in *Coles v. Cleveland Board of Education* was the prayer policy permitting meetings of the Cleveland Board of Education to be opened with prayer.<sup>205</sup> The Board met on school property and encouraged students and parents to attend so as to “voice their concerns . . . over a wide range of topics related to the operation

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<sup>204</sup> *McCarty*, 851 F.3d at 527. In her article, *Prayer is Prologue*, Marie Elizabeth Wicks details this history:

In Pennsylvania, minutes of public-school board meetings from 1820 contain the texts of the invocations delivered. In Massachusetts, the *Common School Journal* for the year 1842 explained that public school boards in Massachusetts could have clergymen as members. The *Journal of the Board of Education of the State of Iowa* contains several references to invocations delivered during school board sessions in the year 1859, as well as the names of the pastors who delivered them. In *A History of Public Schools in North Carolina*, the author notes that each year delegates were chosen from each school board to attend the statewide delegation in 1859, and a large portion of the delegates were “ministers of the gospel.” In Wisconsin, minutes from board meetings dating back to 1857 denote opening prayers, as well as the names of the reverends that delivered them, including some members of the board themselves.

Marie Elizabeth Wicks, *Prayer is Prologue: The Impact of Town of Greece on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & POL. 1, 30–31 (2015). Historical accounts from Missouri, Michigan, and New York provide less direct evidence of school-board prayer, but rather a willingness of the school board to involve local clergy. See Brief for Family Research Council & Louisiana Family Forum as Amici Curiae Supporting Defendants-Appellants at 9–11, *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (No. 05-30294). But see Andrew L. Seidel, *Bad History, Bad Opinions: How “Law Office History” is Leading the Courts Astray on School Board Prayer and the First Amendment*, 12 NE. U.L. REV. 248, 269 (2020) (arguing that the history relied on by the Fifth Circuit and Ms. Wicks “crumbles under scrutiny”).

<sup>205</sup> 171 F.3d 369, 372–73 (6th Cir. 1999).

of the public school system.”<sup>206</sup> A student representative served on the Board, students were routinely invited to accept awards and receive recognition, and, in some cases, students were required to address the Board in disciplinary actions.<sup>207</sup> In 1992, the Board decided to open its public meetings with prayer from either a “local religious community chosen by the school board president, a moment of silent prayer, or a prayer led by the school board president himself.”<sup>208</sup> These prayers were often explicitly sectarian.<sup>209</sup> Relying on the “‘unbroken’ history of accepting public prayer,” the district court upheld the policy, arguing that these meetings fall under *Marsh* as adult legislative meetings rather than the student-centered gatherings at issue in *Lee* or *Santa Fe*.<sup>210</sup>

On appeal, the Sixth Circuit prophetically stated that the case put them “squarely between the proverbial rock and a hard place.”<sup>211</sup> Indeed, the court acknowledged that school board prayer does “not neatly fit within the category” of either school-sponsored prayer or legislative prayer.<sup>212</sup> Despite this, the court reasoned that the school board is more similar to the class of activities governed by the Court’s school prayer cases because it is “inextricably intertwined with the public school system,” rather than the legislative setting.<sup>213</sup> Eschewing *Marsh*, the court comprehensively identified several factors—such as the integral part the board plays in the operation of the public school, the board’s function of serving students who have a “heightened interest in . . . participation in” the meetings, and the setting, which is arguably more coercive than the graduation ceremony in *Lee*—to place this case closer to school prayer.<sup>214</sup> Ultimately, the court chose to apply the *Lemon* test and found the practice unconstitutional.<sup>215</sup>

Confronted with this difficult task of categorizing school board prayer, other appellate courts before the 2014 *Town of Greece* case chose to fall back on *Allegheny* and strike down the school board prayer policies that resulted in

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<sup>206</sup> *Id.* at 372.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 373.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 375.

<sup>211</sup> *Id.* at 371. The rock is *Lee* and coercive school prayer whereas the hard place is *Marsh* and legislative prayer. *Id.*

<sup>212</sup> *Id.* at 376.

<sup>213</sup> *Id.* at 377 (describing *Marsh* and legislative prayer as the “historical exception to the mainstream”).

<sup>214</sup> *Id.* at 381–83. The court notes that students are the focus of meetings and that the Board serves as the students’ only avenue for voicing concerns regarding their education. *Id.* at 382. Whereas graduation ceremonies mark “the end of a student’s association with a school,” here the students are “a far more captive audience” and students may want to attend for a variety of reasons. *Id.* at 383.

<sup>215</sup> *Id.* at 385.

sectarian prayer. The Ninth Circuit confronted the issue in *Bacus v. Palo Verde Unified School District*.<sup>216</sup> The school board prayers that took place regularly were almost always given “in the Name of Jesus.”<sup>217</sup> Although the court recognized that the issue did not fit cleanly into a pre-existing analytical framework, the court found the prayers too sectarian to be upheld even under *Marsh*’s more lenient standard and refused to decide whether the situation was more similar to legislative prayer or a classroom prayer.<sup>218</sup>

The Fifth Circuit charted a similar course in *Doe v. Tangipahoa Parish School Board*.<sup>219</sup> Since 1973, the Tangipahoa School Board allowed board-approved individuals to offer prayers at their meetings following the Pledge of Allegiance.<sup>220</sup> The court assumed *arguendo* that the School Board fell under *Marsh*, but, similar to the Ninth Circuit, found the prayers to be sectarian and thus unconstitutional regardless of *Marsh*’s applicability.<sup>221</sup> Although overturned later for lack of standing,<sup>222</sup> this case, along with *Bacus*, demonstrates that lower courts rely on circuit jurisprudence regarding sectarian prayer, guided by the Court’s decision in *Allegheny*, to avoid the difficult task of categorizing school board prayer.

In *Doe v. Indian River School District*, the Third Circuit addressed the Indian River School District practice of allowing prayer at its board meetings, a practice which began in 1969 and was formalized in 2004.<sup>223</sup> The prayers, which “nearly always—and exclusively—refer[red] to Christian concepts,”<sup>224</sup> were given by board members on a rotating basis and followed the presentation of the colors.<sup>225</sup> Concluding that *Marsh* was more applicable, the district court upheld the policy.<sup>226</sup>

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<sup>216</sup> 52 F. App’x 355, 357 (9th Cir. 2002).

<sup>217</sup> *Id.* at 356.

<sup>218</sup> *Id.*

<sup>219</sup> 473 F.3d 188 (5th Cir. 2006).

<sup>220</sup> *Id.* at 192.

<sup>221</sup> *Id.* at 202–05 (“Because the Board’s prayers in the stipulations demonstrate a clear preference for Christianity, they are *not* permitted under *Marsh*.”).

<sup>222</sup> *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 499 (5th Cir. 2007) (rehearing en banc).

<sup>223</sup> *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 261 (3d Cir. 2011).

<sup>224</sup> *Id.* at 265.

<sup>225</sup> *Id.* at 262.

<sup>226</sup> *Doe v. Indian River Sch. Dist.*, 685 F. Supp. 2d 524, 539 (D. Del. 2010) (“In sum, a school board does not implicate the same concerns as the coercive effect of classroom prayers, graduation prayers, or prayers during extracurricular activities . . .”).

In reversing the district court, the Third Circuit rejected the notion that coercion was not a concern in the school board setting.<sup>227</sup> Similar to *Lee* and *Santa Fe*, attendance at the board meetings was not mandatory.<sup>228</sup> However, student attendance was still meaningful in many ways, and students likely faced peer pressure to attend or otherwise risked losing benefits and recognition.<sup>229</sup> According to the court, *Lee* captured these concerns more accurately than *Marsh* because “the entire purpose and structure of the Indian River School Board revolve[d] around public school education.”<sup>230</sup> Further, *Marsh* was predicated on the unique history of legislative prayer, and courts since have “proven reluctant to extend *Marsh* outside of its narrow historical context.”<sup>231</sup> The court went on to invalidate the policy under the *Lemon* and endorsement tests.<sup>232</sup>

While the Third and Sixth Circuits chose where the school board fit into existing Establishment Clause jurisprudence, the Fifth and Ninth Circuits refused to do so by relying on the sectarian nature of the prayer and *Allegheny* to invalidate the policies. However, *Town of Greece*—which overturned *Allegheny*’s sectarian standard—would remove this safety valve for courts, forcing them to squarely decide where school board prayer fits in the Establishment Clause framework.<sup>233</sup> The circuit split that emerged after *Town of Greece* demonstrates the difficulty for courts in fitting the school board into either the school prayer or legislative prayer jurisprudential schemes.

### B. *The Fifth Circuit Expands Marsh to the School Board Setting*

In *American Humanist Association v. McCarty*, the Fifth Circuit became the first to address school board prayer following the Court’s overturning of *Allegheny* and affirmation of the use of history in Establishment Clause analysis in *Town of Greece*. At issue was the monthly public meetings of the Birdville Independent School District.<sup>234</sup> Beginning in 1997, the Board chose two students based on merit to deliver the Pledge of Allegiance and, subsequently, an

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<sup>227</sup> *Indian River*, 653 F.3d at 275 (“*Marsh* does not adequately capture these concerns.”).

<sup>228</sup> *Id.* at 276.

<sup>229</sup> *Id.* at 277. A student may attend to celebrate academic success with family, extracurricular success with their team, or simply to “comment on school policies or otherwise participate in the decision-making that affects his or her education.” *Id.* at 276, 278, 279.

<sup>230</sup> *Id.* at 278.

<sup>231</sup> *Id.* at 281.

<sup>232</sup> *Id.* at 283–90.

<sup>233</sup> See *Town of Greece v. Galloway*, 572 U.S. 565, 578–86 (2014). The Court upheld the prayer policy of the town Board, concluding that it was similar enough to legislative prayer to be included in the historical analysis of *Marsh* and that prayers under *Marsh* need not be non-sectarian. *Id.* at 590–92.

<sup>234</sup> *Am. Humanist Ass’n v. McCarty*, 851 F.3d 521, 523 (5th Cir. 2017).

invocation, typically in the form of a prayer.<sup>235</sup> Members of the Board and audience typically stood for the Pledge and remained standing for the invocation.<sup>236</sup> In 2015, the Board changed the word “invocation” to a “student expression” in its policy and began selecting from a list of volunteers to deliver the message.<sup>237</sup> The American Humanist Association, along with former student Isaiah Smith, filed suit, alleging the policy amounted to an endorsement or advancement of religion—specifically, Christianity.<sup>238</sup> In support of this claim, the complaint detailed years of instances of sectarian Christian prayer in the presence of students.<sup>239</sup>

The district court upheld the policy, concluding that the “school board is more like a legislature than a school classroom,” and thus *Marsh* governed.<sup>240</sup> The court found that the policy should be governed by *Town of Greece* because the prayer opportunity was not “used to proselytize or to disparage other . . . beliefs,” and citizens attending were not coerced to participate.<sup>241</sup>

On appeal, the Fifth Circuit agreed with the district court in a short, limited opinion, concluding that the school board is a “deliberative body, charged with overseeing . . . tasks that are undeniably legislative.”<sup>242</sup> Although the court acknowledged that students may be in attendance, the principal audience is nonetheless the board members.<sup>243</sup> Admitting that the history of school board prayer is more limited than that of legislative prayer, the court still concluded that *Town of Greece* and *Marsh* stand for a broader history of prayer at public meetings.<sup>244</sup> Even though students may attend the meetings, their presence did not transform the nature of the meeting from one that was mainly legislative and meant for adult members.<sup>245</sup> The court distinguished its opinion from *Coles* and *Indian River*—where the Sixth and Third Circuits declined to apply *Marsh* to school board prayer—relying on the fact that those cases were decided prior to *Town of Greece*.<sup>246</sup>

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<sup>235</sup> *Id.* at 524.

<sup>236</sup> *E.g.*, Feb 28, 2019 Regular Board Meetings, BIRDVILLE INDEP. SCH. DIST. (Feb. 28, 2019), <https://birdvilleisdtx.new.swagit.com/videos/38343>.

<sup>237</sup> *McCarty*, 851 F.3d at 524.

<sup>238</sup> Complaint at 10, *Am. Humanist Ass’n v. Birdville Indep. Sch. Dist.*, No. 4:15-cv-377 (N.D. Tex. Aug. 1, 2016).

<sup>239</sup> *Id.* at 6–9.

<sup>240</sup> *Am. Humanist Ass’n*, No. 4:15-cv-377, at 5.

<sup>241</sup> *Id.* at 6.

<sup>242</sup> *McCarty*, 851 F.3d at 526.

<sup>243</sup> *Id.* at 527.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 527–28.

<sup>246</sup> *Id.* at 528.

The Fifth Circuit took a bold step in upholding the school board's prayer policy solely under the broad guise of prayer at public meetings without subjecting the practice to any further Establishment Clause scrutiny, especially considering the limited factual and historical record relied on by the court.<sup>247</sup> As discussed above, no court before the Fifth Circuit in *McCarty* had extended the legislative prayer doctrine to a setting outside of state and town government meetings.<sup>248</sup>

### C. *The Ninth Circuit Chooses Lemon over Marsh*

The Ninth Circuit in 2018 took a decidedly different approach in *Freedom From Religion Foundation v. Chino Valley Unified School District*. At issue were the school board meetings of the Chino Valley Unified School District.<sup>249</sup> These meetings are held eighteen times per year to make policy decisions, address various issues facing the district's students and teachers, and celebrate student achievement.<sup>250</sup> Since at least 2010, the Board has opened its meetings with the Pledge of Allegiance, a presentation of colors, and an opening prayer.<sup>251</sup> Religious leaders in the community were randomly chosen from a list to give the prayer.<sup>252</sup> Often, a board member gave the opening prayer instead.<sup>253</sup> Board members frequently and explicitly invoked Christianity as a part of regular board business.<sup>254</sup> The Freedom From Religion Foundation filed suit to enjoin the Board from conducting prayer at the meetings, alleging that the opening prayer and regular conduct of the board members violated the Establishment Clause.<sup>255</sup> The district court agreed, granting partial summary judgment.<sup>256</sup>

On appeal, the Ninth Circuit concluded that, in light of *Marsh* and *Town of Greece*, the School Board's policy did not fit into the legislative prayer exception to the Establishment Clause.<sup>257</sup> The court stressed that legislative prayer is a uniquely longstanding practice in the presence of citizens who "hold equal status as adult members of the political community."<sup>258</sup> Conversely,

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<sup>247</sup> *Id.* at 527 ("School board prayer presumably does not date back to the Constitution's adoption . . .").

<sup>248</sup> *See supra* notes 158–65.

<sup>249</sup> *Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1138 (9th Cir. 2018).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1138–39.

<sup>252</sup> *Id.* at 1139–40.

<sup>253</sup> *Id.* at 1140.

<sup>254</sup> *Id.* at 1140–41. This activity included preaching and reading Bible verses during the meetings. *Id.*

<sup>255</sup> *Id.* at 1141.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 1145–46.

<sup>258</sup> *Id.* at 1145–48.

school boards “are not solely a venue for policymaking,” but rather an “extension[] of the educational experience of the district’s public schools.”<sup>259</sup> Unlike their adult counterparts, students who attend are controlled by school officials and vulnerable to “peer pressure and other pressures to conform to social norms and adult expectations.”<sup>260</sup> Their presence is “integral to the meeting: they perform for the Board . . . ; they receive awards; and one among their number sits on the Board and participates in the Board’s deliberative process.”<sup>261</sup> Finding the *Town of Greece* historical approach inapposite, the court applied the *Lemon* test to strike down the policy as a violation of the Establishment Clause.<sup>262</sup> However, similar to the Fifth Circuit’s opinion in *McCarty* likening the school board to a legislature, here the opposite conclusion of outright rejecting the *Marsh/Town of Greece* historical approach fails to encapsulate the Supreme Court’s recent instruction. Instead, a new test is needed that both captures the unique elements and concerns inherent in a school board meeting and reflects recent Supreme Court precedent.

### III. A NEW TEST FOR A NEW SETTING

Lower courts have undoubtedly struggled to find the school board’s place in the panoply of existing Establishment Clause jurisprudence. This is because the school board neither fits neatly into the school or legislative settings nor completely embodies the concerns that particularly arise in those settings. Consequently, attempts to categorize school board prayer either as the school day or the legislative setting inevitably stretch the cases they rely upon to illogical extents and result in unsatisfying analysis.<sup>263</sup> Given the Court’s

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<sup>259</sup> *Id.* at 1145.

<sup>260</sup> *Id.* at 1145–46.

<sup>261</sup> *Id.* at 1146.

<sup>262</sup> *Id.* at 1148–51.

<sup>263</sup> See *Am. Humanist Ass’n v. McCarty*, 851 F.3d 521, 526–27 (5th Cir. 2017) (concluding the school board falls under the legislative prayer doctrine and the broader category of public prayer despite admitting the history of school board prayer, the main factor identified by the Court that justifies eschewing traditional Establishment Clause tests, is much more limited than that of legislative prayer). *But see* Tessa M. Bayly, *Prayer, Practice, Precedent and American School Board Meetings*, 51 U. TOL. L. REV. 173, 195 (2019) (arguing a school board meeting is similar enough to the legislature to permit prayer practices under the legislative prayer doctrine); Austin Reed, *Constitutional Law—Where Does It Fit? Solving the School Board Prayer Puzzle*, 43 U. ARK. LITTLE ROCK L. REV. 281, 300 (2020) (arguing school board prayer should be analyzed using legislative prayer precedent rather than school prayer precedent); Claire Lee, *The Practice of Prayer at the School Board Meetings: The Coercion Test as a Framework to Determine the Constitutionality of School Board Prayer*, 2020 U. CHI. LEGAL F. 367, 391 (2020) (arguing school board prayer is best analyzed under the coercion test and is likewise unconstitutional); Kaitlyn Huelskamp, *Lemons, Legislatures, and Liberties: The Constitutionality of Prayer at the Public School Board Meeting*, 73 OKLA. L. REV. 739, 764 (2021) (arguing not only should school board prayer not fall under legislative prayer, but also that legislative prayer should be abandoned altogether).

willingness to buck traditional Establishment Clause tests,<sup>264</sup> a new test that better encapsulates the unique setting and concerns inherent in the school board setting is needed.<sup>265</sup>

Section A describes why neither of the approaches from *Marsh* nor *Lee* used by lower courts is well-suited to the school board prayer context. Section B sets out a balancing test—weighing history and coercion—that is better suited for school board prayer. Finally, sections C and D apply this new test to the Ninth and Fifth Circuit cases involved in the circuit split.

#### A. *Neither Marsh nor Lee Provide an Appropriate Analytical Framework*

Although these inquiries are fact-sensitive,<sup>266</sup> the Fifth and Ninth Circuit split demonstrates the difficulty of lower courts in grappling with the Court's ambiguous, blurred Establishment Clause jurisprudence.<sup>267</sup> This difficulty arises in part because these approaches are far from one size fits all or a grand unified Establishment Clause theory.<sup>268</sup> Rather, these modes of analysis function properly within the circumstances they were decided in and are ill suited to apply to every prayer context.

The legislative prayer doctrine in *Marsh* was crafted in light of the fact that legislative prayer is “deeply embedded in the history and tradition of this country,” uniquely marked by an “unambiguous and unbroken history of more than 200 years.”<sup>269</sup> In *Town of Greece*, the Court logically recognized that town meetings are similar to legislative settings.<sup>270</sup> The prayers offered are for the lawmakers and the risk of coercing mature adults is low.<sup>271</sup> Both the minimal

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<sup>264</sup> *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring) (“Today, the Court declines to apply *Lemon* in a case in the religious symbols and religious speech category, just as the Court declined to apply *Lemon* in *Town of Greece v. Galloway*, *Van Orden v. Perry*, and *Marsh v. Chambers*.”).

<sup>265</sup> *See id.* (arguing “[i]f the challenged government practice is not coercive and if it . . . is rooted in history and tradition,” then the practice is constitutional); *see also* *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) (“[T]he Court has found no single mechanical formula that can accurately draw the constitutional line in every case.”).

<sup>266</sup> *See* *Town of Greece v. Galloway*, 572 U.S. 565, 587 (2014) (“The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.”).

<sup>267</sup> *See, e.g.,* *Freedom From Religion Found. v. Connellsville Area Sch. Dist.*, No. 2:12-cv-1406, 2013 WL 869663, at \*6 (W.D. Pa. Mar. 7, 2013) (noting four different Establishment Clause tests).

<sup>268</sup> *See Am. Legion*, 139 S. Ct. at 2087 (“While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.”).

<sup>269</sup> *Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983).

<sup>270</sup> *Town of Greece*, 572 U.S. at 589–90.

<sup>271</sup> *Id.* at 589.

risk posed and the uniquely longstanding history dating back to the Founders justify legislative prayer.

On the one hand, although the school board is similarly “composed of publicly elected officials drawn from the local community, that is where the similarity ends.”<sup>272</sup> Unlike legislative prayer, school board prayer is not “deeply embedded in the history and tradition of this country.”<sup>273</sup> The school board is “intertwined with the public school system,” is “uniquely directed toward school-related matters,” and its constituency is the students rather than the adult citizens served by the legislature.<sup>274</sup> Students who serve as representatives, seek disciplinary remedies, or wish to voice opinions to the board directly concerning their education are obliged to attend. Students may also attend to accept awards or be recognized for their extracurricular activities.<sup>275</sup> While not strictly mandatory, students face peer pressure to attend and forfeit intangible benefits by non-attendance, making the optional nature of the meeting “formalistic in the extreme.”<sup>276</sup> Further, even the Supreme Court explicitly recognizes the “[i]nherent differences between the public school system and a session of a state legislature,”<sup>277</sup> concluding that mature adults, unlike children, may freely leave without being subjected to “religious indoctrination or peer pressure.”<sup>278</sup>

Given these differences and the higher risk of coercion, school board prayer cannot be justified solely by longstanding history as in *Marsh* or *Town of Greece*. The Fifth Circuit’s decision to do so by simply declaring that school board prayer falls under the broad umbrella of prayer at public meetings was certainly questionable. Expanding the category of Establishment Clause actions, justified by history alone and exempt from any real scrutiny to this spacious extent, would severely hamper litigants who truly have injuries to press and makes short work of claims that require deeper analysis. Indeed, it is hard to imagine what practices would not be constitutional under the Fifth Circuit’s approach.

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<sup>272</sup> *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999).

<sup>273</sup> *Marsh*, 463 U.S. at 786.

<sup>274</sup> *Coles*, 171 F.3d at 377, 381; see *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 278–79 (3d Cir. 2011) (concluding the school board’s “entire purpose and structure . . . revolves around public school education” and is “aimed at educating students or otherwise administering the public school system”).

<sup>275</sup> *Coles*, 171 F.3d at 372.

<sup>276</sup> *Lee v. Weisman*, 505 U.S. 577, 595 (1992).

<sup>277</sup> *Id.* at 596.

<sup>278</sup> See *Town of Greece v. Galloway*, 572 U.S. 565, 590 (2014) (citing *Marsh*, 463 U.S. at 792); see also *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 404 (5th Cir. 1995) (after a high school basketball coach led his team in prayer, spectators asked a non-participating team member, “Aren’t you a Christian?” and a teacher referred to the team member as a “little atheist”).

Despite the Court’s recent pronouncement in *American Legion* of a presumption of constitutionality for certain longstanding monuments, symbols, and practices, much uncertainty exists regarding when and how such a presumption applies.<sup>279</sup> The factors identified by the Court to support abandoning *Lemon* in favor of such a presumption in that case—that the passage of time imbues a practice with familiarity and historical significance and that the original purpose or meaning may be hard to decipher or may evolve over time<sup>280</sup>—do not appear to be at issue in these school board prayer cases. Indeed, as discussed above, school board prayer lacks the established history, familiarity, and significance of legislative prayer, and is neither as continuously longstanding nor imbued with quite as much contrary or substantive meaning as the century old Maryland Peace Cross at issue in *American Legion*.<sup>281</sup> Therefore, this Comment assumes *arguendo* that this presumption of constitutionality does not apply to school board prayer, but dares not ignore the Court’s more central command to “look[] to history for guidance.”<sup>282</sup>

On the other hand, school boards do not involve the same level of coercive danger present during the school day or other school-sponsored activities, such as a graduation ceremony or football game. While the school board exists to serve the students of its district, the meetings are not as student centered as other activities considered by the Court. A pure coercion analysis, such as the one used in *Lee*, fails to capture the unique setting of the school board, which is less intimately associated with the school day than other school-sponsored events. Student presence and involvement in the school board meeting is a central factor but not a necessary one, as a school board meeting may occur without students, unlike a graduation ceremony or football game. Although the subject matter discussed at school board meetings inherently implicates students, and coercion of those students deciding to attend must be considered, student presence should not be the sole factor.

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<sup>279</sup> See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2102 (2019) (Gorsuch, J., concurring) (“How old must a monument, symbol, or practice be to qualify for this new presumption?”); see also *Woodring v. Jackson County*, 986 F.3d 979, 994 (7th Cir. 2021) (“[W]e are unable to conclude, as a threshold matter, that the County’s nativity scene is ‘longstanding’ or ‘established’ such that *American Legion*’s presumption could attach.”).

<sup>280</sup> *Am. Legion*, 139 S. Ct. at 2081–85 (majority opinion).

<sup>281</sup> *Id.* at 2085–86 (noting the uncertainty over the cross’s original purpose if the purpose for its maintenance changed over time and if the cross had “become a familiar part of the physical and cultural landscape” to the point where its removal may be seen as hostile towards religion rather than neutral).

<sup>282</sup> *Id.* at 2087; see also *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“The Court’s interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees.”).

The test set out in *Lemon* is equally unavailing.<sup>283</sup> At best, the test has been called into question.<sup>284</sup> At worst, it has been abandoned.<sup>285</sup> The struggle to fit school board prayer into the previously tailored frameworks of *Town of Greece*, *Lemon*, and *Lee* speaks to the need of a new mode of analysis.<sup>286</sup> Indeed, the Court almost explicitly calls for fresh Establishment Clause evaluation.<sup>287</sup>

### B. *Balancing Coercion and History*

The school board setting involves elements and concerns of both the school day and the legislature. Therefore, this proposed test balances the coercive effect of the prayer against the history and accepted tradition of the practice and our tolerance of religious acknowledgment in public life.

As an initial matter, the coercive effect of the prayer will serve as the threshold to balancing. Where a prayer practice is blatantly coercive, it need not be balanced against the history and tradition of the practice and is likewise unconstitutional.<sup>288</sup> Coercion is the barrier to the test because the school board is intertwined with the school day and is “uniquely directed toward school-related matters.”<sup>289</sup> The school board’s chief constituency is students and its

<sup>283</sup> See *Am. Legion*, 139 S. Ct. at 2080 (“If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it.”).

<sup>284</sup> *Id.* at 2081 (“The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.”).

<sup>285</sup> See *id.* at 2093 (Kavanaugh, J., concurring) (“Today, the Court declines to apply *Lemon* in a case in the religious symbols and religious speech category, just as the Court declined to apply *Lemon* in *Town of Greece v. Galloway*, *Van Orden v. Perry*, and *Marsh v. Chambers*.”); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (“Although [*Lemon*] initially provided helpful assistance, we soon began describing the test as only a ‘guideline.’” (citations omitted)); *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (describing the *Lemon* test as a “formulaic abstraction” for which the Court “demonstrates the irrelevance of . . . by essentially ignoring it”); see also *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1326 (11th Cir. 2020) (“*Lemon* is dead.”).

<sup>286</sup> See *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) (“Neither can this Court’s other tests readily explain the Establishment Clause’s tolerance . . . of the prayers that open legislative meetings, . . . invocations of . . . the Deity [by] public officials; the public references to God on coins, decrees, and buildings . . .”).

<sup>287</sup> See *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (“The case teaches instead that the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’” (quoting *Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 670 (1989))); *Am. Legion*, 139 S. Ct. at 2087 (“[W]e have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.”); *Lynch*, 465 U.S. at 678 (“In each case, the inquiry calls for line-drawing; no fixed, *per se*, rule can be framed.”); *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (“[T]he Court has found no single mechanical formula that can accurately draw the constitutional line in every case.”).

<sup>288</sup> See *Town of Greece*, 572 U.S. at 576 (“Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundations.”).

<sup>289</sup> *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999); see also *Lee*, 505

audience may include impressionable young people susceptible to peer pressure and influence by government authorities, in contrast to adults who are better equipped to resist subtle coercive state pressure.<sup>290</sup>

This coercive effect is understood by analyzing the government’s involvement in the prayer, content, speaker, setting, the voluntary nature of attendance for students, and the totality of circumstances surrounding the prayer such as the order and process by which it occurs.<sup>291</sup> This analysis uses *Lee v. Weisman* and *Santa Fe Independent School District v. Doe* as guideposts to determine whether a prayer practice is coercive enough to fail at the threshold.<sup>292</sup>

Where a prayer practice is not coercive enough to fail at the threshold, any coercive elements will then be weighed against the tradition of the practice and our history of religious acknowledgment in public spaces and by public officials.<sup>293</sup> History and tradition have been explicitly identified by the Court as an essential component in Establishment Clause analysis.<sup>294</sup> However, upholding a practice based solely on history is a far more controversial and exceptional matter. As explained above, although our history of religious acknowledgment in public spaces is robust, school board prayer lacks the same longstanding history or established pedigree of legislative prayer or other similar practices.<sup>295</sup>

Therefore, the practice cannot be upheld by history alone under *Town of Greece*, and this Comment assumes *arguendo* that it does not qualify for

U.S. at 592, 597 (noting the “obvious differences” between the school and legislative setting “where adults are free to enter and leave with little comment and for any number of reasons,” and recognizing that concern about coercion “may not be limited to the context of schools, but it is most pronounced there”); *Town of Greece*, 572 U.S. at 590 (noting the difference between the legislative setting and school setting, which includes objecting students and supervision by school officials, and the town board meeting, which includes “mature adults who ‘presumably’ are ‘not readily susceptible to religious indoctrination or peer pressure’” (citations omitted)).

<sup>290</sup> See *Lee*, 505 U.S. at 597 (detailing the differences between the state legislative prayers upheld in *Marsh* and the prayers that occurred at a school-sponsored event connected with the school day).

<sup>291</sup> These factors are discussed in detail *supra* at Part.I.A.3.

<sup>292</sup> See *supra* Part.I.A.2.

<sup>293</sup> See *supra* notes 170–78 and accompanying text.

<sup>294</sup> See *Town of Greece*, 572 U.S. at 576 (“[T]he Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’” (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1969))); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion) (“While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.”); see also *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (“[O]ur analysis is driven both by the nature of the monument and by our Nation’s history.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“The Court’s interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees.”).

<sup>295</sup> See *supra* note 204.

*American Legion*'s indeterminate and ambiguous presumption of constitutionality for longstanding and established practices. Additionally, some degree of coercion is presumed in the school board setting due to its entwined relationship with the school and impressionable students.<sup>296</sup> Accordingly, the Court's long line of school prayer precedent cannot be ignored, and history alone cannot justify the practice.<sup>297</sup> Instead, each must be considered and weighed against the other.

The balancing here works like a sliding scale.<sup>298</sup> The more coercive a practice, the stronger a showing of longstanding history and tradition is required to find it constitutional. Although a showing of longstanding history will be enough to outweigh a practice that contains some coercive elements, the threshold test prevents blatantly coercive practices from constitutionality simply because they happen to have existed for a long period of time.<sup>299</sup> This balance follows Court precedent in which older displays and practices are more often found constitutional because they have "become a part of American culture, society, and democracy—and [are] thus unlikely to be a fateful first step toward an establishment of religion."<sup>300</sup> Once the practice passes the threshold coercion

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<sup>296</sup> See *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 275 (3d Cir. 2011) ("[T]he Supreme Court's . . . school prayer cases reveal . . . the need to protect students from government coercion in the form of endorsed or sponsored religion . . . *Marsh* does not adequately capture these concerns.").

<sup>297</sup> See *Am. Legion*, 139 S. Ct. at 2093 (Kavanaugh, J., concurring) (arguing "[i]f the challenged government practice is not coercive and if it . . . is rooted in history and tradition," then the practice is constitutional).

<sup>298</sup> See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (adopting a sliding scale approach to determine personal jurisdiction in internet cases where the more commercial a website is the more likely that the operator has "purposefully availed itself" of the forum state); *Aparicio v. Christian Union, Inc.*, 18-CV-0592 (ALC), 2019 WL 1437618, at \*5 (S.D.N.Y. Mar. 29, 2019) (describing the sliding scale for the ministerial exception, "in which 'the more religious the employer institution is, the less religious the employee's functions must be to qualify'" as a minister (quoting *Penn v. N.Y. Methodist Hosp.*, 158 F. Supp. 3d 177, 182 (S.D.N.Y. 2016))).

<sup>299</sup> See *Town of Greece*, 572 U.S. at 576 ("Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation.").

<sup>300</sup> WITTE & NICHOLS, *supra* note 109, at 217; cf. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2007) (explaining "longstanding prohibitions on the possession of firearms" are not called into question by the ruling that the Second Amendment is an individual right). Compare *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding legislative prayer based on the fact that "[f]rom colonial times through the founding of the Republic and ever since" it has been "deeply embedded in the history and tradition of this country"), and *Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring in the judgment) ("[Forty] years passed in which the presence of this monument, legally speaking, went unchallenged . . ."), and *Am. Legion*, 139 S. Ct. at 2078 (upholding maintenance by the city of a cross that had been erected for over ninety years), with *Stone v. Graham*, 449 U.S. 39, 40 (1980) (striking down a Kentucky statute requiring public school classrooms to post a copy of the Ten Commandments, which was passed the same year litigation ensued), and *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (striking down several courthouse displays of the Ten Commandments and other biblical depictions, the earliest of which was erected only six years prior to litigation and the latest of which was erected while litigation was ongoing).

question, the elements of the prayer practice, including those that may be somewhat or debatably coercive but not so flagrant as to fail at the threshold, can be weighed and understood in light of history and tradition to determine its constitutionality. With this framework in mind, the Ninth Circuit case of *Freedom From Religion Foundation v. Chino Valley Unified School District Board of Education* and the Fifth Circuit case of *American Humanist Association v. McCarty* will be analyzed in turn.

### C. Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District

Since 2010, the Chino Valley Unified School District has opened the public portion of its school board meetings with an invocation led by local clergy or sometimes even a Board member.<sup>301</sup> A student representative sits on the Board and students are regularly in attendance because a student performance typically follows the invocation.<sup>302</sup> As explained below, this prayer policy is unconstitutionally coercive and fails this Comment's proposed Establishment Clause test at the threshold.

#### 1. Coercion Analysis

All factors to consider in a coercion analysis are present in this case. First, the School Board here has control over the speaker and some control over the message. The Board selects clergy from a list of eligible chaplains organized by the superintendent.<sup>303</sup> Although the Board's official policy is not to control the message of the speaker, there are times when this procedure has not been followed.<sup>304</sup> Additionally, in the absence of selected clergy at the meeting, a Board member gives the opening prayer.<sup>305</sup> Just as in *Lee*, where school officials monitored and oversaw the speakers and prayer given,<sup>306</sup> here the Board has

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<sup>301</sup> *Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1139 (9th Cir. 2018).

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *See id.* at 1138 n.2.

<sup>305</sup> *Id.* A review of the available Board minutes from 2012 shows that eighteen of the twenty-five invocations given that year were by Board members or school officials rather than invited clergy. *2012 Board of Education Agendas and Minutes*, CHINO VALLEY UNIFIED SCH. DIST., <https://www.chino.k12.ca.us/Page/17383> (last visited Nov. 10, 2021). In 2013, that number was seven of the nineteen invocations. *2013 Board of Education Agendas and Minutes*, CHINO VALLEY UNIFIED SCH. DIST., <https://www.chino.k12.ca.us/Page/17382> (last visited Nov. 10, 2021). In 2014, it was eight of the fifteen invocations. *2014 Board of Education Agendas and Minutes*, CHINO VALLEY UNIFIED SCH. DIST., <https://www.chino.k12.ca.us/Page/17381> (last visited Nov. 10, 2021).

<sup>306</sup> *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

intertwined itself with the invocation and exercises some control over who may speak and what type of message may be delivered.<sup>307</sup>

Aside from the inherently coercive setting of the school board meeting, here, many students are either actually or practically obliged to attend. The Board has a student representative present and active at all regular meetings.<sup>308</sup> A student showcase often follows the prayer and involves performances or other student recognitions.<sup>309</sup> Similar to the practically obligatory nature of the events in *Lee* and *Santa Fe*, students invited to perform in front of their school community with their peers encounter pressure to attend or face the threat of ostracism.<sup>310</sup> To say that attendance is voluntary and that invited students who disagree with the invocation need not come would be “formalistic in the extreme.”<sup>311</sup> Additionally, the student member of the Board is obliged to attend by virtue of her position and must sit through the invocation, which is often given by the board members who sit and vote with her and with whom she is expected to work alongside. This is also true for students who may be required to appear before the Board for certain discipline and readmission cases or waiver requests pertaining to high school graduation.<sup>312</sup>

The process by which the prayer occurs here is also coercive and gives little opportunity for a non-participating student to avoid involvement without dissenting in front of those assembled. The prayer comes near the beginning of the meeting and is directly followed by the student showcase.<sup>313</sup> To avoid the invocation, a student involved in the student showcase must either arrive late or leave and re-enter the room moments before performing in front of the Board.<sup>314</sup> Otherwise, a non-participating student must firmly resist the pressure to pray under the watchful eye of the Board.<sup>315</sup>

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<sup>307</sup> Indeed, a review of the available board minutes for 2012 shows that every invocation given by an outside pastor was of the Christian faith. See *2012 Board of Education Agendas and Minutes*, *supra* note 305. In 2015, Christian pastors gave thirteen of the eighteen invocations. *2015 Board of Education Agendas and Minutes*, CHINO VALLEY UNIFIED SCH. DIST., <https://www.chino.k12.ca.us/Page/17380> (last visited Nov. 10, 2021).

<sup>308</sup> *Chino Valley*, 896 F.3d at 1139.

<sup>309</sup> *Id.*

<sup>310</sup> See *Lee*, 505 U.S. at 589 (holding that students, for all “practical purposes, are obliged to attend” the graduation ceremony); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000) (holding that, although football games are in some ways voluntary, students still feel “immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event”).

<sup>311</sup> *Lee*, 505 U.S. at 595.

<sup>312</sup> *Chino Valley*, 896 F.3d at 1138–39.

<sup>313</sup> *Id.*

<sup>314</sup> See *Chino Valley Unified Sch. Dist. Bd. Videos*, *supra* note 8 (showing a group of twenty-seven band students come before the Board to perform immediately following the invocation at 3:20).

<sup>315</sup> See *Lee*, 505 U.S. at 590 (“[Coercion] concerns have particular application in the case of school

Finally, a student attending a Chino Valley School Board meeting faces immense pressure to conform and participate in the invocation. Through both personal invocations and statements following invocations, board members have made it clear that Christianity is the favored religion.<sup>316</sup> Similar to the school in *Santa Fe*, these actions communicate to students in attendance that the Board has associated itself with Christian invocations and viewpoints.<sup>317</sup> A student sitting on the Board as a representative, performing in the student showcase, or involved in an appeal or other disciplinary procedure before the Board is inevitably exposed to a state-endorsed Christian message during the meeting and undoubtedly coerced to conform to it.<sup>318</sup> Any student of a different faith or who simply disagrees with the message of the invocation would certainly feel compelled to conform and participate in the religious exercise, especially when given by one of the board members, knowing that the Board will witness the student's deliberate act of non-conformance to what is known to be the Board's preferred creed and practice.<sup>319</sup> The compulsion here is beyond simply the desire not to stand out. Rather, attending students feel pressured to conform because the prayer bears "the imprint of the State," making it indistinguishable from the Board or school business and leading students to believe that adherence to the religious exercise is the price of attending the meeting.<sup>320</sup>

The clear and substantial coercive effect on students is a result of the Board's control of and association with invocation speakers, the obligation of some students to attend board meetings, and the obvious pressure to conform to a religious exercise that is often Christian in nature and either performed by a board member or vocally commended for its sectarian content. History and

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officials, whose effort to monitor prayer will be perceived by students as inducing a participation they might otherwise reject.").

<sup>316</sup> Based on the available Board minutes, only one invocation in 2013 was given by a member of a non-Christian church. See *2013 Board of Education Agendas and Minutes*, *supra* note 305; see also *Chino Valley*, 896 F.3d at 1140 (concluding "Board members' invocation of Christian beliefs, Bible readings, and further prayer were a regular feature of Board meetings"). This included board members stating things such as "[our] one goal is under God, Jesus Christ," "everyone who does not know Jesus Christ to go and find Him," "God appointed us to be here," and "[the pastor] was right, in his prayers, that I need [to] first look to Jesus Christ for serving our students." *Id.*

<sup>317</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("[A]n objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.").

<sup>318</sup> *Chino Valley*, 896 F.3d at 1140 ("[Board members] explicit linkages of the work of the Board, teachers, and the school community to Christianity, and their endorsement of prayer by the faculty, were frequent.").

<sup>319</sup> *Lee*, 505 U.S. at 593 ("[T]he school district's supervision and control . . . places public pressure, as well as peer pressure, on attending students . . . . This pressure, though subtle and indirect, can be as real as any overt compulsion.").

<sup>320</sup> *Id.* at 590.

subsequent practice show that the prayer opportunity is exploited by the Board to proselytize to a captive audience of impressionable students, some of whom are required to attend. Even longstanding history cannot save a “state-sanctioned religious exercise in which the student [is] left with no alternative but to submit.”<sup>321</sup> Accordingly, the prayer practice here is unconstitutional under the test proposed in this Comment.

#### D. American Humanist Association v. McCarty

At the start of regularly scheduled board meetings, the Birdville Independent School Board asks two students chosen from a list of volunteers to stand before the audience and Board.<sup>322</sup> The first student leads the assembly in the U.S. and Texas Pledges of Allegiance while the second offers an expression of their choosing.<sup>323</sup> Subsection one will analyze the coercive effect of the prayer policy. Then, subsection two will balance the coercive effect of the policy against the history and tradition of the practice to determine its constitutionality.

##### 1. Coercion Analysis

First, the coercive effect of the policy must be analyzed to determine if it is blatantly coercive or if the prayer opportunity is being taken advantage of to proselytize, and thus cannot be justified by any longstanding history. Here, the coercive effect present does not rise to a level that would invalidate the policy without further balancing. While the process and setting present some coercion, the Board controls neither the speaker nor the message, unlike the school involvement in *Lee*, *Santa Fe*, and *Chino Valley*. Therefore, the risk that a student will be compelled by the Board to participate in a religious exercise in violation of their conscience is relatively low.

The school board setting inherently creates some coercive effect. Here, board members sit at the front of the room on a raised platform able to observe all audience members. Indeed, attending students have incentive not to raise the ire of board members who not only broadly oversee their education but may hear their individual claims and concerns. The process by which the prayer occurs may also be coercive. Audience members are asked to stand to be led by a student volunteer in the U.S. and Texas Pledges of Allegiance. Immediately after, while still standing but without direction from the Board, the next student volunteer takes center stage to offer their expression, which may be a prayer or

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<sup>321</sup> *Id.* at 597.

<sup>322</sup> *Am. Humanist Ass’n v. McCarty*, 851 F.3d 521, 524 (5th Cir. 2017).

<sup>323</sup> *Id.* Before 2015, the student expression was called the “invocation.” *Id.*

other message. Students wishing not to participate must distinguish themselves from all others and “profess publicly [their] disbelief.”<sup>324</sup> A dissenting student must either sit or leave in front of their community, classmates, and the Board.<sup>325</sup>

However, lessening this coercive effect is the fact that the Board plays almost no role in the selection of the speaker or the content of their expression. Instead, the policy largely gives the student speaker autonomy over their message. This policy reads as follows:

The subject of the student introductions must be related to the purpose of the event and to the purpose of marking the opening of the event; honoring the occasion, the participants, and those in attendance; bringing the audience to order; and focusing the audience on the purpose of the event. A student must stay on the subject, and the student may not engage in obscene, vulgar, offensively lewd, or indecent speech. The District shall treat a student’s voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student’s voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.<sup>326</sup>

Although this is a selective access forum like the football pregame prayer in *Santa Fe*, here, a different student speaks at every Board meeting and, even though the expression was originally titled “invocation,” there is no suggestion that the message now must or should be a prayer. Indeed, the student expressions vary and include moments of silence commemorating victims of terrorism,<sup>327</sup> poems,<sup>328</sup> personal stories about overcoming the challenges of teen pregnancy,<sup>329</sup> and messages encouraging others to stay positive during the circumstances created by the COVID-19 pandemic.<sup>330</sup> This is notably different

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<sup>324</sup> Sch. Dist. of Abington Twp. v. Schempp., 374 U.S. 203, 289 (1963) (Brennan, J., concurring).

<sup>325</sup> See *Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1138 (9th Cir. 2018). Conversely, a student may choose to arrive a few minutes late to avoid participation without missing substantive parts of the meeting, unlike those students asked to perform in *Chino Valley*.

<sup>326</sup> *McCarty*, 851 F.3d at 524 n.6. The change from “invocation” to “student expression” further attenuates the Board’s connection and regulation of what the student speaker may choose to say. *Id.* at 524.

<sup>327</sup> *Sept 28, 2017 Regular Board Meetings*, BIRDVILLE INDEP. SCH. DIST. (Sept. 28, 2017), <https://birdvilleisdtx.new.swagit.com/videos/38322> (items D & E at 1:42).

<sup>328</sup> *Dec 14, 2017 Regular Board Meetings*, BIRDVILLE INDEP. SCH. DIST. (Dec. 14, 2017), <https://birdvilleisdtx.new.swagit.com/videos/38326> (items D & E at 1:52).

<sup>329</sup> *Feb 22, 2018 Regular Board Meetings*, BIRDVILLE INDEP. SCH. DIST. (Feb. 22, 2018), <https://birdvilleisdtx.new.swagit.com/videos/38329> (items D & E at 1:47).

<sup>330</sup> *Nov 19, 2020 Regular Board Meetings*, BIRDVILLE INDEP. SCH. DIST. (Nov. 19, 2020), <https://birdvilleisdtx.new.swagit.com/videos/107455> (item E at 2:38).

from the policy and school involvement in the pre-game prayer at issue in *Santa Fe*, in which the school “invit[ed] and encourag[ed] religious messages,”<sup>331</sup> or in *Chino Valley*, in which the Board itself often either directed the prayer or explicitly endorsed it.<sup>332</sup>

Here, the Board allows students to broadly choose their topic with minimal regulation. No indication is given that the Board favors or encourages religious messages from students. For example, of the thirty video-recorded regular board meetings where a student has given a voluntary student expression since 2017, a prayer has been offered on only three occasions.<sup>333</sup> The Board is passive and neither approves nor disapproves of a student’s chosen message except for a polite round of applause at the end.<sup>334</sup> There is no evidence that the Board seeks to convey a religious message through the student expression, adheres to or promotes any particular religious belief, or exploits the opportunity to preach to or convert those students in attendance.<sup>335</sup>

Further, the Board makes every effort during the student expression to distinguish itself from whatever message the student speaker may offer. While the student is offering their expression, a slide is projected above the board members at the front of the room distinguishing the speaker and their message from the Board.<sup>336</sup> Any direction, such as to bow your head, associated with the few prayers given is requested by the student speaker and not the Board, and the

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<sup>331</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306 (2000).

<sup>332</sup> *Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1139 (9th Cir. 2018).

<sup>333</sup> *Jul 26, 2018 Regular Board Meetings*, BIRDVILLE INDEP. SCH. DIST. (July 26, 2018), <https://birdvilleisdtx.new.swagit.com/videos/38335> (items D & E at 1:22; showing an eighteen-second prayer asking for a successful meeting and school year); *Feb 28, 2019 Regular Board Meetings*, *supra* note 236 (items C & D at 1:32) (showing a thirty-second prayer asking God to make sure everyone has a “great 2019”) (last visited Nov. 10, 2021); *Jul 25, 2019 Regular Board Meetings*, *supra* note 1 (items D & E at 2:15) (showing a forty-eight-second prayer generally asking “the Lord” for help and guidance for all faculty and students).

<sup>334</sup> *Sep 28, 2017 Regular Board Meetings*, *supra* note 327 (items D & E at 2:20).

<sup>335</sup> *Cf. Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (holding the moment of silence was unconstitutional because it sought “to characterize prayer as a favored practice”).

<sup>336</sup> *Feb 28, 2019 Regular Board Meetings*, *supra* note 236 (items C & D at 1:23). The message reads as follows:

The student speaking at the board meeting was selected based on neutral criteria to deliver messages of the student’s own choices. The content of the speaker’s message is the private expression of the individual student and does not reflect any position or expression of the District, the Board of Trustees, the District’s administration, or employees of the District. The contents of this message were prepared by the student volunteer, and the District refrained from interaction with the student speaker regarding their viewpoints on permissible subjects.

*Id.*

extent of board member participation is to respectfully join.<sup>337</sup> Although the pressure exerted over those in attendance to join in the prayer may be coercive, here, unlike *Lee*, *Santa Fe*, and *Chino Valley*, the prayers are not sanctioned, overseen, or chosen by the Board.<sup>338</sup> This hardly creates a perception that the prayers or messages offered bear the imprimatur of the Board, and any student in attendance may easily distinguish the student expression from the passive, silent role played by board members while it is being conducted.

## 2. *Balancing Coercion and History*

Since the policy is not so coercive as to fail at the threshold, its coercive elements must be weighed against the modest history and tradition of school board prayer and official religious acknowledgment in public spaces. On balance, this history and established tradition outweigh the relatively low coercive effect of the policy.

The practice here does not indicate that the Board exploits the prayer opportunity to proselytize, favor, or disparage any religion. Instead, the freely volunteered student expressions, including the rare prayer, remind those present to “transcend petty differences in pursuit of a higher purpose, and express a common aspiration to a just and peaceful society.”<sup>339</sup> Indeed, the practice exists in the same spirit as constitutional tolerant acknowledgment of our religious heritage.

Evidence shows that the policy, rather than acting as a façade for government endorsed prayer, largely promotes students to share their experiences and accomplishments. When prayer is offered, it is hardly coercive given its brief, embracive content, the autonomy of the student speaker, and the board’s minimal role in oversight, regulation, and audience compulsion. Although students may feel obliged to attend the meetings for several reasons, students are not required to attend, and the only risk present is that they may hear the thoughts or occasional beliefs of a fellow student.<sup>340</sup> Outside of the normal pressure not

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<sup>337</sup> *Id.*

<sup>338</sup> See *Lee v. Weisman*, 505 U.S. 577, 587, 592 (1992) (discussing the “troubling” involvement of school officials in choosing to have an invocation and who the speaker should be, which “may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy”); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000) (concluding the district’s policy “involves both perceived and actual endorsement of religion”).

<sup>339</sup> *Town of Greece v. Galloway*, 572 U.S. 565, 575 (2014); see *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2089 (2019) (noting the principles of acceptable prayer, which show “respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans”).

<sup>340</sup> See *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (holding there is a

to stand out from their peers, no evidence suggests that an attending student will be coerced to participate in a state-sanctioned religious exercise. Given the nature of the prayers—comparable to constitutional official acknowledgment of faith and our religious heritage—and the low risk of coercion, the policy does not violate the Establishment Clause.

In *Lee*, the Court cautioned “there will be instances when religious values, religious practices, and religious persons will have some interaction with the public school and their students.”<sup>341</sup> Here, the risk of true coercion to students in attendance is minor given the minimal role served by the Board in conducting the expressions, the autonomy given to the student speaker, and the brief and varied messages offered. The policy poses no practical threat of an establishment of religion. Therefore, on balance, the policy is constitutional considering the low risk of coercion and the modest history and tradition of prayer and religious acknowledgment in public life.

### CONCLUSION

No Establishment Clause test can perfectly address the concerns of every situation and prayer context that might arise. While *Lemon* may have attempted to create a “grand unified theory,” the Court has since found such an approach unworkable.<sup>342</sup> Instead, Establishment Clause analysis is fact sensitive and any test must be appropriately tailored to allow courts to apply the law accurately and appropriately, rather than forcing new situations into pre-existing frameworks made for different contexts. This is most clear in the school board prayer context where lower courts have attempted to apply either the legislative prayer doctrine or school prayer jurisprudence.

While the legislative prayer doctrine is effective in recognizing that religion is tolerated to some degree in our public life, in other contexts outside of the legislature that lack such a benign history of ceremonial prayer, it may permit acts which veer close to government sponsorship of religion. Similarly, where the coercion test understandably seeks to protect impressionable young students from compelled, state-sponsored religious acts while at school, it could be rigid and antithetical to our religious history when applied to situations involving

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constitutional difference between government endorsement of religion and private endorsement of religion).

<sup>341</sup> *Lee*, 505 U.S. at 597, 598–99 (“People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.”).

<sup>342</sup> *Am. Legion*, 139 S. Ct. at 2087 (“While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.”).

adults and longstanding, traditional practices. The inability of lower courts to transpose these doctrines to the school board—a setting with elements that encompass several areas of Establishment Clause jurisprudence—is itself evidence that a more tailored mode of analysis is needed and preferable to fitting square pegs in round holes.

The test this Comment proposes to adequately analyze school board prayer includes the relevant elements of both the legislative prayer doctrine and the coercion test to satisfy the concerns unique to the school board and follows Supreme Court guidance most recently rearticulated in *American Legion*. Indeed, both the legislative prayer doctrine and coercion tests were crafted to review prayer in particular settings. The school board should be no different. Using coercion as a threshold permits a reviewing court to allay the concerns regarding impressionable students who are present at the school board meeting or the target of its work. Similarly, balancing less coercive elements against history and tradition allows for some religious acknowledgement, which follows in the best of our traditions and adheres to the Court’s definitive command that the Establishment Clause be “interpreted by reference to historical practices and understandings.”<sup>343</sup> This test both recognizes that “[w]e are a religious people whose institutions presuppose a Supreme Being” and prevents the dais of the school board from becoming the pulpit.<sup>344</sup> It is tailored to better fit the school board context and incorporates appropriate elements of Establishment Clause jurisprudence, a compromise insisted upon by the Court’s precedent and a faithful application of the law.

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<sup>343</sup> *Id.* at 2101 (quoting *Town of Greece*, 572 U.S. at 576).

<sup>344</sup> *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

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