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Lemons, Legislatures, and Liberties: The Constitutionality of Prayer at Public School Board Meetings

I. Introduction

While the Establishment Clause protects the people from the commingling of church and state,¹ the Supreme Court has consistently allowed legislatures to begin sessions with an opening prayer.² Generally, according to the bodies that practice legislative prayer, the purpose of the ritual is to “place [officials] in a solemn and deliberative frame of mind”³ and “create a ‘more businesslike and professional decorum.’”⁴ In allowing such practices, the Court did not engage in its typical analysis of Establishment Clause claims. Instead, the Court emphasized the historical tradition of prayer beginning such sessions and evidence that the founders would have accepted such practices.⁵ The Court’s historical interpretation, however, has been criticized as not completely accurate.⁶

The Sixth Circuit first considered the issue of opening prayers at public school board meetings in 1999.⁷ Holding opening prayers at public school board meetings unconstitutional,⁸ the Sixth Circuit created a precedent that the Third Circuit and the Ninth Circuit upheld, respectively, in 2011 and 2018.⁹ The Fifth Circuit, however, departed from this precedent and allowed opening prayers at public school board meetings in 2017.¹⁰

Although the Supreme Court denied certiorari to the Fifth Circuit case,¹¹ the right to freedom of religion is a relentless government bulwark deserving of preservation. When children are involved in Establishment Clause claims, the Court has, rightfully, been concerned about the potential

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1. See U.S. CONST. amend. I.
 2. See *Marsh v. Chambers*, 463 U.S. 783, 795 (1983); see also *Town of Greece v. Galloway*, 572 U.S. 565, 592 (2014) (Alito, J., concurring).
 3. *Town of Greece*, 572 U.S. at 570 (majority opinion).
 4. *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 373 (6th Cir. 1999).
 5. See *Marsh*, 463 U.S. at 792; see also *Town of Greece*, 572 U.S. at 576.
 6. See, e.g., Chad West, Note, *Legislative Prayer: Historical Tradition and Contemporary Issues*, 2019 UTAH L. REV. 709, 711–14.
 7. *Coles*, 171 F.3d at 371.
 8. *Id.* at 385–86.
 9. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 279–80 (3d Cir. 2011), *cert. denied*, 565 U.S. 1157 (2012); *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1144–45 (9th Cir. 2018).
 10. *Am. Humanist Ass’n v. McCarty*, 851 F.3d 521, 529–30 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 470 (2018).
 11. *Id.*

coercive nature of prayer in the school setting due to children's susceptibility towards conformity.¹² The public school board plays a significant role in shaping schools' policies, procedures, and even disciplinary actions. Additionally, the school board embodies a public nature, rather than a legislative nature, in which the Supreme Court has allowed opening prayer. Because public school board meetings greatly influence schools' policies, atmosphere, and social structure, opening prayers at such meetings are unconstitutional under the First Amendment's Establishment Clause.

This Comment discusses the constitutionality, under the Establishment Clause and Supreme Court precedent, of opening prayer at public school board meetings. Part II analyzes the tests that courts utilize to determine if a law or practice violates the Establishment Clause, including the Supreme Court's standard rejection of religion and prayer in the public school setting.¹³ Part III analyzes the recent circuit split regarding opening prayer in public school board meetings.¹⁴ Part IV of this Comment recommends a constitutional approach for future courts confronted with prayer in the public school board setting and similar situations.¹⁵ Public school boards should begin sessions with a moment of silence, allowing each individual to use that time as he or she so chooses. Finally, Part V concludes by emphasizing the role of the Establishment Clause in promoting democratic engagement.¹⁶

II. Establishment Clause 'Tests'

The Establishment Clause protects the people against "three main evils"¹⁷ regarding religion and government: "sponsorship, financial support, and active involvement of the sovereign in religious activity."¹⁸ When confronted with an Establishment Clause claim, the Supreme Court has applied numerous—and often paradoxical—tests.

12. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 593 (1992) ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.").

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Part V.

17. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

18. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668 (1970).

A. Traditional Analysis: The Lemon Test

In 1971, the Supreme Court articulated a three-pronged approach to determine whether a challenged law or practice violates the Establishment Clause.¹⁹ Moving forward, the Supreme Court itself utilized this analysis in Establishment Clause claims.²⁰ The three prongs require the statute to “have a secular legislative purpose,” have a “principal or primary effect . . . that neither advances nor inhibits religions,” and avoid “foster[ing] ‘an excessive government entanglement with religion.’”²¹ If the statute violates one prong, the law is unconstitutional.²²

In *Lemon v. Kurtzman*, the Court considered two similar state statutes that provided aid to nonpublic schools.²³ While explicitly prohibiting the use of state-provided funds for religious purposes, the statutes primarily funded Roman Catholic schools.²⁴ Additionally, both statutes allowed state-provided funds to supplement nonpublic schoolteachers’ salaries.²⁵

The Court found excessive entanglement, violating the third prong, due to the “cumulative impact of the entire relationship . . . between government and religion.”²⁶ Specifically, the Court was concerned with states funding nonpublic school teachers’ salaries because even “[w]ith the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.”²⁷ Moreover, one statute enabled the state to perform a post-audit of the nonpublic school’s financial records to ensure that only secular programs were state funded, which the Court found “creates an intimate and continuing relationship between church and state.”²⁸

While the majority opinion did not allude to any heightened concern of Establishment Clause claims in relation to children, Justice Douglas, in his concurring opinion, highlighted it as a key issue.²⁹ Justice Douglas noted that a primary disadvantage of the public school system “is that a state system may attempt to mold all students alike according to the views of the

19. *Lemon*, 403 U.S. at 612–13.

20. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

21. *Lemon*, 403 U.S. at 612–13 (citations omitted).

22. *Stone v. Graham*, 449 U.S. 39, 40–41 (1980).

23. *Lemon*, 403 U.S. at 606.

24. *Id.* at 608–10.

25. *Id.* at 607, 609.

26. *Id.* at 614.

27. *Id.* at 618–19.

28. *Id.* at 621–22.

29. *Id.* at 630 (Douglas, J., concurring).

dominant group and to discourage the emergence of individual idiosyncrasies.”³⁰

B. The ‘Legislative Prayer Exception:’ The Marsh-Greece Test

After articulating the *Lemon* three-pronged analysis, the Supreme Court consistently applied the analysis to a multitude of Establishment Clause claims.³¹ In applying the analysis in various cases, the Court held various challenged practices as violating the Establishment Clause,³² and the Court also held other practices as constitutional.³³ In practice, the *Lemon* test requires a case-by-case analysis. When presented with a claim challenging a legislative-prayer practice, the Eighth Circuit applied the *Lemon* analysis.³⁴ On review of the Eighth Circuit’s decision, however, the Supreme Court created a different analysis altogether for legislative-prayer claims just twelve years after its articulation of the *Lemon* analysis.³⁵

I. Marsh v. Chambers

In 1983, the Supreme Court considered whether a state legislature’s practice of beginning sessions with an opening prayer violates the Establishment Clause.³⁶ While the Eighth Circuit applied the *Lemon* test and found the practice violated all three prongs,³⁷ the Supreme Court reversed and, significantly, did not apply the *Lemon* analysis.³⁸

Instead, the Court’s analysis focused on “the unambiguous and unbroken history” of beginning legislative sessions with prayer.³⁹ “The opening of sessions of legislative and other deliberative public bodies with prayer,” the majority argued, “is deeply embedded in the history and tradition of this country.”⁴⁰ Specifically, the Court noted that both the Continental Congress

30. *Id.*

31. *See, e.g.,* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (applying the *Lemon* analysis after *Marsh*); New York v. Cathedral Acad., 434 U.S. 125, 133 (1977) (applying the *Lemon* analysis prior to *Marsh*).

32. *See, e.g.,* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779–80 (1973); Larkin v. Grendel’s Den, Inc., 459 U.S. 116, 123, 126 (1982).

33. *See, e.g.,* Hunt v. McNair, 413 U.S. 734, 736 (1973); Mueller v. Allen, 463 U.S. 388, 404 (1983).

34. Chambers v. Marsh, 675 F.2d 228, 234–35 (8th Cir. 1982), *rev’d*, 463 U.S. 783 (1983).

35. *See* Marsh v. Chambers, 463 U.S. 783, 786–91 (1983).

36. *Id.* at 784.

37. *Chambers*, 675 F.2d at 234–35.

38. *Marsh*, 463 U.S. at 786–91.

39. *Id.* at 792.

40. *Id.* at 786.

and the First Congress engaged in such practices.⁴¹ The Constitutional Convention, however, did not begin with a prayer, though Chief Justice Burger averred that “this may simply have been an oversight.”⁴²

Based on these historical instances of legislative prayer, the Court concluded that “[c]learly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”⁴³ The Court focused on this historical evidence regarding the founders’ practices because it “sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.”⁴⁴ Additionally, the Court interpreted evidence of the founders’ debates regarding the constitutionality of legislative prayer as “demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society.”⁴⁵

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an “establishment” of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.⁴⁶

Therefore, the Court held that the state legislature may continue its practice of beginning sessions with an opening prayer because it is not an “establishment” of religion, given the historical tradition of legislative prayer.⁴⁷

In an impassioned dissent, Justice William J. Brennan criticized the majority for “carving out an exception to the Establishment Clause” instead

41. *Id.* at 787–88.

42. *Id.* at 787 n.6.

43. *Id.* at 788.

44. *Id.* at 790.

45. *Id.* at 791.

46. *Id.* at 792.

47. *Id.*

of adhering to established precedent, namely the *Lemon* test.⁴⁸ Justice Brennan had “no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”⁴⁹

Justice Brennan found the majority’s reasoning unpersuasive for three key reasons.⁵⁰ First, it was “self-evident” to Justice Brennan “[t]hat the ‘purpose’ of legislative prayer is pre-eminently religious rather than secular.”⁵¹ Any secular purpose that such a practice might afford, like “formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose,” could be accomplished without any connection to prayer or religion.⁵² Second, “[t]he ‘primary effect’ of legislative prayer is also clearly religious” because it “explicitly link[s] religious belief and observance to the power and prestige of the State.”⁵³ Third, legislative prayer necessarily entails “excessive entanglement” between government and religion.⁵⁴ Specifically, the method of selecting a “‘suitable’ chaplain” entangles government and religion.⁵⁵

Justice Brennan also discussed the implicit principles of “separation [and] neutrality” in the Establishment Clause.⁵⁶ One purpose of these principles is “to guarantee the individual right to conscience,”⁵⁷ which is “implicated when the government engages in direct or indirect coercion”⁵⁸ and “when the government requires individuals to support the practices of a faith with which they do not agree.”⁵⁹ Second, the First Amendment’s adherence to separation and neutrality ensures that the state does not “interfer[e] in the essential autonomy of religious life.”⁶⁰ Additionally, these principals “prevent the trivialization and degradation of religion by too close an attachment to the organs of government.”⁶¹ Finally, separation

48. *Id.* at 796 (Brennan, J., dissenting).

49. *Id.* at 800–01.

50. *Id.* at 796–801.

51. *Id.* at 797.

52. *Id.* at 797–98.

53. *Id.* at 798.

54. *Id.*

55. *Id.* at 799.

56. *Id.* at 803.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 804.

and neutrality ensure that religious debates do not infiltrate the political sphere so citizens do not “feel alienated from [their] government because that government has declared or acted upon some ‘official’ or ‘authorized’ point of view on a matter of religion.”⁶²

Moreover, the dissent rebutted the majority’s interpretation of the “unbroken practice” of legislative prayer in the United States.⁶³ Justice Brennan noted that the founders did not include a reference to “God” in the Constitution, which significantly differed from the Articles of Confederation and many state constitutions following the revolution.⁶⁴ Additionally, the dissent referenced James Madison questioning the early Congresses’ beginning sessions with an opening prayer: “Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?”⁶⁵ The dissent continued by criticizing the belief that the founders should be viewed as “sacred figures whose every actions must be emulated,” rather than “the authors of a document meant to last for the ages.”⁶⁶

Justice Brennan recognized “that not every governmental act which coincides with or conflicts with a particular religious belief is for that reason an establishment of religion.”⁶⁷ Yet, that reasoning does not justify legislative prayer because “prayer is fundamentally and necessarily religious.”⁶⁸ Therefore, the dissent urged the abolishment of legislative prayer so that “all the purposes of the Establishment Clause” are “vindicate[d].”⁶⁹

2. *Town of Greece v. Galloway*

In 2014, the Supreme Court reaffirmed *Marsh* and expanded it to allow legislative prayer in town board meetings.⁷⁰ Since 1999, the town board began its public meetings with an opening prayer delivered by a local clergyman,⁷¹ who “compose[d] their own devotions” without approval or guidance by the board.⁷² Similar to the majority’s reasoning in *Marsh*, the

62. *Id.* at 805–06.

63. *Id.* at 806–08.

64. *Id.* at 807.

65. *Id.*

66. *Id.* at 817.

67. *Id.* at 810.

68. *Id.*

69. *Id.* at 812.

70. *Town of Greece v. Galloway*, 572 U.S. 565, 570 (2014).

71. *Id.*

72. *Id.* at 571.

town argued that the opening prayer served several nonreligious functions, including creating a solemn environment and honoring tradition, and “follow[ed] a tradition practiced by Congress.”⁷³

In analyzing the town board’s practice, the Court cautioned against interpreting *Marsh* “as permitting a practice that would amount to a constitutional violation if not for its historical foundation.”⁷⁴ Instead, *Marsh* demonstrates “that the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”⁷⁵ The proper inquiry in legislative-prayer claims is “to determine whether the [challenged] prayer practice . . . fits within the tradition long followed in Congress and the state legislatures.”⁷⁶

The Court emphasized that “*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content.”⁷⁷ Therefore, the Court rejected the argument that legislative prayer must be nonsectarian because such a requirement “would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech.”⁷⁸ Any restraints on legislative prayer come instead from “its place at the opening of legislative sessions, where it is meant to lend gravity on the occasion and reflect values long part of the Nation’s heritage.”⁷⁹

The Court noted that the “principal audience” of the legislative prayer challenged in *Town of Greece* was not the public but the town board members.⁸⁰ Unconstitutional coercion does not occur in legislative bodies simply because the body “expos[es] constituents to prayer they would rather not hear and in which they need not participate.”⁸¹ The Court explained, however, that “[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person’s acquiescence in the prayer opportunity.”⁸² Yet, the

73. *Id.* at 570.

74. *Id.* at 576.

75. *Id.* (citation omitted).

76. *Id.* at 577.

77. *Id.* at 580.

78. *Id.* at 581.

79. *Id.* at 582–83.

80. *Id.* at 587 (“The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer of quiet reflection sets the mind to a higher purpose and thereby eases the task of governing.”).

81. *Id.* at 590.

82. *Id.* at 588.

Court cautioned that “[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.”⁸³

The dissenting opinions in *Town of Greece* did not call into question the underlying premise of *Marsh*—that legislative prayer is constitutional based on its historical tradition—but, rather, objected to the specific form of legislative prayer at the town board.⁸⁴ In her dissenting opinion, Justice Elena Kagan argued that the town board’s practice was unconstitutional because the “meetings involve participating by ordinary citizens, and the invocations given—directly to those citizens—were predominately sectarian in content”⁸⁵ and because the town board “did nothing to recognize religious diversity.”⁸⁶

According to Justice Kagan, when governments offer primarily sectarian prayers that reference a single religion, the “public proceeding becomes (whether intentionally or not) an instrument for dividing [a minority citizen] from adherents to the community’s majority religion, and for altering the very nature of her relationship with her government.”⁸⁷ The U.S. Constitution guarantees that a citizen’s “religious beliefs” do not affect one’s ability “to perform a service or request a benefit” from the government.⁸⁸ Therefore, exclusively sectarian prayers that refer exclusively to the majority religion have no place in governmental proceedings because they can alienate minority citizens.⁸⁹

Additionally, Justice Kagan rebutted the majority’s assertion that requiring legislative prayers to be nonsectarian would necessitate government sponsorship of religion.⁹⁰ “If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint.”⁹¹ Alternatively, the town board could have “invited clergy of

83. *Id.* at 585.

84. *See id.* at 610 (Breyer, J., dissenting) (emphasizing that the Second Circuit “did not believe that the Constitution forbids legislative prayers that incorporate content associated with a particular denomination”); *id.* at 616 (Kagan, J., dissenting) (“I agree with the Court’s decision in *Marsh v. Chambers*.” (citation omitted)).

85. *Id.* at 616 (Kagan, J., dissenting).

86. *Id.*

87. *Id.* at 621.

88. *Id.*

89. *Id.*

90. *Id.* at 632.

91. *Id.*

many faiths to serve as chaplains, as the majority notes that Congress does.”⁹²

In conclusion, the *Town of Greece* Court reaffirmed the holding of *Marsh* and extended its application to town board meetings.⁹³ Lower courts are instructed to consider whether the challenged practice conforms with the historical tradition of prayer at such public bodies.⁹⁴

3. Lower Courts’ Applications of the Marsh-Greece Test

Following the Supreme Court’s clarification of *Marsh* in *Town of Greece*, claims regarding prayer practices in meetings of counties’ boards of commissioners reached the Fourth Circuit and the Sixth Circuit.⁹⁵ Interestingly, while the two circuits agreed that the *Marsh-Greece* framework was the correct analysis for such issues,⁹⁶ their holdings diverged.⁹⁷

a) *Lund v. Rowan County*

The Fourth Circuit found that the challenged practice violated the Establishment Clause under the *Marsh-Greece* analysis.⁹⁸ In *Lund*, the board of commissioners began their bi-monthly meetings with an opening prayer.⁹⁹ “No one outside the Board is permitted to offer [such] an invocation.”¹⁰⁰ Moreover, the prayers, both “composed and delivered” by a commissioner,¹⁰¹ were “invariably and unmistakably Christian in content.”¹⁰²

When presented with “whether Rowan County’s practice of lawmaker-led sectarian prayer runs afoul of the Establishment Clause,”¹⁰³ the Fourth Circuit applied the *Marsh-Greece* framework and emphasized the Supreme

92. *Id.*

93. *Id.* at 570 (majority opinion).

94. *Id.* at 577.

95. See *Lund v. Rowan Cnty.*, 863 F.3d 268 (4th Cir. 2017); see also *Bormuth v. Cnty. of Jackson*, 870 F.3d 494 (6th Cir. 2017).

96. *Lund*, 863 F.3d at 276; *Bormuth*, 870 F.3d at 509.

97. Compare *Lund*, 863 F.3d at 290 (holding that the practice violated the Establishment Clause under the *Marsh-Greece* analysis), with *Bormuth*, 870 F.3d at 514–15 (holding that the practice did not violate the Establishment Clause under the *Marsh-Greece* analysis).

98. *Lund*, 863 F.3d at 290.

99. *Id.* at 272.

100. *Id.* at 273.

101. *Id.* at 272.

102. *Id.* at 273.

103. *Id.* at 271–72.

Court's iteration of the purposes of legislative prayer.¹⁰⁴ The Fourth Circuit recognized that the Supreme Court "acknowledged that it has not 'define[d] the precise boundary of the Establishment Clause.'"¹⁰⁵ Additionally, the Fourth Circuit noted that neither *Marsh* nor *Town of Greece* involved lawmaker-led prayer.¹⁰⁶

In applying the *Marsh-Greece* analysis, the Fourth Circuit considered the board's prayer practice "from the perspective of the 'reasonable observer,' who is presumed to be 'acquainted with [the] tradition' of legislative prayer."¹⁰⁷ Due to the unique circumstances of this legislator-led prayer,¹⁰⁸ which consisted nearly exclusively of Christian doctrine¹⁰⁹ and often "served to advance that faith,"¹¹⁰ the Fourth Circuit concluded that the prayer practice violated the Establishment Clause under the *Marsh-Greece* framework.¹¹¹ The prayer practice was "exploited to proselytize or advance [a particular faith] or to disparage any other."¹¹²

The Fourth Circuit contrasted the present facts from those in *Marsh* and *Town of Greece*. The Fourth Circuit distinguished the identity of the prayer-givers—in *Marsh* and *Town of Greece*, the state invited the prayer-giver; "[b]ut in Rowan County, the prayer-giver was the state itself."¹¹³ Additionally, the Fourth Circuit noted that the ability to lead prayer in this case "was exclusively reserved for the commissioners," while the prayer opportunity in *Marsh* and *Town of Greece* reserved the prayer opportunity for guests.¹¹⁴

In considering the legislator-led prayer, the Fourth Circuit was careful to emphasize that it "is not inherently unconstitutional."¹¹⁵ Weighing the

104. *Id.* at 275–76 ("[A] moment of prayer or quiet reflection sets the mind[s] [of legislators] to a higher purpose and thereby eases the task of governing." (alterations in original) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 587 (2014))).

105. *Id.* at 276 (alteration in original) (quoting *Town of Greece*, 572 U.S. at 577).

106. *Id.*

107. *Id.* at 283–84 (alteration in original) (quoting *Town of Greece*, 572 U.S. at 587).

108. *Id.* at 277.

109. *Id.* at 273 ("97% of the Board's prayers mentioned 'Jesus,' 'Christ,' or the 'Savior.'").

110. *Id.* at 284–85 ("By portraying the failure to love Jesus or follow his teachings as spiritual defects, the prayers implicitly 'signal[ed] the disfavor toward' non-Christians." (alteration in original) (quoting *Town of Greece*, 572 U.S. at 589)).

111. *Id.* at 275.

112. *Id.* at 276 (quoting *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983)) (alterations in original).

113. *Id.* at 281.

114. *Id.*

115. *Id.* at 280.

empirical evidence regarding legislator-led prayer, the Fourth Circuit concluded that “while lawmakers may occasionally lead an invocation, this phenomenon appears to be the exception to the rule, at least at the state and federal levels.”¹¹⁶ In reaching its conclusion, the Fourth Circuit considered “the identity of the prayer-giver [as] relevant to the constitutional inquiry.”¹¹⁷

Additionally, the Fourth Circuit acknowledged the real “risk of political division stemming from prayer practice conflict.”¹¹⁸ For example, after an individual who objected to the board’s prayer practice was “booed and jeered by the audience,”¹¹⁹ the prayer practice became a campaign issue in the subsequent board elections.¹²⁰ These threats to democracy, according to both the Supreme Court in *Lemon* and the Fourth Circuit, are perils that “the First Amendment was intended to protect” against.¹²¹

b) *Bormuth v. County of Jackson*

Following the *Town of Greece* decision, the Sixth Circuit was confronted with a claim regarding opening prayer in monthly public meetings of a county board of commissioners.¹²² In *Bormuth*, the Sixth Circuit applied the *Marsh-Greece* framework in its analysis of the board’s practice.¹²³ While recognizing that its holding “conflict[s] with the Fourth Circuit’s recent en banc decision,” the Sixth Circuit ultimately found the Fourth Circuit’s opinion and reasoning “unpersuasive.”¹²⁴

The Sixth Circuit applied *Marsh-Greece* by “follow[ing] the Supreme Court’s precedent and conclud[ing] *Lemon*’s endorsement test is inapplicable to legislative prayer cases.”¹²⁵ Previously, the Sixth Circuit refused to apply the *Marsh-Greece* framework to a public school board’s practice of beginning meetings with an opening prayer.¹²⁶ In *Bormuth*,

116. *Id.* at 279.

117. *Id.* at 280.

118. *Id.* at 282.

119. *Id.*

120. *Id.*

121. *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971)).

122. *Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017).

123. *Id.* at 509 (“[T]he prayer practice [in Jackson Country] fits within the tradition long followed in Congress and the state legislatures.” (alteration in original) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014))).

124. *Id.* at 509 n.5.

125. *Id.* at 515.

126. *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999).

however, the Sixth Circuit declined to reconsider prayer in public school board meetings “[b]ecause the issue is not [now] before us.”¹²⁷

In *Bormuth*, the Sixth Circuit rejected the argument that the board’s “prayer practice falls outside our historically accepted traditions because the Commissioners themselves, not chaplains, or invited community members, lead the invocations.”¹²⁸ In so holding, the Sixth Circuit emphasized that the Supreme Court never restricted “*who* may give prayers” in either *Marsh* or *Town of Greece*.¹²⁹ Additionally, the court’s analysis relied on the “long-standing tradition” of legislator-led prayer, which amicus briefs of various states sought to establish.¹³⁰ “Amici’s helpful identification of the historical breadth of legislator-led prayer in the state capitals for over one hundred fifty years more than confirms to us that our history embraces prayers by legislators as part of the ‘benign acknowledgement of religion’s role in society.’”¹³¹

Moreover, the Sixth Circuit considered the strange results that could occur if a constitutional distinction was made regarding who led prayer: “an invocation delivered in one county by a guest minister would be upheld, while the identical invocation delivered in another county by one of the legislators would be struck down.”¹³² The Sixth Circuit also rejected the argument that the board’s practice violated the Establishment Clause because “the prayers offered before the Board generally espouse the Christian faith.”¹³³ Again relying on *Marsh* and *Town of Greece*, the court held “that creed-specific prayers alone do not violate the First Amendment.”¹³⁴

C. Justice O’Connor’s Endorsement Test

Another test was articulated in the 1980s by Justice O’Connor in a concurring opinion in *Lynch v. Donnelly*.¹³⁵ The endorsement test

127. *Bormuth*, 870 F.3d at 505 n.4.

128. *Id.* at 509.

129. *Id.*

130. *Id.* at 509–10.

131. *Id.* at 510 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

132. *Id.* at 512.

133. *Id.*

134. *Id.* at 513 (stating that the Supreme Court, in *Town of Greece*, clarified that *Marsh* “did not ‘imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed’” (quoting *Town of Greece*, 572 U.S. at 580–81)).

135. *Lynch v. Donnelly*, 465 U.S. 668, 687–89 (1984) (O’Connor, J., concurring).

“clarifies” the excessive entanglement prong.¹³⁶ Justice O’Connor began her opinion by recognizing that “[t]he Establishment Clause prohibits government from making adherence to a religion relevant in *any way* to a person’s standing in the political community.”¹³⁷

While acknowledging excessive entanglement as a way governments can violate the Establishment Clause, Justice O’Connor was primarily concerned with “government endorsement or disapproval of religion.”¹³⁸ Endorsement, according to Justice O’Connor, is a “more direct infringement” than entanglement because it “sends a message to nonadherents that they are outsiders, not fully members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”¹³⁹

Rejecting the argument that political divisiveness caused by government action violates the *Lemon* excessive entanglement prong,¹⁴⁰ Justice O’Connor clarified that “[t]he entanglement prong of the *Lemon* test is properly limited to institutional entanglement.”¹⁴¹ While the existence of political divisiveness “may be evidence” of an Establishment Clause violation, “the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself.”¹⁴²

D. Prayer in the Public School Setting

The Supreme Court is hesitant to allow religious practices in the public school setting.¹⁴³ Generally, the Court forbids government sponsorship of religion in public schools due to children’s impressionable nature, children’s susceptibility to peer pressure, and the mandatory attendance requirement.¹⁴⁴ The Court has also characterized prayer in public schools as an “indirect coercion” risk.¹⁴⁵ The Justices are generally more hesitant

136. *Id.*

137. *Id.* at 687 (emphasis added).

138. *Id.* at 687–88.

139. *Id.* at 688.

140. *Id.* at 689 (“In my view, political divisiveness along religious lines should not be an independent test of constitutionality.”).

141. *Id.*

142. *Id.*

143. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding unconstitutional a public school’s practice of beginning each day with a prayer).

144. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

145. *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

about indirect coercion because students are more susceptible to such risks.¹⁴⁶

1. Prayer at the Beginning of Public School Days

In 1962, the Supreme Court considered whether a school district's practice of beginning each day with an opening prayer violates the Establishment Clause.¹⁴⁷ The prayer, which state officials wrote, read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."¹⁴⁸ The Court held the practice as "wholly inconsistent with the Establishment Clause" because the same "establish[es] an official religion," regardless of whether it "directly . . . coerce[d] nonobserving individuals or not."¹⁴⁹ Additionally, the Court maintained that "[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people."¹⁵⁰ Holding that an opening prayer to begin the public school day violates the Establishment Clause, the Court would continue to strike down similar practices,¹⁵¹ like prayer at public school graduations.¹⁵²

2. Prayer at Public School Graduations

In 1992, the Supreme Court in *Lee v. Weisman* held a school district's practice of including prayer in middle school and high school graduations unconstitutional as violating the Establishment Clause.¹⁵³ The Court focused on the coercive atmosphere of school compared to the atmosphere of a legislative session.¹⁵⁴

The atmosphere at the opening session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining

146. *Id.* ("As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.")

147. *Engel*, 370 U.S. at 423.

148. *Id.* at 422.

149. *Id.* at 424, 430.

150. *Id.* at 435.

151. *Id.* at 424.

152. *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

153. *Id.*

154. *Id.* at 596–97.

potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*.¹⁵⁵

The Court was concerned with protecting students from “subtle coercive pressure” in public schools.¹⁵⁶ Additionally, the Court referred to psychology studies which maintain that children generally are vulnerable to peer pressure, and such is “strongest in matters of social convention.”¹⁵⁷ Moreover, the Court highlighted the extreme political divisiveness of undisguised religious exercises in public school, where students have “no real alternative . . . to avoid the fact or appearance of participation.”¹⁵⁸ Finally, the Court recognized that the founding fathers believed that the governmental establishment of religion was “antithetical to the freedom of all.”¹⁵⁹

Lee articulates that the Court is hesitant to allow any form of religion, including prayers, in the public school setting. Due to the reality of peer pressure in adolescents, the coercive nature of the school setting, and the Constitution’s protection of individuals’ freedom of religion, the Court has consistently declared unconstitutional the use of prayer in public schools.

3. Prayer at Public School Extracurricular Activities

In 2000, the Supreme Court considered whether its disapproval of prayer in public schools extended to voluntary school-sponsored events, specifically student-led and student-initiated prayers before high school football games.¹⁶⁰ The stated purpose of the prayer was to “solemnize” the sporting events.¹⁶¹

Considering the prayer practice at the football games, the Court’s analysis was “guided by the principles that we endorsed in *Lee*.”¹⁶² In holding that “an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval,” the Court applied Justice O’Connor’s so-called

155. *Id.* at 597.

156. *Id.* at 592.

157. *Id.* at 593.

158. *Id.* at 588.

159. *Id.* at 591.

160. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000).

161. *Id.* at 296–97, 298 n.6.

162. *Id.* at 302.

endorsement test.¹⁶³ “In cases involving state participation in a religious activity, one of the relevant questions is ‘whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.’”¹⁶⁴

While the school district argued that attendance at the events was voluntary, the Court noted that attendance was essentially mandatory for many students, such as the players, the cheerleaders, and the band members.¹⁶⁵ More strikingly, however, the Court explained that it would still find the pregame prayer to be coercive even assuming all students’ attendance to be completely voluntary.¹⁶⁶ “Even if we regard every high school student’s decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.”¹⁶⁷

Regarding the school district’s election system for choosing the student who would lead the prayer, the Court was concerned “that minority candidates will never prevail and that their views will be effectively silenced.”¹⁶⁸ Concerning the school district’s entanglement with religion, the Court again referenced *Lee*: “In this case, as we found 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.’”¹⁶⁹ Specifically, the Court was concerned with the school district’s policy behind the prayer “to solemnize the event,” which, “by its terms, invites and encourages religious messages.”¹⁷⁰ Additionally, the Court was cognizant of the environment in which these prayers were presented: “Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property.”¹⁷¹

163. *Id.* at 308.

164. *Id.* (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring)).

165. *Id.* at 292.

166. *Id.* at 312.

167. *Id.*

168. *Id.* at 304.

169. *Id.* at 305 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

170. *Id.* at 306.

171. *Id.* at 307.

The Court, although ultimately striking down this practice as unconstitutional, articulated a reoccurring tension in Establishment Clause cases between “the sincere desire to include public prayer as a part of various occasions so as to mark those occasions’ significance” and the First Amendment’s guarantee of separation of church and state.¹⁷²

III. Prayer in Public School Board Meetings

Recently, the specific issue of opening prayer in public school board meetings has circulated the lower courts. The majority of courts addressing the issue have applied the *Lemon* analysis and concluded such practices are unconstitutional.¹⁷³ In 2017, however, the Fifth Circuit analogized school boards to legislatures and instead applied the *Marsh-Greece* framework, finding the practice of opening prayers constitutional.¹⁷⁴

A. The Majority View

In applying the *Lemon* test to public school boards’ prayer practices, the majority of circuits focused on the inherent differences between a public school board and a legislative session.¹⁷⁵ The circuits articulated a reoccurring difference between the two: students were generally present at the board meetings, both voluntarily and involuntarily.¹⁷⁶ These circuits emphasized the school boards are “an integral component” of the public school system.¹⁷⁷

1. Sixth Circuit: *Coles ex rel. Coles v. Cleveland Board of Education*

In Cleveland, Ohio, the public school board is responsible for a variety of school policies, including “the school system’s curriculum, dress code, searches of student lockers, disciplinary rules, expulsion and suspension procedures, and the promotion of ‘ethical principles and democratic ideals’

172. *Id.*

173. *See, e.g., Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 383, 385 (6th Cir. 1999); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 283, 290 (3d Cir. 2011), *cert. denied*, 565 U.S. 1157 (2012); *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1142–43 (9th Cir. 2018).

174. *Am. Humanist Ass’n v. McCarty*, 851 F.3d 521, 526, 529–30 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 470 (2018).

175. *See, e.g., Coles*, 171 F.3d at 382–83.

176. *Id.* at 381–82; *see also Indian River*, 653 F.3d at 281; *Chino Valley*, 896 F.3d at 1145–46.

177. *Coles*, 171 F.3d at 381.

in students.”¹⁷⁸ Approximately twice per month, the school board holds meetings on school property that are opened to the public, including both adults and students, who can discuss issues and concerns with the board.¹⁷⁹ Additionally, “a student representative regularly sits on the school board itself,” and the board regularly invites students of all ages in recognition of the students’ various achievements.¹⁸⁰

Although the school board held meetings without prayer prior to 1992,¹⁸¹ the newly elected board president established the practice of beginning the meetings with an opening prayer to promote a “more businesslike and professional decorum.”¹⁸² That same year, a high school student was invited to a board meeting to receive an award.¹⁸³ The high school student was “shocked and surprised” by the opening prayer and “questioned whether she would attend another school board meeting if the practice continued.”¹⁸⁴ Additionally, a high school teacher consistently questioned the constitutionality of the board’s practice of opening prayer, but he continued attending the meetings so to address various issues with the board.¹⁸⁵ Since he had to arrive early to secure a seat, the teacher could not wait outside of the meeting until the conclusion of the prayer in order to join afterward.¹⁸⁶

The Sixth Circuit began its analysis by acknowledging that “the Supreme Court has consistently held that school-sponsored religious activity transgresses the Establishment Clause.”¹⁸⁷ The Sixth Circuit then acknowledged the *Marsh* decision, which, at the time, was “the only case in which the Court has dealt with government-sponsored prayer outside the context of the public schools.”¹⁸⁸ The court framed the issue as “whether the school board’s practice falls within the mainstream of school prayer cases, as did the graduation speaker in *Lee*, or instead is controlled by *Marsh*, a historical exception to the mainstream.”¹⁸⁹ In determining which analysis to apply to public school board meetings, the Sixth Circuit noted

178. *Id.* at 372 (quoting OHIO REV. CODE ANN. § 3313.602 (West, Westlaw through 133d Gen. Assemb.)).

179. *Id.*

180. *See id.*

181. *Id.*

182. *Id.* at 373.

183. *Id.* at 374.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 376.

188. *Id.*

189. *Id.* at 377.

that “the school board is an integral part of the public school system.”¹⁹⁰ The Sixth Circuit interpreted a “dual basis” underlying the Supreme Court’s decisions regarding public schools and religion: “One is the fact that students are young, impressionable, and compelled to attend public school, and the other is that public schools are particularly important to the maintenance of a democratic, pluralistic society.”¹⁹¹

Significantly, the Sixth Circuit refused to adopt the district court’s reliance on a particular phrase in *Marsh*—“other deliberative public bodies”—as reason to apply the *Marsh* analysis to additional scenarios other than legislative bodies.¹⁹² The Sixth Circuit relied on the fact that “[t]he Supreme Court did not define the term, and has never discussed its scope.”¹⁹³ Instead of applying the *Marsh* framework to the board, the Sixth Circuit held “that the school board, unlike other public bodies, is an integral part of the public school system.”¹⁹⁴

In applying the traditional analysis of prayer in public schools, the Sixth Circuit was concerned with the fact that the board meetings were held on school property and were “attended by students who actively and regularly participate in the discussions of school-related matters.”¹⁹⁵ Because of the board’s unique relationship to the school itself, the Sixth Circuit concluded that public school boards are different than legislative bodies.¹⁹⁶

Under the *Lemon* analysis, the court held the board’s practice of beginning meetings with an opening prayer as unconstitutional.¹⁹⁷ While the board’s stated purpose of the prayers was to furnish the meetings with “a more professional decorum,”¹⁹⁸ the board president publicly endorsed Christianity in his explanation of the prayer’s purpose.¹⁹⁹ The court regarded these conflicting purposes as particularly concerning under the

190. *Id.* at 376.

191. *Id.* at 377.

192. *Id.* at 380–81.

193. *Id.* at 381.

194. *Id.*

195. *Id.*

196. *Id.* (“[T]he fact that the function of the school board is uniquely directed toward school-related matters gives it a different type of ‘constituency’ than those of other legislative bodies—namely, students.”).

197. *Id.* at 385.

198. *Id.* at 384.

199. *Id.* (referring to the board president’s statements “that the prayers were an acknowledgement of ‘Christians who participate in the schools’ and that ‘I feel that the moment you kick prayer out of the school, the Lord walks out of the school’”).

secular-purpose prong.²⁰⁰ Additionally, the court was concerned with the content of the prayers, which frequently referenced the Bible and Jesus.²⁰¹ “The board could have used the inspirational words of Abraham Lincoln or, as in fact one speaker did, the speeches of Dr. Martin Luther King, Jr. to achieve the same ends. Instead, the board relied upon the intrinsically religious practice of prayer to achieve its stated secular end.”²⁰²

Under the second prong of the *Lemon* analysis, which considers the primary effect of the practice, the Sixth Circuit found that the opening prayer practice had “the primary effect of endorsing religion.”²⁰³ Because the prayers frequently referenced a specific religion in a setting where schoolchildren were regularly present, the court found that “any reasonable observer would conclude that the school board was endorsing Christianity.”²⁰⁴ Regarding the third prong of entanglement, the court found nearly identical entanglement as that in *Lee*.²⁰⁵ Over a decade later, the Third Circuit also held a public school board’s practice of beginning meetings with an opening prayer as a violation of the Establishment Clause.²⁰⁶

2. *Third Circuit: Doe v. Indian River School District*

In Indian River, Delaware, the public school board is tasked with multiple responsibilities involving the schools so that the board is involved in “nearly all aspects of a student’s life.”²⁰⁷ The board’s extensive duties include determining the public schools’ hours, holidays, and educational policies.²⁰⁸ Regarding the audience of the board meetings, “at least some students attend nearly all of the meetings held during the school year.”²⁰⁹ For example, a student may attend board meetings to speak with the board when he or she has committed a serious offense requiring disciplinary

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 385.

205. *Id.* (“The school board decided to include prayer in its public meetings, chose which member from the local religious community would give those prayers, and has more recently had the school board president himself compose and deliver prayers to those in the audience.”).

206. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 290 (3d Cir. 2011), *cert. denied*, 565 U.S. 1157 (2012).

207. *Id.* at 263.

208. *Id.*

209. *Id.* at 264.

actions, and students are invited to the public comments section, where they can discuss any matter with the board.²¹⁰

Since the district was formed in 1969, the school board has begun its monthly board meetings, held on school property, with an opening prayer.²¹¹ The prayer practice, however, was not formalized until 2004 following a “heated community debate” surrounding the practice.²¹² According to the board’s policy, the purpose of the opening prayer is “to solemnify its proceedings.”²¹³ The Third Circuit, however, noted that “the record shows that the prayers recited at the meetings nearly always—and exclusively—refer to Christian concepts.”²¹⁴ The policy also states that the “prayer is voluntary, and it is among only the adult members of the Board.”²¹⁵

The Third Circuit applied *Lee* to the school board’s prayer policy because “*Lee* and the Supreme Court’s other school prayer cases reveal that the need to protect students from government coercion in the form of endorsed or sponsored religion is at the heart of the school prayer cases.”²¹⁶ The court emphasized this decision was due in part to the fact that “students are particularly vulnerable to peer pressure in social context.”²¹⁷ Critically, the court “conclude[d] that *Marsh* is ill-suited to [the public school board] context because the entire purpose and structure of the Indian River School Board revolves around public school education.”²¹⁸

Applying *Lemon*, the Third Circuit found that the prayer practice violates the second prong because its “primary effect . . . is to promote Christianity.”²¹⁹ Additionally, the court highlighted that “[p]rayer in school and at school events has been a contentious issue in the Indian River School District for some time.”²²⁰ Regarding the excessive entanglement prong, the court found that the prayer practice bears multiple “hallmarks of state involvement.”²²¹ Specifically, the school board, “in official meetings that are completely controlled by the state,” “composes and recites the prayer”

210. *Id.* at 264–65.

211. *Id.* at 261, 263.

212. *Id.* at 261.

213. *Id.*

214. *Id.* at 265.

215. *Id.* at 261.

216. *See id.* at 275.

217. *Id.* at 277.

218. *Id.* at 278.

219. *Id.* at 284.

220. *Id.* at 286.

221. *Id.* at 288.

as “a formal part of the Board’s activities.”²²² Therefore, the Third Circuit held that the school board’s prayer practice violates the Establishment Clause.²²³

3. *Ninth Circuit: Freedom from Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education*

In Chino Valley, California, the public school board is tasked with “district administration,” which includes approving various expenses and disciplining students.²²⁴ Following an initial “closed” session, the school board meeting is open to the public and is “broadcast on local television.”²²⁵ During the open session, the school board “sets aside time for ‘student recognition,’ to highlight the academic and extracurricular accomplishments of students in the district.”²²⁶ Additionally, a “student representative is . . . an active participant in the meetings.”²²⁷

Since at least 2010, the school board “has included prayer as part of its meetings.”²²⁸ Generally, an opening prayer is given by a clergy member at the beginning of the open session.²²⁹ Under its prayer policy, the school board “selects clergy for each meeting” on a “first-come, first-serve, or other random basis.”²³⁰ Primarily, the opening prayer consisted of Christian beliefs.²³¹ Moreover, the school board’s president consistently referenced God throughout the meetings.²³²

Because the opening “prayers typically take place before groups of schoolchildren whose attendance is not truly voluntary and whose relationship to school district officials, including the Board, is not one of

222. *Id.*

223. *Id.* at 290.

224. *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1138–39 (9th Cir. 2018).

225. *Id.*

226. *Id.* at 1138.

227. *Id.* at 1139.

228. *Id.*

229. *Id.* at 1138.

230. *Id.* at 1139–40.

231. *Id.* at 1140.

232. *Id.* at 1140–41 (“At another meeting, then-Board president James Na ‘urged everyone who does not know Jesus Christ to go and find Him.’ Na informed the assembled audience in May 2014, ‘God appointed us to be here—whether you to be teachers, or our staff members, or our principals, or our directors, assistant superintendents’ At another meeting, he instructed the teachers and the assembled audience: ‘anything you desire, depend on God.’”).

full parity,”²³³ the Ninth Circuit applied the *Lemon* test rather than the *Marsh-Greece* analysis to the prayer practice.²³⁴ The court described the school board meetings as “extensions of the educational experience of the district’s public schools.”²³⁵ Focusing on the audience of the board meetings, the court found that “[t]he presence of these children is integral to the meeting: they perform for the Board, assembled audience, and television viewers; they receive awards; and one among their number sits on the Board and participates in the Board’s deliberative process.”²³⁶

Applying the *Lemon* analysis, the Ninth Circuit found that “the [school board’s] prayer policy and practice lacks a secular legislative purpose.”²³⁷ Specifically, the court found that “the prayer policy’s provision for a solemnizing invocation does not constitute a permissible secular purpose” due to the prevalence of Christian prayer and broad endorsement of Christianity.²³⁸ The court stated that “[t]here is no secular reason to limit the solemnization to prayers or, relatedly, to have a presupposition in the policy that the solemnizers will be religious leaders.”²³⁹ Additionally, the court found that the prayer practice violated the second prong of the *Lemon* test because “the prayers frequently advanced religion in general and Christianity in particular.”²⁴⁰ Regarding the third prong, the court found that the prayer practice fostered “excessive government entanglement with religion” because “an invocation is not necessary to accomplish” the goal of solemnizing the meetings.²⁴¹ Therefore, the Ninth Circuit held that the prayer practice violated the Establishment Clause.²⁴²

B. Minority View: The Fifth Circuit

The minority approach regarding opening prayer in public school board meetings allows such practices under the *Marsh-Greece* analysis by analogizing such meetings to those of legislatures.²⁴³ In Birdville, Texas, the school board is responsible for “overseeing the district’s public schools,

233. *Id.* at 1142.

234. *Id.* at 1145, 1148.

235. *Id.* at 1145.

236. *Id.* at 1146.

237. *Id.* at 1149.

238. *Id.* at 1150.

239. *Id.*

240. *Id.* at 1151.

241. *Id.*

242. *Id.* at 1152.

243. *Am. Humanist Ass’n v. McCarty*, 851 F.3d 521, 526 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 470 (2018).

adopting budgets, collecting taxes, conducting elections, [and] issuing bonds.”²⁴⁴ The school board’s monthly meetings, which are open to the public, are held in an administrative building.²⁴⁵ “Most attendees are adults, though students frequently attend school-board meetings to receive awards or for other reasons, such as brief performances by school bands and choirs.”²⁴⁶

Following the American Humanist Association’s concern with the school board’s policy of inviting students to lead “invocations” based on merit, the school board amended its policy.²⁴⁷ In 2015, the school board referred to the opening remarks by students as “student expressions,” provided a disclaimer that the students’ expressions “do not reflect” the school board’s views, and invited students, who volunteered, at random to lead the “student expressions.”²⁴⁸

In its decision to apply the *Marsh-Greece* framework, the Fifth Circuit “agree[d] with the district court that ‘a school board is more like a legislature than a school classroom or event.’”²⁴⁹ Specifically, the Fifth Circuit found that “[t]he [school board] is a deliberate body, charged with . . . tasks that are undeniably legislative.”²⁵⁰ The court distinguished Birdville’s school board from those in *Coles* and *Indian River* by emphasizing the lack of student members or representatives.²⁵¹ Additionally, the Fifth Circuit noted that “[m]ost attendees at school-board meetings . . . are ‘mature adults.’”²⁵²

While acknowledging that “[s]chool-board prayer presumably does not date back to the Constitution’s adoption,” the Fifth Circuit was ultimately persuaded by historical evidence of opening prayer at school board meetings “dating from the early nineteenth century.”²⁵³ Furthermore, the court accepted the board’s argument that the prayers’ audience was the board members themselves, rather than the public present at meetings.²⁵⁴ Although holding this specific practice as constitutional under the *Marsh-*

244. *Id.*

245. *Id.* at 524.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 526.

250. *Id.*

251. *Id.* at 528.

252. *Id.* at 526.

253. *Id.* at 527.

254. *Id.* (“In its brief, [the school board] explains that the board members are the invocations’ primary audience. [The opposing parties] have not shown otherwise.”).

Greece analysis, the Fifth Circuit acknowledged that “it is possible to imagine a school-board student-expression practice that offends the Establishment Clause.”²⁵⁵

IV. Suggested Approach

Even though the Supreme Court has upheld legislative prayer on two occasions, legislatures, deliberative bodies, and public school boards alike should not begin sessions with an opening prayer. Such practices alienate citizens and facilitate the tyranny of the majority, thereby diminishing democracy and public engagement.

A. Problems with the “Legislative-Prayer Exception” Under *Marsh-Greece*

The Supreme Court has applied the *Marsh-Greece* test in two settings: a state’s legislative sessions²⁵⁶ and a town’s board meetings.²⁵⁷ In Establishment Clause claims, the *Marsh-Greece* test remains the exceptional, rather than the typical, analysis utilized by lower courts.²⁵⁸ While scholars have criticized the *Marsh-Greece* analysis as premised on an incomplete interpretation of the historical tradition of legislative prayer,²⁵⁹ one must seriously consider whether modern society should primarily rely on the founders’ practices regarding religion’s presence in government. Additionally, because the traditional purposes of theological prayer and the purposes of legislative prayer significantly differ,²⁶⁰ prayer is not necessary to achieve the purported goals of legislative prayer.

255. *Id.* at 529–40.

256. *See Marsh v. Chambers*, 463 U.S. 783, 784 (1983).

257. *See Town of Greece v. Galloway*, 572 U.S. 565, 569–70 (2014).

258. *See West*, *supra* note 6, at 711–13 (discussing *Marsh* as the exception to Establishment Clause jurisprudence, applicable during a legislative prayer); *see also Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 377–81 (6th Cir. 1999) (discussing Establishment Clause jurisprudence and referring to *Marsh* as a “unique tradition,” inapplicable in the context of a school board meeting).

259. *See, e.g., West*, *supra* note 6, at 712–13.

260. Compare Mark Batterson, *What Is the Purpose of Prayer?*, FAITH GATEWAY (Aug. 10, 2018), <https://www.faithgateway.com/what-is-the-purpose-of-prayer/#.Xe7hTpNKjY> (stating that the purpose of theological prayer is to “glorify God”), and *The Purpose of Prayer*, GRACE TO YOU (Nov. 11, 1979), <https://www.gty.org/library/sermons-library/2233/the-purpose-of-prayer> (explaining that the purpose of theological prayer is “[n]umber one, to hallow the name of God; number two, to bring in his kingdom; [and] number three, to do his will”), with *Town of Greece*, 572 U.S. at 570 (providing that the purpose of legislative prayer is to “place town board members in a solemn and deliberative frame of mind”), and *Coles*, 171 F.3d at 373 (describing the goal of legislative prayer as “creat[ing] a ‘more businesslike and professional decorum’ at the meetings”).

Moreover, the Supreme Court bears the duty of protecting religious minorities from the tyranny of the majority.²⁶¹ By allowing potentially alienating legislative-prayer practices, the Court fails to adequately maintain this safeguard.²⁶²

1. “Historical Tradition”

Laurence Tribe, a Harvard constitutional law professor, classified the primary religious views of the founders into three categories:

first, the evangelical view (associated primarily with Roger Williams) that “worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained”; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) “against ecclesiastical depredations and incursions”; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one.²⁶³

Today, however, there are not three primary sects of religion in the United States.²⁶⁴ Instead, the country enjoys a plurality of religion, and those religions are not exclusively based on Christianity.²⁶⁵

Scholars have criticized the Supreme Court’s interpretation of the historical practice of legislative prayer as not entirely accurate.²⁶⁶ The founders were not in unanimous agreement that government actions should be premised with a prayer.²⁶⁷ While conceding that the Constitutional

261. See THE FEDERALIST No. 78, at 432 (Alexander Hamilton) (Gideon ed., 1818).

262. See *Marsh v. Chambers*, 463 U.S. 783, 805–06 (1983) (Brennan, J., dissenting) (“[N]o American should at any point feel alienated from his government because that government has declared or acted upon some ‘official’ or ‘authorized’ point of view on a matter of religion.”).

263. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158–59 (2d ed. 1988) (alteration in original) (footnotes omitted).

264. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 240 (1963) (Brennan, J., concurring) (“[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.”).

265. *Id.*

266. See, e.g., West, *supra* note 6, at 720–26.

267. *Id.* at 709–10.

Convention did not begin with a prayer, the majority opinion in *Marsh* brushes this discrepancy off as a simple “oversight” because the Convention “thought that a mid-stream adoption of the policy would highlight prior omissions and because ‘[t]he Convention had no funds.’”²⁶⁸ The lack of documented opening prayer at the Constitutional Convention, however, might not have been an oversight. There is record of Benjamin Franklin insisting “that chaplain-led prayer would guide the Framers as they fashioned a new system of government.”²⁶⁹

On the other hand, “[t]he [same] Congress that passed the First Amendment also reenacted the Northwest Ordinance, which declared: ‘Religion, morality, and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged.’”²⁷⁰ This congressional statement suggests that the founding generation believed religion was an indispensable element in both the formation and the continuation of government. Additionally, as President George Washington opined, “[o]f all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports.”²⁷¹ As a popular president, Washington’s statements likely represented the general population’s beliefs regarding the relationship between religion and government.

Early state constitutions also are not particularly helpful in determining the founders’ intent regarding the place of religion, if any, in government. For example, the Pennsylvania Constitution of 1776 included a clause guaranteeing its citizens the right to free exercise of religion.²⁷² Similarly, in 1823, Virginia enacted a statute guaranteeing, “no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief.”²⁷³ Yet, the early Virginia legislatures typically began

268. *Marsh v. Chambers*, 463 U.S. 783, 787 n.6 (1983) (alteration in original).

269. West, *supra* note 6, at 710.

270. Matthew D. Fridy, Comment, *What Wall? Government Neutrality and the Cleveland Voucher Program*, 31 CUMB. L. REV. 709, 720–21 (2001) (footnote omitted).

271. George Washington, *Farewell Address, 19 September 1796*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-20-02-0440-0002> (last visited Apr. 20, 2021).

272. PA. CONST. of 1776, art. II (“[N]o man ought or of right can be compelled to attend any religious worship . . . against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship . . .”).

273. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 13 (1947).

their sessions with opening prayer.²⁷⁴ Additionally, the Massachusetts Constitution of 1780 required a religious oath for government officials: “I believe the Christian religion, and have a firm persuasion of its truth.”²⁷⁵

In short, the historical evidence regarding the founders’ beliefs about religion’s place in government is conflicting. It is questionable whether their intentions can be definitively determined for two reasons. First, historical records from the late eighteenth century are limited. Second, and most importantly, the founders were a diverse group of individuals with differing opinions regarding many issues, including the proper role of religion in government.²⁷⁶

Regardless of the historical controversy, the Supreme Court should seriously consider its excessive reliance on the founders’ beliefs and actions when confronted with constitutional questions regarding the relationship between religion and government. As Justice Brennan articulated, the founders should be viewed “as the authors of a document meant to last for the ages” rather than “sacred figures whose every actions must be emulated.”²⁷⁷ In a letter to James Madison, Thomas Jefferson discussed a “self-evident” principle: “*that the earth belongs in usufruct to the living;*” that the dead have neither powers nor rights over it.”²⁷⁸ Since our modern society is composed of a plurality of religions not necessarily based on Christianity, relying primarily on the founders’ predominantly Christian religious beliefs to decide contemporary Establishment Clause cases becomes difficult to rationalize.

2. Purposes of Prayer

Theologically, the purposes of prayer are to “glorify God”²⁷⁹ or “[n]umber one, to hallow the name of God; number two, to bring in his kingdom; [and] number three, to do his will.”²⁸⁰ The purpose of legislative prayer, on the other hand, as articulated by the legislative bodies themselves, is to “place [elected officials] in a solemn and deliberative

274. *Marsh v. Chambers*, 463 U.S. 783, 787 n.5 (1983).

275. MASS. CONST. ch. VI, art. 1 (amended 1821).

276. *See, e.g.*, TRIBE, *supra* note 263, at 1158–59 (comparing the Jeffersonian and Madisonian opinions on church and state).

277. *Marsh*, 463 U.S. at 817 (Brennan, J., dissenting).

278. [Letter from] Thomas Jefferson to James Madison, 6 September 1789, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-15-02-0375-0003> (last visited Apr. 20, 2021).

279. Batterson, *supra* note 260.

280. *The Purpose of Prayer*, *supra* note 260.

frame of mind,”²⁸¹ to “create a ‘more businesslike and professional decorum,’ at the meetings,”²⁸² or to “invite[] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing.”²⁸³

A pessimistic critic might accuse legislative bodies of masking their true purpose of legislative prayer behind a cloak of promoting seriousness. For example, Justice Brennan explicitly questioned the purported purposes of legislative prayer in his dissenting opinion in *Marsh*.²⁸⁴ A less pessimistic critic might not accuse legislators of falsely expressing their purposes behind legislative prayer, but instead, may question the necessity of prayer as the vehicle to achieve such purposes. As the Sixth Circuit noted, these goals can be achieved by beginning sessions with references to inspirational quotes that do not implicate religion whatsoever, such as passages from Abraham Lincoln or Martin Luther King, Jr.²⁸⁵

3. Tyranny of the Majority

In *Federalist Paper No. 51*, James Madison explained that one purpose of the Constitution is to prevent the tyranny of the majority.²⁸⁶

Whilst all authority in [the federal republic of the United States] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority.²⁸⁷

Similarly, in *Federalist Paper No. 78*, Alexander Hamilton articulated that the court system guards against “serious oppressions of the minor party in the community” because judges are appointed rather than elected.²⁸⁸ Therefore, the Supreme Court has a duty to ensure that the minority voices are heard, especially by the legislative bodies that are elected by the majority.

281. *Town of Greece v. Galloway*, 572 U.S. 565, 570 (2014).

282. *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 373 (6th Cir. 1999).

283. *Town of Greece*, 572 U.S. at 583.

284. *Marsh v. Chambers*, 463 U.S. 783, 797–98 (1983) (Brennan, J., dissenting).

285. *Coles*, 171 F.3d at 384.

286. THE FEDERALIST NO. 51 (James Madison).

287. *Id.*

288. THE FEDERALIST NO. 78, at 487–88 (Alexander Hamilton) (Gideon ed., 1818).

Today, most U.S. citizens identify with Christianity.²⁸⁹ A minority of the citizens either identify with non-Christian religions or do not identify with any religion.²⁹⁰ One study found that sixty-two percent of surveyed agnostics and atheists were uncomfortable when asked to pray in public, while only fifteen percent of surveyed Christians expected others to feel uncomfortable in such situations.²⁹¹ A recent law review article recognized that this study “means non-religious legislators and members of the public may feel out of place during the [legislative] prayers.”²⁹²

Moreover, “[i]n a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers’ constituents,”²⁹³ which, today, is Christianity.²⁹⁴ When the content of legislative prayer is primarily Christian, “[n]on-Christian citizens attending a town meeting with the hopes of addressing meaningful local issues may face the choice of participating in a prayer practice they do not believe in or offending the very government leader that they will soon be attempting to persuade.”²⁹⁵ In other words, the content of prayer matters because it “can cause citizens to feel excluded from their communities and the local political process.”²⁹⁶ Additionally, legislative prayer, by its very nature, entails government “promot[ion] [of] the idea of religion over the idea of nonreligion.”²⁹⁷ Therefore, Justice Brennan’s assertion that legislative prayer could potentially alienate citizens from their government identifies a genuine problem with allowing such practices.²⁹⁸

Democracy is better served when citizens participate in democracy. “Citizens attend local government meetings to ‘participate in democracy’ and to petition the town’s elected representatives for rights and benefits.”²⁹⁹

289. Frank Newport, *Percentage of Christians in U.S. Drifting Down, but Still High*, GALLUP NEWS (Dec. 24, 2015), <https://news.gallup.com/poll/187955/percentage-christians-drifting-down-high.aspx>.

290. *Id.*

291. Leah Libresco, *When Does Praying in Public Make Others Uncomfortable?*, FIVETHIRTYEIGHT (Sept. 16, 2016, 11:03 AM), <https://fivethirtyeight.com/features/when-does-praying-in-public-make-others-uncomfortable/>.

292. Amanda Voeller, *A Leap of Faith: Questioning the Constitutionality of Texas’s Legislative Prayer Practice*, 51 TEX. TECH L. REV. 305, 308 (2019).

293. *Marsh v. Chambers*, 463 U.S. 783, 822–23 (1983) (Stevens, J., dissenting).

294. *See* Newport, *supra* note 289.

295. West, *supra* note 6, at 728.

296. *Id.* at 730.

297. Voeller, *supra* note 292, at 323.

298. *See Marsh*, 463 U.S. at 805–06 (Brennan, J., dissenting).

299. West, *supra* note 6, at 728.

When citizens feel alienated from their governments, however, their participation in government may decrease.³⁰⁰ Democracy suffers when citizens do not participate because citizen participation “[e]nsure[s] that government actually works for the public good.”³⁰¹ When a minority citizen feels alienated from his government, he may not voice his opinion, and then legislative bodies will make public decisions without considering all constituents. In addition, the legislative bodies may be making decisions without even realizing such decisions are not fully informed because minority citizens are deterred from even participating in democracy.

Citizens whose religious preferences are expressed in legislative prayers also may object to the practice. As discussed above, the purposes of legislative prayer significantly diverge from those of traditional theological prayer.³⁰² Justice Brennan was troubled by legislative prayer’s potential to generate the “trivialization and degradation of religion.”³⁰³ In other words, “[t]he dread of reducing prayer to the merely ceremonial and instrumental—to idolatry—unquestionably deters some faithful and conscientious believers.”³⁰⁴

By upholding legislative prayer as constitutional, the Supreme Court facilitates the tyranny of the majority. Instead of acting as guardian of citizens’ individual rights and protector of the minority, the Court is ignoring citizens in their plea to prevent opening prayer in legislative sessions. Moreover, as Justice Brennan was concerned, the Court’s interpretation of legislative prayer as constitutional has created a “political battle[]” regarding religion’s role in governmental bodies.³⁰⁵ This feud, in itself, hinders productive legislative sessions because citizens, as well as legislators themselves, waste time, money, and resources arguing about opening prayers instead of considering the meaningful issues that fill a legislative body’s agenda.

B. Alternatives to Legislative Prayer

Justices and scholars have proposed various alternatives to legislative prayer. For example, proposals include beginning sessions with

300. *See id.* at 711–12.

301. *See Citizen Participation*, NAT’L DEMOCRATIC INST., <https://www.ndi.org/what-we-do/citizen-participation> (last visited Dec. 10, 2019).

302. *See supra* Part IV.

303. *Marsh*, 463 U.S. at 804.

304. Robert J. Delahunty, “*Varied Carols*”: *Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517, 551 (2007).

305. *See Marsh*, 463 U.S. at 805–06.

nonsectarian prayer or with readings of inspirational passages.³⁰⁶ These alternatives, however, do not adequately redress the concern of alienating citizens, thereby decreasing democratic engagement. Additionally, these alternatives may raise concerns of constitutionality. Instead, governmental bodies, including but not limited to public school boards, should begin sessions with a moment of silence because it adequately and inclusively accomplishes the goals of opening prayer. Furthermore, a moment of silence is unquestionably constitutional.

1. Nonsectarian Prayer

Rather than abolish legislative prayer altogether, Justice Kagan suggests requiring such prayer to be nonsectarian.³⁰⁷ In his concurring opinion in *Town of Greece*, Justice Samuel A. Alito challenged Justice Kagan's suggestion of requiring legislative prayer to be nonsectarian as "daunting, if not impossible," given our religiously pluralist society.³⁰⁸

A serious problem to this proposed solution is the fact that "prayer is fundamentally and necessarily religious."³⁰⁹ As one law professor stated, "the purported distinction between 'sectarian' and 'non-sectarian' prayer is illusory."³¹⁰ Generally, prayer entails calling upon a divine being to express one's gratitude and to request its assistance. "Searching for a 'non-sectarian' essence of prayer is not like stripping the husks from an ear of corn to find the kernels inside; it is like peeling off the layers of an onion until nothing is left but empty space."³¹¹ Another obstacle to this proposed solution is the religious citizen's objection to the trivialization of his religion³¹² that could occur in attempts to reduce legislative prayer to be devoid of religious sentiments.

306. See, e.g., Voeller, *supra* note 292, at 327.

307. *Town of Greece v. Galloway*, 572 U.S. 565, 632 (2014) (Kagan, J., dissenting).

308. *Id.* at 595 (Alito, J., concurring) ("Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder.").

309. *Marsh*, 463 U.S. at 810.

310. Delahunty, *supra* note 304, at 522.

311. *Id.* at 539.

312. *Marsh*, 463 U.S. at 804.

2. *Inspirational Passages*

Many judges and scholars suggest beginning legislative sessions with inspirational words as an alternative to legislative prayer.³¹³ Allowing “inspirational” words while prohibiting religious words, however, might infringe on citizens’ and legislators’ free speech rights.³¹⁴ Thus, this alternative must allow legislative bodies to begin by delivering religious statements not amounting to a “prayer.”³¹⁵

Although reciting “something like a Bible verse or words from the Pope would be more appropriate than a prayer,”³¹⁶ this surrogate to legislative prayer still has the potential to alienate citizens. For example, if a legislative body predominantly began sessions with a biblical verse, the concern that non-Christian citizens would feel alienated still exists. Therefore, this alternative of removing specifically prayer while still allowing legislators to verbalize statements, including those of religious connotations, does not address the primary problem of legislative prayer. Such statements with religious overtones in governmental affairs can alienate minority citizens, thereby inhibiting a successful democracy.

3. *Moment of Silence*

Beginning sessions with a moment of silence, thereby abolishing opening prayer altogether, is a plausible alternative.³¹⁷ In *Wallace v. Jaffree*, the Supreme Court considered three statutes relating to a moment of silence at the beginning of public school days.³¹⁸ The first statute, which was not found to be unconstitutional, “authorized a 1-minute period of silence in all public schools ‘for meditation.’”³¹⁹ The Court struck down the second and third statutes as unconstitutional,³²⁰ holding that they expanded on the moment of silence when explicitly authorizing the time “for meditation or

313. See, e.g., *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 384 (6th Cir. 1999); see also Voeller, *supra* note 292, at 327, 329.

314. Voeller, *supra* note 292, at 329.

315. *Id.*

316. *Id.*

317. *Id.* at 323 (“Ensuring that legislative prayer practices are constitutional is such a subjective analysis that it would be fairer to abolish the practice, not because of any animosity toward religion, but because abiding by the United States Constitution—the foundation of our country—should be the United States legal system’s first and foremost goal.”).

318. *Wallace v. Jaffree*, 472 U.S. 38, 40–41 (1985).

319. *Id.* at 40.

320. *Id.* at 48, 61.

voluntary prayer³²¹ and allowing “teachers to lead ‘willing students’ in a prescribed prayer to ‘Almighty God . . . the Creator and Supreme Judge of the world.’”³²² Specifically, the Court found that these two statutes were enacted “for the sole purpose of expressing the State’s endorsement of prayer activities”³²³ because the statute authorizing one minute of silence already “protect[ed] every student’s right to engage in voluntary prayer during an appropriate moment of silence during the schoolday.”³²⁴

In a concurring opinion, Justice Powell asserted that “some moment-of-silence statutes may be constitutional, a suggestion set forth in the Court’s opinion as well.”³²⁵ In a separate concurring opinion, Justice O’Connor, distinguishing “[a] state-sponsored moment of silence . . . from state-sponsored vocal prayer or Bible reading,”³²⁶ explained that “a moment of silence is not inherently religious” and a participant “need not compromise his or her beliefs.”³²⁷ According to Justice O’Connor, a moment-of-silence statute is constitutional as long as it “is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative other the others.”³²⁸

Legislatures, deliberative bodies, and public school boards should implement a moment of silence rather than opening prayer because such a practice “would create the same solemnity that legislative prayer purports to create and may achieve this goal more inclusively than prayer does.”³²⁹ This practice would pass constitutional muster under the traditional *Lemon* analysis used in Establishment Clause claims.³³⁰ First, a moment of silence has an exclusively secular purpose of promoting seriousness to the beginning of legislative sessions. Second, a moment of silence neither advances nor inhibits religion because individuals may use the time as they choose, whether to “reflect on their goals for the day, meditate, or use those moments of peace however they feel would best benefit them.”³³¹ Third, a moment of silence would not foster any governmental entanglement with religion because religion is simply not implicated.

321. *Id.* at 40.

322. *Id.*

323. *Id.* at 60.

324. *Id.* at 59.

325. *Id.* at 62 (Powell, J., concurring) (footnote omitted).

326. *Id.* at 72 (O’Connor, J., concurring).

327. *Id.*

328. *Id.* at 76.

329. Voeller, *supra* note 292, at 327.

330. *Id.* at 328.

331. *Id.* at 327.

While it would be subject to strict scrutiny because no individual is given the right to speak during the moment of silence, the practice remains constitutional. The government has a compelling interest in creating an inclusive atmosphere for legislative sessions by mandating a moment of silence, rather than allowing the practice of opening prayers, to ensure citizens' participation in government.³³² Additionally, this practice would respect the historical tradition of legislative prayer by preserving its general purposes while modernizing the tradition to be more inclusive and respectful of our country's diverse citizens.

V. Conclusion

The Supreme Court has held opening prayer at deliberative bodies as constitutional under the Establishment Clause. Whether the Court would allow opening prayer at public school boards is speculative, although possible, because of the Court's heightened concern regarding religion at public schools. Regardless, legislatures, deliberative bodies, and public school boards should not continue such practices due to the risk of alienating citizens, which decreases democratic engagement. Additionally, opening prayer at public school board meetings may be indirectly coercive to students, who have a heightened risk of succumbing to peer pressure to conform. The Establishment Clause protects citizens' right to freedom of religion, and opening prayer at deliberative bodies is at direct odds with this fundamental right.

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332. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 805–06 (Brennan, J., dissenting) (“[T]he Establishment Clause seeks . . . that no American should at any point feel alienated from his government because that government has declared or acted upon some ‘official’ or ‘authorized’ point of view on a matter of religion.”).