
The Establishment Clause: The *Lemon* and *Marsh* Conflict, Where *Lund* and *Bormuth* Leave Us, and the Constitutionality of Exclusive, Legislator-Led Prayer

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”*¹

I. INTRODUCTION

Over the last fifty years, Establishment Clause jurisprudence has caused widespread dissent and confusion within the legal community.² The Supreme Court’s Establishment Clause cases have left lower courts with little guidance on how to address similar issues.³ Specifically, cases involving the constitutionality of legislative prayer practices have generated inconsistency among lower courts due to the conflicting analytical approaches set forth in the Supreme Court’s *Marsh v. Chambers*⁴ and *Lemon v. Kurtzman*⁵ opinions.⁶ *Marsh* sets forth a historical approach to legislative prayer cases, deferring to an interpretation and application of the Framers’ intent regarding the Establishment Clause, while providing limited framework to guide lower courts confronted with legislative prayer challenges.⁷ *Lemon*, on the other hand, constructed an abstract three-

1. U.S. CONST. amend. I.

2. See *First Amendment—Establishment Clause—Legislative Prayer—Town of Greece v. Galloway*, 128 HARV. L. REV. 191, 191 (2014) (recognizing lack of clarity in Establishment Clause jurisprudence); Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, 2013-2014 CATO SUP. CT. REV. 71, 80-81 (stating dissatisfaction with Establishment Clause precedent shared by academics, lawyers, and judges alike).

3. See *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting) (noting widespread belief Establishment Clause jurisprudence “formless, unanchored, [and] subjective” while “provide[ing] no guidance”); *Card v. City of Everett*, 520 F.3d 1009, 1024 (9th Cir. 2008) (Fernandez, J., concurring) (calling Establishment Clause tests “indefinite and unhelpful”); see also Rassbach, *supra* note 2, at 81 (noting appellate court criticisms of Supreme Court Establishment Clause decisions commonplace).

4. 463 U.S. 783 (1983).

5. 403 U.S. 602 (1971).

6. See *Marsh*, 463 U.S. at 790-91 (applying historically deferential Establishment Clause standard for legislative prayer); *Lemon*, 403 U.S. at 612-13 (setting forth three-prong *Lemon* test); Rassbach, *supra* note 2, at 82-84 (stating key conflict between *Marsh* and *Lemon* revolves around historical deference). Courts did not know whether to apply *Marsh* or the *Lemon* test to Establishment Clause cases, but lower courts tended to prefer the *Lemon* test due to its abstract nature. See Rassbach, *supra* note 2, at 83 (stating *Lemon* test’s purported comprehensiveness gave it preference in lower courts).

7. See *Marsh*, 463 U.S. at 790-92 (stating legislative prayer acceptable at “Founding” and deserved deference). In his *Marsh* dissent, Justice Brennan argued that the Court’s decision did not fit with preexisting Establishment Clause jurisprudence, and asserted that the lower court’s decision would have been affirmed if the

prong test based on “cumulative criteria developed by the Court over many years,” diverging from the historically deferential approach previously governing Establishment Clause constitutional analyses.⁸

This conflict was supposedly resolved by the Supreme Court’s ruling in *Town of Greece v. Galloway*.⁹ In a 5-4 split decision, the majority clarified and affirmed *Marsh*’s role as a “historical override” to Establishment Clause analyses, negating any role *Lemon* or its counterparts would play in the constitutional analyses for legislative prayer cases.¹⁰ *Town of Greece* continued the trend towards an originalist and historically informed approach to First Amendment jurisprudence, an approach some scholars have welcomed to replace the current governing law.¹¹

In light of *Town of Greece*, an Establishment Clause split now exists between the Fourth Circuit and the Sixth Circuit concerning the constitutionality of legislator-led prayer practices.¹² In *Lund v. Rowan County*,¹³ the Fourth Circuit conducted a fact-sensitive review, examining the coercive effects of Rowan County’s exclusive, legislator-led prayer practice, and in determining the prayer practice fell outside of the historical exception set forth in *Marsh* and its progeny, the Fourth Circuit held that the county’s practice was constitutionally impermissible.¹⁴ To the contrary, in *Bormuth v. County of Jackson*,¹⁵ the Sixth

Lemon test had been applied. See *id.* at 796-801 (Brennan, J., dissenting) (applying *Lemon* test to *Marsh* case facts).

8. See *Lemon*, 403 U.S. at 612-13 (rationalizing analytical analysis of Establishment Clause application); Rassbach, *supra* note 2, at 82-83 (describing *Lemon*’s failure to consider preceding Establishment Clause jurisprudence).

9. 572 U.S. 565, 576-77 (2014) (clarifying *Marsh*’s status in Establishment Clause jurisprudence).

10. *Id.* (discussing historical deference necessary for practices previously accepted by Framers); Rassbach, *supra* note 2, at 84 (labeling *Town of Greece* decision “historical override”). In evaluating the issue, the Court held that “[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.” See *Town of Greece*, 572 U.S. at 577. *Town of Greece* also rejected the proposition that, for legislative prayer to be constitutional, the prayer’s content must be neutral. See *id.* at 581 (quoting *Marsh v. Chambers*, 463 U.S. 783, 794-95(1983)) (stating “content of the prayer . . . not of concern to judges”); cf. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (finding no Establishment Clause violation in *Marsh* because prayers lacked biblical references), *abrogated by Town of Greece v. Galloway*, 572 U.S. 565 (2014).

11. See Rassbach, *supra* note 2, at 87-88 (recognizing Bill of Rights cases’ reliance on history); Daniel Blomberg, *Sixth Circuit to Hear Important Establishment-Clause Case*, NAT’L REV. (June 13, 2017), <https://www.nationalreview.com/blog/bench-memos/establishment-clause-bormuth-v-county-jackson-case/> [<https://perma.cc/6FJE-WX5Q>] (stating Court may soon need to officially renounce *Lemon*). *Town of Greece* also shed light on differing interpretations among the Justices about the historical meaning and effect of the Establishment Clause. See Rassbach, *supra* note 2, at 87-88 (describing Establishment Clause differences among Justices).

12. See *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017) (en banc) (holding commissioner-led legislative prayer constitutional), *cert. denied*, 138 S. Ct. 2708 (2018); *Lund v. Rowan Cty.*, 863 F.3d 268, 272 (4th Cir. 2017) (en banc) (holding commissioner-led legislative prayer unconstitutional), *cert. denied*, 138 S. Ct. 2564 (2018).

13. 863 F.3d 268 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2564 (2018).

14. See *id.* at 272, 276-77, 281 (distinguishing *Lund* from Establishment Clause precedent).

15. 870 F.3d 494 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018).

Circuit—while declining to consider in its analysis the unique setting and circumstances of the prayer practice at issue—determined that Jackson County’s prayer practice was permitted by the Court’s ruling in *Town of Greece*.¹⁶

This Note begins by tracing the origins and development of modern Establishment Clause jurisprudence.¹⁷ Next, this Note identifies and critiques the tests the Supreme Court has created and applied in Establishment Clause cases.¹⁸ This Note then evaluates the Fourth Circuit’s analysis in *Lund* and the Sixth Circuit’s analysis in *Bormuth*, and determines the extent to which each is consistent with Supreme Court precedent.¹⁹ Thereafter, this Note argues that, while the weight the Supreme Court affords to historical practices in legislative prayer cases can be justified, the same or more weight should also be given to the coercive effects of such practices.²⁰ Consequently, this Note concludes that Establishment Clause jurisprudence regarding legislator-led prayer requires clarification and additional review to account for the direct or indirect adverse effects on religious minorities.²¹

II. HISTORY

A. *Origins of Modern Establishment Clause Jurisprudence*

Prior to the 1940s, the Supreme Court had few opportunities to interpret the Establishment Clause’s meaning or purpose, and for that reason Establishment Clause jurisprudence remained largely undeveloped.²² It was not until the Court’s 1947 *Everson v. Board of Education of Ewing Township*²³ decision that this Nation’s modern Establishment Clause jurisprudence began to take form.²⁴ The Court used *Everson* as a vehicle to extend and apply the Establishment

16. See *id.* at 516-17 (stating distinctions not present in *Town of Greece*, and thus unnecessary). It is worth noting that Jackson County’s prayer practice was materially identical to the prayer practice at issue in *Lund*. Compare *id.* at 498 (detailing Jackson County’s prayer practice), with *Lund*, 863 F.3d at 272 (explaining Rowan County’s prayer practice).

17. See *infra* Section II.A.

18. See *infra* Section II.B.

19. See *infra* Section II.C.

20. See *infra* Part III.

21. See *infra* Part IV.

22. See David W. Cook, Comment, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11 TEX. WESLEYAN L. REV. 71, 76-77 (2004) (discussing lack of cases involving Establishment Clause in early twentieth century).

23. 330 U.S. 1 (1947).

24. See Cook, *supra* note 22, at 77 & n.38 (discussing aftermath of *Everson* and increase of Establishment Clause claims brought before Supreme Court). The increase in Establishment Clause claims was likely due to the increase in religious diversity that resulted from the influx of immigrants in the 1940s. See *id.* at 77 (noting public rarely bothered by Christian beliefs before religious diversity developed); Elizabeth A. Harvey, Casenote, Freiler v. Tangipahoa Parish Board of Education: *Squeeze the Lemon Test Out of Establishment Clause Jurisprudence*, 10 GEO. MASON L. REV. 299, 302 (2001) (discussing increased religious diversity in United States in 1940s); see also *Religious Landscape Study*, PEW RES. CTR. (Feb. 20, 2018), <http://www.pewforum.org/religious-landscape-study/> [<https://perma.cc/9WCU-YY5E>] (presenting current religious makeup in United States).

Clause to the states through the Due Process Clause of the Fourteenth Amendment.²⁵ Further, *Everson* marked the first time the Supreme Court gave weight to historically relevant events and practices in an Establishment Clause case.²⁶

Everson, however, left much to be desired in its Establishment Clause approach.²⁷ To give historical credence to its decision, the *Everson* Court chose to rely on one event in this Nation's centuries-old history—a 1785 Virginia tax dispute—to define the Establishment Clause's purpose as intended by the Framers.²⁸ In doing so, the Court failed to consider—or even acknowledge—the complete legal history relating to disestablishment in early American states and colonies.²⁹

Still, *Everson*'s historical approach “set the tone for Establishment Clause cases” for the next two decades, dictated by a brief 1785 Virginia tax dispute that determined the Clause's meaning and purpose during that time period.³⁰ Twenty-four years after *Everson* established its abbreviated and insufficient historical approach to Establishment Clause cases, the Supreme Court recognized that it could not definitively determine the Framers' intent nor the meaning behind the Clause, and effectively turned to a new page in Establishment Clause jurisprudence.³¹

25. See *Everson*, 330 U.S. at 15-16 (addressing Establishment Clause extension to states through Fourteenth Amendment); see also Rassbach, *supra* note 2, at 75 (stating *Everson* first to apply Establishment Clause to nonfederal entity). Prior to *Everson*, only two Supreme Court cases applied the Establishment Clause, and neither applied it directly to the states. See *Quick Bear v. Leupp*, 210 U.S. 50, 81-82 (1908) (discussing federal funding of sectarian school on Indian reservation); *Bradfield v. Roberts*, 175 U.S. 291, 295, 297 (1899) (considering federal funding of hospitals in Establishment Clause context).

26. See *Everson*, 330 U.S. at 11-12 (describing 1785-1786 Virginia tax dispute); Rassbach, *supra* note 2, at 75-76 (discussing Supreme Court's first instance of historical consideration in Establishment Clause cases).

27. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107-08 (2003) (arguing *Everson*'s view of establishment history insufficient); see also Rassbach, *supra* note 2, 75-76 (concurring with Judge McConnell's characterization of *Everson*'s description of history).

28. See *Everson*, 330 U.S. at 11-12 (describing Madison and Jefferson's opposition to Virginia church tax). The Virginia tax dispute concerned a tax levy renewal in support of Virginia's established church. See *id.* “Thomas Jefferson and James Madison led the fight against this tax [levy]” and, in addition to preventing the renewal, assisted in enacting the Virginia Bill for Religious Liberty, originally written by Jefferson himself. See *id.* at 12. The *Everson* Court used this historical event to support its holding that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’” See *id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

29. See McConnell, *supra* note 27, at 2108 (describing Virginia Assessment Controversy of 1784-1786). Judge McConnell states that the disestablishment issue at that time was not as one-sided as the *Everson* Court suggested. See *id.* (stating disestablishment issue “hotly contested” in 1780s).

30. See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 12 (1947) (determining Establishment Clause's meaning); Rassbach, *supra* note 2, at 75-76 (criticizing Court's reliance on 1785 Virginia tax dispute).

31. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (conceding vagueness of Establishment Clause and establishing new test for Establishment Clause cases).

B. Establishment Clause After *Everson*

1. Establishment Clause Tests

Establishment Clause jurisprudence began to take on a completely new form in the last quarter of the twentieth century.³² New doctrinal standards grounded in long-standing constitutional values replaced historical deference in Establishment Clause cases.³³ Presently, the Supreme Court has created three main tests to assist and guide courts in reviewing and determining the outcomes in Establishment Clause cases: the *Lemon* test, the endorsement test, and the coercion test.³⁴

The Supreme Court's jurisprudential shift past *Everson's* historical approach began in 1971 with its decision in *Lemon v. Kurtzman*.³⁵ *Lemon* marked a new era in Establishment Clause jurisprudence by setting forth a universal Establishment Clause standard, shifting the focus from historical deference to a cumulative criteria developed by the Court.³⁶ Under the three-pronged *Lemon* test, to avoid conflict with the Establishment Clause, government action must have a secular purpose, the action's primary effect must not be to advance or inhibit religion, and the action must not foster excessive entanglement between state and church.³⁷ Accordingly, the *Lemon* test gained preference in lower courts because its abstract terms, while vague, provided lower courts with a

32. See *Lee v. Weisman*, 505 U.S. 577, 586-87 (1992) (recognizing coercion test formally); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (establishing expansion of *Lemon* test to prohibit endorsement or disapproval of religion); *Marsh v. Chambers*, 463 U.S. 783, 791 (1983) (holding legislative prayer constitutional in light of Framers' historical practices); *Lemon*, 404 U.S. at 612-13 (creating new test for Establishment Clause cases).

33. See *Lemon*, 404 U.S. at 612-13 (replacing *Everson* with Establishment Clause standards developed by Court over many years); DANIEL O. CONKLE, RELIGION, LAW, AND THE CONSTITUTION 158 (Robert C. Clark et al. eds., 2016) (discussing Court's shift from *Everson* to *Lemon*).

34. See *supra* note 32 (listing main Establishment Clause cases).

35. See *Lemon*, 403 U.S. at 611-13 (discussing shift from *Everson* approach).

36. See *id.* at 612-13 (marking change from *Everson* historical approach to new *Lemon* test); CONKLE, *supra* note 33, at 158 (discussing *Lemon* test development); Rassbach, *supra* note 2, at 76-77 (noting *Lemon* test emergence in Establishment Clause jurisprudence).

37. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (setting forth three-prong *Lemon* test). *Lemon's* first prong addresses whether the purpose of the government action at issue is to endorse or condemn religion. See Cook, *supra* note 22, at 80 (defining "secular purpose"). The application of the second prong is slightly more elusive, with no clear interpretation or illustration by the Supreme Court as to what constitutes a "primary effect." See *id.* at 81. Lastly, the third prong concerning excessive entanglement is best illustrated by the *Lemon* case itself, which requires evaluation of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 615 (articulating "excessive entanglement" prong considerations); Cook, *supra* note 22, at 81-82 (expanding on *Lemon* Court's inquiry into "excessive entanglement" prong). The Supreme Court has modified and collapsed the last two prongs into one another due to fact that they are difficult to distinguish. See *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (combining second and third *Lemon* test prongs); Cook, *supra* note 22, at 87 (discussing reasons behind *Lemon* test modification).

foundation for their analyses—a benefit unavailable under the previous *Everson* approach.³⁸

The Establishment Clause’s evolution continued with the Supreme Court’s 1984 decision in *Lynch v. Donnelly*,³⁹ where Justice O’Connor’s concurrence introduced the endorsement test.⁴⁰ The endorsement test—initially proposed as a “clarification” of *Lemon*—became a separate doctrinal tool prohibiting two types of governmental action: excessive governmental entanglement in religion and governmental endorsement or disapproval of religion.⁴¹ While the *Lemon* and endorsement tests share similar constitutional values, the latter gives greater weight to values such as protecting minority religious identities and promoting religiously inclusive communities.⁴² However, the Court has rarely found impermissible endorsement in subsequent Establishment Clause cases, evidencing its unwillingness to apply the standard to enjoin state action.⁴³

The coercion test is the last major Establishment Clause standard in the Court’s repertoire of doctrinal tools, formally added to the lineup in the Court’s 1992 decision in *Lee v. Weisman*.⁴⁴ The approach reflects the constitutional

38. See Rassbach, *supra* note 2, at 77 (discussing *Lemon*’s impact on lower courts); Cook, *supra* note 22, at 87 (noting lower courts’ reliance on *Lemon* test). No other test existed at this time to compete with the *Lemon* test and its abstract terms allotted more discretion to judges. See Cook, *supra* note 22, at 87-88.

39. 465 U.S. 668 (1984).

40. See *id.* at 688-89 (O’Connor, J., concurring) (suggesting governmental endorsement or disapproval of religion equates direct infringement).

41. See *id.* (noting impact of endorsement or disapproval on religious minority populations); CONKLE, *supra* note 33, at 160-61 (discussing endorsement test’s independent doctrinal tool status); Cook, *supra* note 22, at 82 (noting Justice O’Connor’s original intent to clarify *Lemon*). Scholars have argued, however, that the endorsement test is not without its flaws, and fails to be an adequate update or replacement to the disfavored *Lemon* test. See Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & POL. 499, 510 (2002) (highlighting endorsement test flaws). The endorsement test presents issues of over- and underinclusiveness, which “run[] counter to the usual understandings of the degree of injury needed to justify constitutional invalidation.” See *id.* at 535. Further, the test is lacking because it has the potential to invalidate governmental accommodations of any religion when applied strictly. See *id.*

42. See Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1176 (1988) (discussing governmental interest in providing religiously-inclusive communities). The psychological assault on religious minorities by governmental endorsement or disapproval of religion is foreseeable and may lead to the minority viewing the government as one for the majority, which is contrary to our constitutional values. See *id.* at 1173-76 (discussing different forms of impermissible government action and their effects on disfavored individuals).

43. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (discussing endorsement of religion in schools); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989) (holding county impermissibly endorsed Christianity through conveyance of cross), *abrogated by* *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (articulating legislature’s alteration of science curriculum to endorse religious views); *Wallace v. Jaffree*, 472 U.S. 38, 59-60 (1985) (holding state endorsed prayer activities); see also Rassbach, *supra* note 2, at 79 (discussing Supreme Court’s lack of endorsement test usage).

44. See *Lee v. Weisman*, 505 U.S. 577, 586-87 (1992) (applying coercion test instead of *Lemon* or endorsement tests); Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1632 (2006) (noting *Lee* decision depended solely on coercion test). Justice Kennedy first articulated the coercion test in *County of Allegheny v. ACLU*. See *Allegheny*, 492 U.S. at 659-60 (Kennedy, J., concurring in judgment and dissenting in part) (discussing principles for coercion test); see also Ward, *supra*, at 1630-32 (noting Justice Kennedy’s distinction between direct and indirect coercion).

guarantee that the government may not coerce its citizens “to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”⁴⁵ As such, any state action that is coercive towards or against any religion, whether it be direct or indirect, is prohibited under the coercion test.⁴⁶ While recognized as a separate and distinct doctrinal analysis tool, coercion is not essential to an Establishment Clause claim.⁴⁷ Instead, it is often treated as an auxiliary element to most Establishment Clause claims due to the *Lemon* and endorsement tests’ lower thresholds for Establishment Clause violations.⁴⁸

2. Legislative Prayer Exception

In addition to the doctrinal tools set forth above, the Supreme Court has, at its discretion, applied a historically deferential approach in cases dealing with the

45. See *Lee*, 505 U.S. at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)) (discussing constitutional guarantee against religious coercion); see also Ward, *supra* note 44, at 1632 (discussing Court’s decision to only analyze coercion in *Lee*). While the school in *Lee* did not expressly force students to engage in prayer, Justice Kennedy, writing for the majority, stated that a school setting coupled with peer pressure, “though subtle and indirect,” was sufficiently coercive to rise to the level of a constitutional violation. See *Lee*, 505 U.S. at 593 (recognizing uniqueness of school setting); see also Ward, *supra* note 44, at 1632 (discussing Justice Kennedy’s focus on special need to protect student from subtle coercive pressures). Justice Scalia vehemently disagreed with the majority opinion in his dissent, opposing the Court’s view that the Establishment Clause prohibits indirect coercion. See *Lee*, 505 U.S. at 642 (Scalia, J., dissenting) (stating constitutionally prohibited coercion only limited to acts backed by threat of penalty). Notwithstanding Justice Scalia’s dissent, *Lee* indicated that the Court had developed an increased interest in protecting students from religiously coercive state practices. See Ward, *supra* note 44, at 1632-34 (discussing rationale behind heightened coercion standard in school setting).

46. See Ward, *supra* note 44, at 1631, 1637-38 (providing examples of directly and indirectly coercive state actions). Directly coercive state action is exemplified by “explicit, state-imposed sanction[s] for nonpreferred religious behavior,” while indirect coercion can involve “less overt, but . . . genuinely coercive state action[] that impinge[s] on religious liberty.” See *id.* at 1631-32 (discussing Justice Kennedy’s description of direct and indirect coercion). In other words, “present[ing] citizens with a choice between religious and nonreligious activity,” which would not be present but for a challenged state-sponsored activity, may be deemed indirectly coercive under the Establishment Clause. See *id.* at 1637-38 (noting easily discernable limits of direct coercion and difficulty in defining indirect coercion).

47. See *id.* at 1660-61 (discussing cases holding proof of coercion not essential to Establishment Clause claims); see also *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973) (holding absence of coercion in Establishment Clause irrelevant); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963) (holding Establishment Clause does not depend on governmental compulsion); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (holding Establishment Clause, unlike Free Exercise Clause, requires no showing of governmental compulsion). However, Justice Kennedy expressed in his *Allegheny* concurrence that, absent coercion, transgressions against religious liberties are minimal. See *Allegheny*, 492 U.S. at 660-62 (Kennedy, J., concurring in judgment and dissenting in part) (discussing role of coercion in Establishment Clause analyses). Thus, according to Professor Ward, “Justice Kennedy appeared to argue that a showing of either direct or indirect state coercion should be necessary and sufficient to prove an Establishment Clause violation.” See Ward, *supra* note 44, at 1661 (interpreting Justice Kennedy’s stance on coercion in Establishment Clause claims).

48. See CONKLE, *supra* note 33, at 165 (stating Establishment Clause violations under *Lemon* and endorsement precede coercion). Although, Professor Conkle notes the coercion test’s increased relevance in areas where there is an exception to the *Lemon* or endorsement tests; specifically, the traditional exception for the practice of legislative prayer. See *id.* at 165-66.

constitutionality of legislative prayer.⁴⁹ The Court used its 1983 decision in *Marsh v. Chambers*—about a year before Justice O’Connor’s concurrence in *Lynch*—to set forth an *Everson*-like, historically deferential approach to govern legislative prayer cases; an approach the Court used to uphold the Nebraska legislature’s practice of opening sessions with prayer, relying on the fact that the practice mirrored the Framers’ legislative prayer practices.⁵⁰ Justice Brennan’s dissent, however, criticized the majority decision’s inconsistency with established precedent, arguing that an application of the *Lemon* test would have undoubtedly led to an antithetical result.⁵¹ Due to *Marsh*’s limited applicability, lower courts developed a preference for *Lemon* and viewed *Marsh* as an exception when dealing with Establishment Clause claims.⁵²

The *Marsh* decision created a doctrinal conflict in Establishment Clause jurisprudence.⁵³ Under *Marsh*’s fact-specific criteria, the constitutionality of a specific legislative prayer practice turns on whether the reviewing court finds that the practice is within the scope of the Framers’ intent and practice of legislative prayer, which in turn has caused courts to narrowly apply *Marsh*.⁵⁴ *Marsh*’s lack of guidance, coupled with its limited applicability, has caused courts to view the decision as a historical outlier.⁵⁵ On the other hand, while the *Lemon* test’s abstract three-prong approach has been the preferential test in many lower courts, the Supreme Court has largely abandoned the *Lemon* test.⁵⁶ As a result, the legal community has expressed frustration toward the currently muddled state of Establishment Clause jurisprudence.⁵⁷

49. See *Marsh v. Chambers*, 463 U.S. 783, 787-91 (1983) (relying on First Congress’s legislative prayer practices to determine constitutionality).

50. See *id.* at 787-90 (discussing Framers’ usage of paid chaplains for opening prayers at congressional sessions). *Marsh* conflicted with *Lemon* because the Court provided no explanation as to how the *Marsh* approach fit with the rest of Establishment Clause jurisprudence. See Rassbach, *supra* note 2, at 79 (agreeing with Justice Brennan’s dissent in *Marsh*).

51. See *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) (noting application of *Lemon* would result in violation of Establishment Clause).

52. See Rassbach, *supra* note 2, at 82-83 (comparing legal community’s view of *Lemon* and *Marsh* standards).

53. See *supra* note 49 and accompanying text (discussing *Marsh* and *Lemon* conflict).

54. See *Marsh*, 463 U.S. at 790 (explicating standard’s application); see, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O’Connor, J., concurring) (suggesting *Marsh* special due to long history of legislative prayer), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999) (labeling *Marsh* “one-of-a-kind”); *Cammack v. Waihee*, 932 F.2d 765, 772 (9th Cir. 1991) (declining to expand *Marsh*).

55. See Rassbach, *supra* note 2, at 83 (discussing *Marsh*’s inflexibility and concrete nature).

56. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, J., dissenting) (discussing *Lemon*’s checkered career in Supreme Court); Rassbach, *supra* note 2, at 83 (stating *Lemon*’s purported comprehensiveness made its test useful for lower courts); Cook, *supra* note 22, at 87 (noting lower courts prefer *Lemon* test); cf. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (electing to not overrule *Lemon*). Justice Rehnquist noted that the Court also stated in *Lynch* that the *Lemon* test was not binding upon the Court. See *Santa Fe*, 530 U.S. at 319 (Rehnquist, J., dissenting) (critiquing *Lemon*); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (explaining Court’s refusal to confine itself to single test or criterion).

57. See *infra* Section II.B.3 (discussing legal community’s dissatisfaction with Establishment Clause jurisprudence).

3. Dissatisfaction with Establishment Clause Precedent

The current Establishment Clause precedent has elicited critiques from judges, academics, and lawyers across the board.⁵⁸ Some criticize the Establishment Clause tests as groundless judicial inventions lacking any textual support, while others—despite accepting the current precedent’s constitutionality—struggle to come to terms with its confusing, indefinite, and open-ended standards.⁵⁹ In the legislative prayer context, the precedent failed to provide a clear framework until the Court’s 2014 decision in *Town of Greece v. Galloway*.⁶⁰

4. *Town of Greece v. Galloway*

Any confusion over which Establishment Clause standard applies in legislative prayer cases was clarified by the Supreme Court in *Town of Greece*.⁶¹ The case involved a suit brought by Susan Galloway and Linda Stephens against the town of Greece, New York, alleging the town violated their First Amendment

58. See Rassbach, *supra* note 2, at 80-81 (noting widespread frustration with formless Establishment Clause jurisprudence); Cook, *supra* note 22, at 91 (noting lack of consistency in Establishment Clause jurisprudence). The numerous tests in our Establishment Clause jurisprudence, coupled with the Court’s inconsistent application of those tests, has not only affected how the Supreme Court handles these cases, but has also left lower courts lost as to which standard to apply. See Cook, *supra* note 22, at 91-92 (critiquing Supreme Court’s jurisprudential inconsistency). Justice Rehnquist, for example, starkly criticized the *Lemon* test in *Wallace v. Jaffree*, stating the test’s prongs “are in no way based on either the language [of the Constitution] or intent of the drafters.” See *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting) (criticizing *Lemon*’s lack of constitutional foundation); Cook, *supra* note 22, at 87 (quoting Justice Rehnquist’s *Lemon* criticism). Justice Kennedy resisted the endorsement test, stating that it was too broad and an unwelcome addition to an already tangled Establishment Clause jurisprudence. See *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (characterizing endorsement test “flawed” and “unworkable”), *abrogated by* *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (Kennedy, J., concurring in part and dissenting in part); Cook, *supra* note 22, at 89 (discussing Justice Kennedy’s disapproval of endorsement test). The coercion test has also met with criticisms from scholars within the legal community, with one side arguing that the test was unfair to religious minorities because it was too narrow, while the other side argued that the Establishment Clause itself worked to the benefit of religious minorities. See Cook, *supra* note 22, at 89 n.163 (comparing varying criticisms of coercion test).

59. See *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting) (discussing Establishment Clause jurisprudence’s lack of First Amendment support); *Card v. City of Everett*, 520 F.3d 1009, 1023-24 (9th Cir. 2008) (Fernandez, J., concurring) (stating Establishment Clause precedent “indefinite and unhelpful”); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 934-36 (1986) (discussing Court’s lack of adequate support and justification in Establishment Clause jurisprudence). Professor McConnell emphasizes the Establishment Clause jurisprudence’s lack of precedential support, lack of explanation, and failure to consider the element of coercion as concerning observations of the Court’s development of the law. See McConnell, *supra*, at 934-36 (critiquing Supreme Court’s approach in Establishment Clause cases).

60. See *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (resolving *Marsh* and *Lemon* conflict); Lisa Shaw Roy, *The Unexplored Implications of Town of Greece v. Galloway*, 80 ALB. L. REV. 877, 878 (2017) (discussing lower court confusion regarding *Marsh*’s application in state legislatures and nonsectarian prayer requirements); see also Rassbach, *supra* note 2, at 82-84 (discussing lower courts’ trend of disfavoring *Marsh*).

61. See *Town of Greece*, 572 U.S. at 576-77 (placing priority on historical practice in legislative prayer realm).

rights by opening the monthly town board meetings with prayer.⁶² Volunteer chaplains were invited to open each town board meeting with a prayer freely composed of the chaplains' own devotions.⁶³ The predominantly Christian nature of the prayers offended the respondents, and when their complaints about the practice were met with what the respondents perceived as insufficient remedial measures, they sued the town.⁶⁴ On appeal, the Second Circuit held that the practice was unconstitutional, and the Supreme Court granted the town a writ of certiorari.⁶⁵ The respondents argued that the prayers' sectarian nature pulled the town's practice outside the scope of *Marsh's* historically accepted practices, and that the town's board meeting prayers were unduly coercive to nonadherents due to the social pressures created by the prayers' sectarian content, and in light of the unique setting and purpose of the meetings.⁶⁶ The Court reversed the Second Circuit and held that the town of Greece's legislative prayer practice was constitutional under two theories: the *Marsh* exception and the coercion test.⁶⁷

Town of Greece effectively reaffirmed *Marsh*, and held that any test adopted by a court "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."⁶⁸ The Court

62. See *id.* at 577-78 (presenting respondents' legal theories in case).

63. See *id.* at 570-72 (describing Greece's legislative prayer practice). In Greece, New York, an unpaid town volunteer would reach out to the congregations listed in the local directory and invite chaplains to lead a prayer to begin each town board meeting. See *id.* at 571. The town did not review or guide any of the prayers given, nor did it exclude or deny the opportunity to any would-be prayer giver. See *id.* However, the prayer practice included the chaplain facing the audience with the board to his or her back, and sometimes even included the chaplain encouraging participation from the audience. See *id.* at 627-28 (Kagan, J., dissenting).

64. See *id.* at 570-73 (majority opinion) (discussing events leading to suit). From 1999 to 2007, all prayer leaders at Greece's town board meetings were Christian. *Id.* at 571. It was not until after the respondents complained in 2008 that the board invited non-Christian prayer leaders. See *id.* at 611-12 (Breyer, J., dissenting) (elaborating on Greece's legislative prayer practice). Justice Breyer estimated that only 4 out of more than 120 monthly town board meetings between 1999 and 2000 were led by non-Christian prayer leaders. See *id.*

65. See *Town of Greece*, 572 U.S. at 574 (noting case's procedural history).

66. See *Town of Greece v. Galloway*, 572 U.S. 565, 577-78 (2014) (summarizing respondents' legal theories for Greece's Establishment Clause violations).

67. See *id.* at 578-80, 584-89 (denying respondents' claims under *Marsh's* historical approach and coercion test); see also Alan E. Garfield, *And the Wall Comes Tumbling Down: How the Supreme Court Is Striking the Wrong Balance Between Majority and Minority Rights in Church-and-State Cases*, 68 ARK. L. REV. 789, 795-76 (2015) (discussing *Town of Greece* majority's basis for opinion). Justices Scalia and Thomas—who joined for the first part of the opinion—did not join Justice Kennedy's coercion test application because they felt that it was too broad, and, in their view, only "actual legal coercion" matters. See *Town of Greece*, 572 U.S. 608-10 (Thomas, J., concurring) (expressing disapproval of Justice Kennedy's coercion test application).

68. See *Town of Greece*, 572 U.S. at 577-78 (holding historical approach for legislative prayer takes priority over other tests). *Town of Greece* rejected the dictum in *Allegheny* that suggested a legislative prayer's constitutionality turned on the neutrality of its contents. Compare *id.* at 580-81 (holding content of legislative prayer practice has no bearing on its constitutionality), with *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (determining *Marsh's* nonsectarian prayer content important to its constitutionality), *abrogated by Town of Greece v. Galloway*, 572 U.S. 565 (2014). Justice Kennedy's obliviousness to the coercive effects a prayer practice may have on a religious minority is evidenced by his dismissal of the plaintiffs' coercion argument in *Town of Greece*. See *Town of Greece*, 572 U.S. at 589-90 (stating offense does not equal coercion); Garfield, *supra* note 67, at 803-05 (stating no exclusively nonsectarian prayer requirement after *Town of Greece*). Some

rejected the argument that legislative prayer must be nonsectarian, holding *Marsh* prescribed no such requirement, and noting that a challenge based on a prayer's content alone would likely not rise to the level of a constitutional violation.⁶⁹ Furthermore, the Court held that the town's efforts to include non-Christian chaplains were sufficient, determining that requiring active "religious balancing" by the town would cause far more problematic state entanglement.⁷⁰ In applying a fact-sensitive review, the Court also rejected the plaintiffs' coercion argument, holding that the town's practice did not compel its citizens to engage in religious observance in a constitutionally violative manner.⁷¹ Notwithstanding, the Court acknowledged that there are limits to the constitutionality of legislative prayer, noting that a practice's excessively coercive nature may pull it out of the constitutionally accepted tradition.⁷²

Accordingly, the *Town of Greece* decision negates the previous view that *Marsh* is an aberration, and creates a historical override in the area of legislative

scholars believe that after *Town of Greece*, a showing of discriminatory intent will be required to prove an Establishment Clause violation. See Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 304 (2015) (discussing Establishment Clause violation threshold after *Town of Greece*). As such, unconscious biases, as well as indifference to the prayer practice's impact on minority groups, will remain unchecked because proving intentionality under either concept is essentially impossible. See *id.* at 309-12 (discussing difficulty of bringing legislative prayer claims after *Town of Greece*).

69. See *Town of Greece*, 572 U.S. at 585 (noting increased threshold necessary to prove constitutional violation under Establishment Clause). Justice Kennedy implied that legislative prayer practices mirroring those of the Framers' practices should be insulated from Establishment Clause challenges. See *id.* at 576-77; Garfield, *supra* note 67, at 801 (interpreting Justice Kennedy's intentions in his *Town of Greece* decision). According to Justice Kagan's dissenting opinion, a determination of the Framers' intent is not as clear-cut as Justice Kennedy suggests. See *Town of Greece*, 572 U.S. at 619 n.1 (Kagan, J., dissenting) (presenting historical references contradicting Justice Kennedy's interpretation of Framers' intent).

70. See *Town of Greece*, 572 U.S. at 585-86 (discussing impracticability of requiring nonsectarian prayers in legislative-prayer exception). While the *Town of Greece* decision arguably adversely affects the minority, the alternative suggested by the dissenting Justices may well result in the inverse, and ostracize the majority. See Nathan S. Chapman, *The Establishment Clause, State Action, and Town of Greece*, 24 WM. & MARY BILL RTS. J. 405, 439-40 (2015) (examining consequences of dissenters' solution).

71. See *Town of Greece*, 572 U.S. at 586-87 (rejecting respondents' coercion theory because Court found insufficient coercion). However, Justice Kagan noted that the setting for the Framers' practice of legislative prayer was vastly different than a municipal town board meeting, a setting that is much more "intimate." See *id.* at 625-27 (Kagan, J., dissenting) (noting increased coercive pressures in Greece's "intimate" board meeting setting); see also Garfield, *supra* note 67, at 803-04 (criticizing Justice Kennedy's dismissal of coercion arguments and insensitivity to prayer's effects on religious minorities). Justice Alito's concurrence also prudently addressed the setting and circumstances of Greece's prayer practice, where the prayers preceded the "legislative" portions of the meeting, but not any sort of adjudicatory proceedings. See *Town of Greece*, 572 U.S. at 593-94 (Alito, J., concurring) (suggesting Greece's practices more akin to legislative sessions). The fact that Justice Alito felt the need to distinguish legislative sessions from adjudicatory sessions supports an inference that the constitutionality of a prayer practice prior to an adjudicatory proceeding may constitute coercion under Justice Scalia's definition—"by force of law and threat of penalty." See *id.*; see also *Lee v. Weisman*, 505 U.S. 577, 640, 642 (1992) (Scalia, J., dissenting) (stating Justice Kennedy's version of coercion too broad).

72. See *Town of Greece v. Galloway*, 572 U.S. 565, 582-83 (2014) (recognizing limits on constitutionality of legislative prayer). The Court stated that the breadth of the legislative prayer exception is not unlimited, and practices normally insulated by the *Marsh* exception could constitute an Establishment Clause violation "[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Id.*

prayer over the *Lemon* and endorsement tests.⁷³ Although the decision remedied the conflict between *Marsh* and *Lemon* regarding legislative prayer, there is concern about the holding's impact on religious minorities.⁷⁴ While it solved one conflict within Establishment Clause jurisprudence, the decision gave rise to a plethora of new issues and questions.⁷⁵ In particular, whether legislator-led prayer falls within *Town of Greece*'s historical exception is left unanswered, and has led to a circuit split between the Fourth and Sixth Circuits regarding its constitutionality.⁷⁶

C. Legislator-Led Prayer Practices

Recently, lower courts have been faced with the question of whether legislator-led prayer is constitutionally valid in accordance with the historical exception set forth in *Marsh* and *Town of Greece*.⁷⁷ In *Lund v. Rowan County*, the Fourth Circuit encountered the issue when several Rowan County residents brought suit alleging the county violated the Establishment Clause by opening county board of commissioners meetings with a prayer delivered by one of the elected commissioners.⁷⁸ The Sixth Circuit faced an almost identical situation

73. See Rassbach, *supra* note 2, at 84-85 (stating *Marsh* trumps *Lemon* in legislative prayer realm); Roy, *supra* note 60, at 880 (stating how *Town of Greece* decision made *Marsh* more than exception in Establishment Clause jurisprudence). *Town of Greece* made it much more difficult for a plaintiff to bring a claim questioning the constitutionality of legislative prayer schemes. See Christopher C. Lund, *Leaving Disestablishment to the Political Process*, 10 DUKE J. CONST. L. & PUB. POL'Y 45, 52 (2014) (noting change from *Marsh*'s passive standard to *Town of Greece*'s intentionality requirement). The Court retained its requirement for a fact-sensitive review; the fact that a prayer scheme is similar to the Framers' historical practices does not per se exclude the practice from being overly sectarian or coercive. See *id.* at 51-53 (discussing increased difficulty of bringing Establishment Clause cases in legislative prayer setting).

74. See Garfield, *supra* note 67, at 801-04 (noting Justice Kennedy's dismissal of religious minority interests). Professor Garfield criticizes Justice Kennedy's lack of additional coercive prayer practice analysis, and argues that Kennedy is essentially making religious minorities feel like "second-class citizens." See *id.* at 804 (discussing consequences of *Town of Greece* decision on religious minorities). Furthermore, the importation of discriminatory intent into Establishment Clause jurisprudence has hobbled the Clause's ability to protect minorities from unconscious biases and indifference. See Corbin, *supra* note 68, at 324 (discussing discriminatory intent's handicapping of Establishment Clause protections for minorities).

75. See Rassbach, *supra* note 2, at 89-91 (predicting *Town of Greece*'s likely effect on legal community); Roy, *supra* note 60, at 888-89 (examining impact of *Town of Greece* decision on future Establishment Clause cases).

76. See Rassbach, *supra* note 2, at 89 (noting unsettled area of legislator-led prayer). Rassbach highlights three main categories of legislative prayer cases: rotating volunteer prayer-givers, paid chaplains, and council member-led prayers. See *id.* (discussing consequences and unsettled areas after *Town of Greece*). Volunteer prayer-givers—like those involved in *Town of Greece*—would likely only be found to be in violation of the Establishment Clause if the municipality expressly adopted a preference for a particular religion; paid chaplains are rare in municipalities; and the issue of council member-led prayers had yet to be fully litigated. See *id.*

77. See *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 497-98 (6th Cir. 2017) (en banc) (discussing Jackson County's practice of commissioner-led prayer), *cert. denied*, 138 S. Ct. 2708 (2018); *Lund v. Rowan Cty.*, 863 F.3d 268, 271-72 (4th Cir. 2017) (en banc) (presenting facts relating to Rowan County's practice of commissioner-led prayer), *cert. denied*, 138 S. Ct. 2564 (2018).

78. See *Lund*, 863 F.3d at 272-73 (describing events giving rise to Establishment Clause claim).

in *Bormuth v. County of Jackson*.⁷⁹ The two circuits, however, came to different conclusions about the constitutionality of the practice.⁸⁰ The Fourth Circuit held that the prayer practice was unconstitutional.⁸¹ The Sixth Circuit, on the other hand, held that prayer practice was constitutional.⁸²

In *Lund*, the Fourth Circuit held that Rowan County's exclusive, commissioner-led prayer practice sent a message contrary to that of the historically accepted prayer practices.⁸³ Where the practices at issue in *Town of Greece* and its predecessors welcomed adherents of all faiths and embraced religious pluralism, Rowan County engaged in a "closed-universe" prayer practice, restricting the prayer opportunity to elected commissioners, and effectively blurring the line between religion and politics.⁸⁴ The Supreme Court

79. See *Bormuth*, 870 F.3d at 498 (describing contested legislative-prayer practice); *supra* text accompanying note 78 (identifying cause of action in *Lund*).

80. Compare *Bormuth*, 870 F.3d at 498 (holding practice constitutional), with *Lund*, 863 F.3d at 272 (holding practice unconstitutional).

81. See *Lund*, 863 F.3d at 272 (holding practice of lawmaker-led prayer unconstitutional). The Fourth Circuit held that in a legislative prayer context, "the identity of the prayer-giver is relevant to the constitutional inquiry," which was a factor that allowed the court to analyze the practice outside the scope of the legislative prayer exception. See *id.* at 280 (identifying limits of legislative prayer exception). As such, the Fourth Circuit highlighted Rowan County's practice of exclusively allotting the right to lead prayers to the county's elected officials. See *id.* at 281 (holding Rowan County may not confine prayer opportunity to select few individuals). The *Lund* court also held that, where the prayer practice referred to only Christianity, the practice essentially endorsed the Christian religion and disfavored non-Christians. See *id.* at 281-82 (explaining court may examine prayer's content if it violates *Town of Greece* limitations).

82. See *Bormuth*, 870 F.3d at 498 (holding Jackson County's commissioner-led prayer practice constitutional); see also Patrick L. Gregory, *Circuit Split on Legislator-Led Prayer Could Entice Supreme Court*, BLOOMBERG BNA (Sept. 13, 2017), <https://www.bna.com/circuit-split-legislatorled-n57982087849/> [<https://perma.cc/Z9VF-669V>] [hereinafter Gregory, *Circuit Split*] (noting split between Fourth and Sixth Circuit on issue of legislator-led prayer). The Sixth Circuit held that "*Marsh* and *Town of Greece* do not require Jackson County to provide opportunities for persons of other faiths to offer invocations." See *Bormuth*, 870 F.3d. at 514. However, *Marsh* and *Town of Greece* did not reach the issue of restrictive legislative prayer because both involved "open, inclusive prayer opportunities." See *Lund*, 863 F.3d at 278 (holding Rowan County's prayer practice featured "much greater and more intimate government involvement"). Some scholars believe that the Supreme Court will likely wait to clarify the issue even with the split between the Fourth and Sixth Circuits. See Patrick L. Gregory, *Legality of Legislator-Led Prayer Still Murky, Scholars Say*, BLOOMBERG BNA (Feb. 23, 2017), <https://www.bna.com/legality-legislatorled-prayer-n57982084242/> [<https://perma.cc/G2FL-YDRG>] [hereinafter Gregory, *Prayer Legality*] (discussing considerations relevant to whether Supreme Court will review legislator-led prayer issue). Specifically, Professor Lund believes that the Supreme Court "will probably wait until there are clear lines of division in the Courts of Appeals" before reviewing a third legislative prayer case, noting the time and numerous legislative prayer cases that arose between *Marsh* and *Town of Greece*. See *id.*

83. See *Lund v. Rowan Cty.*, 863 F.3d 268, 281-82 (4th Cir. 2017) (en banc) (comparing divisive message by Rowan County to inclusive messages in precedential cases), *cert. denied*, 138 S. Ct. 2564 (2018). *Town of Greece* suggested that acknowledgement of religious diversity did not require proscription of sectarian content, but rather, the embrace and welcoming of different creeds. See *Town of Greece v. Galloway*, 572 U.S. 565, 578-81 (2014) (suggesting increased religious diversity today does not change constitutionality of legislative prayer).

84. See *Lund*, 863 F.3d at 281-82 (noting "closed-universe" practice relevant to constitutional analysis). Rowan County's exclusive, legislator-led prayer practice had the effect of creating a hostile environment for the county's non-Christian residents. See Nick Wing, *Federal Court Rules Against Christian-Only Government Prayer in North Carolina*, HUFFPOST (July 14, 2017), https://www.huffingtonpost.com/entry/rowan-county-prayer-ruling_us_5968e4f1e4b0174186270695 [<https://perma.cc/XXA5-6HW9>] (presenting views of Rowan County's non-Christian residents).

previously held that this politically divisive conflict was “a threat to the normal political process,” and a “principal evil[] against which the First Amendment was intended to protect.”⁸⁵ The Fourth Circuit took further exception to the fact that commissioners themselves perpetuated the restrictive prayer practice, and after careful review of the complete factual record, held that Rowan County’s practice violated the First Amendment.⁸⁶

In contrast, the Sixth Circuit held in *Bormuth* that Jackson County’s similarly restrictive prayer practice was constitutional.⁸⁷ The factual record in *Bormuth*, however, was not as fully developed as the record in *Lund* due to procedural errors made by the petitioner, which in turn left the court with a deficient view of the case’s factual circumstances.⁸⁸ Even so, the Sixth Circuit refused to consider factors that the Fourth Circuit held relevant to a legislative prayer analysis—including the identity of the prayer giver and the unique setting of the practice—premising its refusal on the Supreme Court’s lack of express distinction in *Town of Greece*.⁸⁹ Accordingly, the Sixth Circuit upheld Jackson County’s materially similar practice by relying on a narrow interpretation of the relevant Supreme Court precedent as well as the historical prayer practices of the circuit’s legislative bodies.⁹⁰

85. See *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (warning against entanglement of politics and religion).

86. See *Wing*, *supra* note 84 (highlighting key divisive conduct by Rowan commissioners). After the district court decision in *Lund*, Rowan County began inviting a volunteer chaplain to lead prayer. See *Court: North Carolina Commissioners’ Prayer Practice Violated Constitution*, CBS NEWS (July 14, 2017), <https://www.cbsnews.com/news/court-north-carolina-commissioners-prayer-practice-violated-constitution/> [<https://perma.cc/HCM3-2XVA>] (discussing Rowan County’s actions after suit).

87. See *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 497-98 (6th Cir. 2017) (en banc) (holding Jackson County’s prayer practice constitutional), *cert. denied*, 138 S. Ct. 2708 (2018).

88. See *id.* at 499 (determining appropriate factual record to consider for review); *cf. Town of Greece*, 572 U.S. at 587 (stating legislative prayer constitutional inquiry remains fact-sensitive). The Sixth Circuit refused to consider any video evidence from *Bormuth* that was not presented to the district court. See *Bormuth*, 870 F.3d at 499-500. Further, the Sixth Circuit upheld the magistrate judge’s decision to grant Jackson County’s motion to quash scheduled depositions. See *id.* at 501-02.

89. Compare *Bormuth*, 870 F.3d at 512, 516 (declining to consider prayer giver identity or view local government and legislative sessions differently), with *Lund v. Rowan Cty.*, 863 F.3d 268, 271-72 (4th Cir. 2017) (en banc) (holding prayer giver identity relevant and noting difference between legislative and adjudicatory proceedings), *cert. denied*, 138 S. Ct. 2564 (2018). Justice Alito noted that the prayer practice preceded the portion of the town board meeting that was legislative, and did not involve the constitutionality of a prayer practice before an adjudicatory proceeding. See *Town of Greece v. Galloway*, 572 U.S. 565, 594 (2014) (Alito, J., concurring) (noting specific setting of Greece’s prayer practice).

90. See *Bormuth*, 870 F.3d at 510, 516 (interpreting precedential decisions narrowly while using historical practices in circuit to support decision). The Sixth Circuit relied on historical examples provided by the Michigan House of Representatives and Senate, which documented similar prayer practices dating back to the late nineteenth century. See *id.* at 509-10. The Jackson County Board of Commissioners replaced its prayer practice with a moment of silence after the original ruling against the prayer, but later returned to opening the board meetings with prayer, and indicated that they planned to continue doing so. See Taylor DesOrmeau, *U.S. Court Sides with Michigan County, Allows Pre-Meeting Prayer to Continue*, MLIVE (Sept. 7, 2017), http://www.mlive.com/news/jackson/index.ssf/2017/09/us_court_sides_with_michigan_c.html [<https://perma.cc/BK9V-QRBQ>] (discussing Jackson County’s response to litigation proceedings). Scholars have seen the circuit split as the Supreme Court’s chance to finally “exorcise” *Lemon*, and use *Town of Greece*’s historical analysis as the

III. ANALYSIS

A. Legislative Prayer Practices Are Entitled to a Historical Override, For Now

The historical override established by *Marsh*, and affirmed and clarified by *Town of Greece*, has essentially immunized the practice of legislative prayer from an Establishment Clause challenge, or at the very least, has forced courts to view such practices as presumptively constitutional.⁹¹ As such, it has allowed lower courts to uphold legislative prayer practices by using similar historical practices as justification.⁹² And, the practical ease by which the *Town of Greece* decision allows courts to resolve legislative prayer practice cases has increased the plaintiff's burden when pursuing such claims.⁹³

While there is a place for respecting the traditions and practices of the past, *Town of Greece*'s analytical approach to legislative prayer claims is based on the incorrect assumption that history is knowable and decisive.⁹⁴ Contrary to the Court's determination in *Town of Greece*, it cannot be said with any certainty that the Framers unequivocally intended that legislative prayer would not violate the First Amendment.⁹⁵ As Justice Kagan pointed out in her *Town of Greece* dissent, there have been multiple instances in this great nation's history that suggest otherwise, including religiously accommodative acts by men such as George Washington, Thomas Jefferson, and James Madison.⁹⁶

touchstone of future Establishment Clause analyses. See Rassbach, *supra* note 2, at 90 (suggesting *Lemon* and endorsement tests on last legs); Blomberg, *supra* note 11 (urging Supreme Court to renounce *Lemon*).

91. See *Town of Greece*, 572 U.S. at 576-77 (reasoning determination of Establishment Clause boundary unnecessary when history permits specific prayer practices); Garfield, *supra* note 67, at 805-06 (discussing immunizing effect of *Town of Greece* decision); Rassbach, *supra* note 2, at 89 (stating after *Town of Greece*, municipalities more likely to win legislative-prayer cases).

92. See, e.g., *Bormuth*, 870 F.3d at 509-10 (discussing Michigan's historical practice of legislator-led prayer). In *Bormuth*, the Sixth Circuit relied on the fact that the Michigan House of Representatives and Senate permitted opening prayer to be given by a member, or a member's guest, to assist in its justification of Jackson County's legislator-led prayer practice. See *id.* at 511.

93. See *Town of Greece*, 572 U.S. at 585 (holding challenges based solely on content of prayer unlikely to establish constitutional violation); *Lund v. Rowan Cty.*, 863 F.3d 268, 277 (4th Cir. 2017) (en banc) (evaluating precedent set by Court's *Town of Greece* decision), *cert. denied*, 138 S. Ct. 2564 (2018).

94. See Garfield, *supra* note 67, at 801-02 (discussing Framers' intent fallacy). Professor Garfield points out the issue with relying on an interpretation of the Framers' intent is that it is speculative, and Justices will likely "cherry-pick [historical events or interpretations] that support their preferred outcomes." See *id.*

95. See *id.* at 801 (questioning which Framers' intent should count when evaluating past legislative actions).

96. See *Town of Greece v. Galloway*, 572 U.S. 565, 636-37 (2014) (Kagan, J., dissenting) (noting various historical events conflicting with Court's decision in *Town of Greece*); see also Garfield, *supra* note 67, at 802 (evaluating Justice Kagan's dissent to show history lacks decisiveness). The historical events noted by Justice Kagan's dissent show that the Framers did, in fact, consciously avoid sectarian references on multiple occasions. See *Town of Greece*, 572 U.S. at 619 n.1 (Kagan, J., dissenting) (discussing some Framers' demand for neutrality among religions). For example, George Washington deleted the phrase, "the blessed Religion revealed in the word of God," from his inaugural speech "because it was understood to denote only Christianity." See *id.* Thomas Jefferson omitted references to Jesus Christ in "Virginia's Bill for Establishing Religious Freedom . . . in order 'to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination.'" See *id.* (quoting 1 WRITINGS OF THOMAS JEFFERSON 62 (Paul Leicester Ford ed. 1892)). Further, James Madison cautioned that religious proclamations

Even assuming the Framers' intent for the practice of legislative prayer can be ascertained, is it sensible to be completely bound by it?⁹⁷ Today, religious diversity in the United States is vastly different than it was at time the Framers engaged in the legislative prayer tradition so heavily relied on by the Supreme Court in *Town of Greece*.⁹⁸ It is illogical to equate the coercive effects in "an age when no one in this country was not a Christian of one kind or another" to the coercive effects present today, when almost a third of our population practices a non-Christian faith.⁹⁹ Fortunately, Justice Kennedy left legislative prayer claims with one leg to stand on when he prudently subjected legislative prayer to a coercion test analysis as well, which effectively prevented complete constitutional insulation for legislative prayer practices.¹⁰⁰

B. Coercive Effects of a Legislative Prayer Practice Must Be Judged Under the Practice's Own Unique Circumstances

The Court's treatment of the legislative prayer setting in *Town of Greece* has led some lower courts to view the coercive effects of legislative prayer at the local government level in the same light as higher-level legislative sessions.¹⁰¹ The Court held in *Town of Greece*, however, that the inquiry into a prayer practice's constitutionality remains "a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed."¹⁰² As such, viewing the two settings as one and the same contravenes the Court's holding and prevents courts from properly considering the unique factual circumstances of the legislative prayer practice at issue.¹⁰³ A more faithful interpretation of *Town of Greece* is that the Court analyzed the factual circumstances of the case, and deemed the differences between the coercive

may "express only 'the creed of the majority and a single sect,'" if such proclamations are not "strictly guarded." See *id.* (quoting James Madison, Detached Memoranda (n.d.), in Elizabeth Fleet, *Madison's "Detached Memoranda"*, 3 WM. & MARY Q. (3d ser.) 534, 561 (1946)).

97. See Garfield, *supra* note 67, at 802 (questioning why one should continue to blindly follow eighteenth-century sensibilities).

98. See Harvey, *supra* note 24, at 302 (discussing increase in religious diversity in 1940s due to immigration); see also *Religious Landscape Study*, *supra* note 24 (displaying current U.S. religious makeup by faith).

99. See *Town of Greece*, 572 U.S. at 565, 619 n.1 (Kagan, J., dissenting) (discussing religious makeup in Framers' era); *Religious Landscape Study*, *supra* note 24 (stating about thirty percent of U.S. citizens practice non-Christian faiths).

100. See *Town of Greece*, 572 U.S. at 582-87 (stating limits still remain on legislative prayer's content and coercive effects). The Court held that if over time a prayer practice shows that it "denigrate[s] nonbelievers or religious minorities, threaten[s] damnation, or preach[es] conversion," then the practice presents a different, constitutionally impermissible circumstance. See *id.* at 583.

101. See, e.g., *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 516 (6th Cir. 2017) (en banc) (refusing to view coercive effects in local and legislative sessions differently), *cert. denied*, 138 S. Ct. 2708 (2018).

102. *Town of Greece v. Galloway*, 572 U.S. 565, 586-87 (2014) (noting importance of considering legislative prayer setting and directed audience).

103. Compare *id.* at 586-87 (requiring fact-sensitive review of prayer setting), with *Bormuth*, 870 F.3d at 516 (refusing to consider local government's unique setting when analyzing legislative prayer constitutionality).

effects of the practices at the local or higher legislative levels of government irrelevant to the outcome, and therefore insufficient to require distinction.¹⁰⁴ Exclusive, legislator-led prayer practices in local governments, however, amplify the coercive effects to such an extent that these practices must be considered outside the scope of the historical exception set forth in *Marsh* and *Town of Greece*.¹⁰⁵

During a legislative floor session, where the position and status of the prayer giver and governmental body are equal, the practice of legislator-led prayer generally lacks constitutionally violative coercion because legislators are not normally subject to, or threatened with, any intentional or reasonably foreseeable sanction for refusing to engage in the prayer.¹⁰⁶ The prayer is addressed solely to the lawmakers, with the purpose of allowing quiet reflection and easing the task of governance.¹⁰⁷ On the other hand, an exclusive, legislator-led prayer practice in a local government setting involves a completely different relational dynamic between the prayer giver and audience.¹⁰⁸ Elected commissioners or board members, who are vested with the power to rule on highly individualized and personal matters, hold authoritative positions over the municipality's citizens attending the board meetings.¹⁰⁹ Therefore, while factors such as the identity of the prayer giver and setting of the practice are not dispositive, they are certainly relevant and warrant consideration in legislative prayer cases.¹¹⁰

104. *Cf. Town of Greece*, 572 U.S. at 586-87 (setting coercion standard for legislative prayer).

105. *See id.* at 633-34 (Kagan, J., dissenting) (noting intimate relationship between citizens and local government creates different dynamic than legislative floor sessions).

106. *See id.* at 633-34 (Kagan, J., dissenting) (noting legislative sessions contain only elected officials, but local government meetings involve ordinary citizens); Ward, *supra* note 44, at 1659-60 (discussing factors relevant to coercion test analysis). Professor Ward suggests that coercion traditionally consists of three main elements: forced choice, threat of sanction, and coercive intent. *See* Ward, *supra* note 44, at 1639-43. She notes, however, that all three elements may not be present or required in instances of indirect coercion. *See id.* at 1646-49 (reconsidering coercion's core elements in context of indirect coercion).

107. *See Town of Greece*, 572 U.S. at 587 (discussing primary purpose and message of legislative prayer practices). The Court in *Town of Greece* further noted that legislative prayer also gives the lawmakers an opportunity to express their religious views to the community without denying the right to dissent to those who disagree. *See id.* at 588.

108. *See Town of Greece v. Galloway*, 572 U.S. 565, 633-34 (2014) (Kagan, J., dissenting) (discussing shift in audience between local government meetings and legislative sessions).

109. *See id.* at 621-24 (discussing local government officials' immediate authoritative position over local citizens).

110. *See* Lund v. Rowan Cty., 863 F.3d 268, 280-81 (4th Cir. 2017) (en banc) (holding prayer giver's identity and prayer practice's setting relevant to constitutional inquiry), *cert. denied*, 138 S. Ct. 2564 (2018); *see also* *Town of Greece*, 572 U.S. at 570-73 (presenting case concerning volunteer chaplain-led prayer in local board meeting); *Marsh v. Chambers*, 463 U.S. 783, 784-85 (1983) (presenting legislative prayer case concerning Nebraska legislative prayer practice using paid chaplain).

C. Indirect Coercive Effects of Town of Greece's Prayer Practices Were Not Addressed

It is unclear how Justice Kennedy's application of the coercion test in *Town of Greece* can coexist with the Court's decision in *Lee*.¹¹¹ While *Town of Greece* analyzed the lack of evidence for direct coercion in the town's prayer practice, the constitutionality of the practice's indirectly coercive effects were not directly addressed.¹¹² Justice Kennedy provided examples of circumstances where the analysis would be different, but all the examples provided related to direct coercion.¹¹³ In *Lee*, however, the Court stated "the government may no more use social pressure to enforce orthodoxy than it may use more direct means."¹¹⁴ The question is not what will happen or has happened to coerce the citizen, but instead, whether the reasonably foreseeable sanctions for religious dissent are coercive from the viewpoint of the Establishment Clause.¹¹⁵ *Lee* and its progeny stand for the proposition that the government may not coerce religious minorities to adopt "majoritarian religious belief[s] or behavior[s]."¹¹⁶

The prayer practice in *Town of Greece* undoubtedly had indirect coercive effects towards the religious minority.¹¹⁷ Social pressures that arise from refusing to participate in the prayer—such as not wanting to irritate officials who are in an authoritative position—create a coercive environment regardless of the state's intent.¹¹⁸ Thus, the question is whether the practice is indirectly coercive

111. Compare *Town of Greece*, 572 U.S. at 588-89 (requiring evidence of direct coercion to constitute First Amendment violation), with *Lee v. Weisman*, 505 U.S. 577, 594 (1992) (holding both direct and indirect religious coercion impermissible under First Amendment).

112. See *Town of Greece*, 572 U.S. at 588-89 (stating evidence of direct coercion required to constitute constitutionally violative state action); Ward, *supra* note 44, at 1631 (stating indirect coercion less overt, but genuinely impinges on religious liberty). Professor Ward states that in instances of indirect coercion there exists, at the very least, a forced choice. See Ward, *supra* note 44, at 1646-47 (analyzing elements of indirect coercion).

113. See *Town of Greece*, 572 U.S. at 588-89 (discussing different coercive circumstances likely to constitute impermissible coercion under First Amendment).

114. *Lee*, 505 U.S. at 594 (considering social pressures in coercion test analysis); see Ward, *supra* note 44, at 1647-48 (noting coercion analysis does not rely solely on acts of intentional coercion).

115. See Ward, *supra* note 44, at 1652-53 (setting forth key question when analyzing state coercion). Professor Ward states that the relevant question when analyzing state coercion is whether coercion that is "premised, not on intentionally inflicted sanctions against religious dissent, but on reasonably foreseeable sanctions," violates the Establishment Clause. See *id.*

116. See *id.* at 1654 (discussing buffer zone around rights of religious minorities). Professor Ward draws an analogy between the religious minority protections under *Lee* and *Santa Fe*, and the Free Speech Clause protection against governmental suppression. See *id.* In both cases, the Court will take constitutional notice of state action that has a "chilling" effect on the rights protected by the Constitution, regardless of whether express governmental intent is present. See *id.*

117. See *Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014) (noting respondent's argument suggesting social pressures caused by prayer practice constituted coercion). The *Town of Greece* Court dismissed the respondents' arguments that they felt pressure to join the prayers to avoid irritating the officials who would rule on their petitions as lacking evidentiary support. See *id.*

118. See *id.* (discussing social pressure hypotheticals caused by prayer practice); Ward, *supra* note 44, at 1652-54 (stating coercion may result from either intentional or reasonably foreseeable sanctions).

enough to constitute a First Amendment violation.¹¹⁹ The *Town of Greece* Court held that in the context of voluntary, chaplain-led prayer in a local government setting, it was not.¹²⁰ But the same cannot be said about exclusive, legislator-led prayer practices in local government settings.¹²¹ Exclusive, legislator-led prayer practices in local government settings are more indirectly coercive than prayer practices conducted exclusively by chaplains, because audience members who do not share the religious beliefs of the legislator delivering the prayer are forced to either choose to practice a faith that is not their own, or rebel against the religious views of the governmental body that may directly affect the life of the citizen through force of law.¹²² Religious minorities are then, in effect, made to feel like “second-class citizens.”¹²³

This is not to say that indirect coercion exists whenever the state requires citizens to make a choice that has religious implications.¹²⁴ Such an impractical standard would contradict the Court’s Establishment Clause accommodation theme.¹²⁵ Rather, judges are vested with the difficult task of determining whether the indirect coercion in a given case is constitutionally impermissible.¹²⁶

119. See Ward, *supra* note 44, at 1649 (stating presence of forced choice does not immediately constitute Establishment Clause violation); cf. *Town of Greece*, 572 U.S. at 590 (holding adults to higher standard than teens in *Lee*).

120. See *Town of Greece*, 572 U.S. at 591-92 (holding coercive effects by town’s legislative-prayer practice insufficient to constitute Establishment Clause violation).

121. See *Lund v. Rowan Cty.*, 863 F.3d 268, 272 (4th Cir. 2017) (en banc) (holding Rowan County’s exclusive, legislator-led prayer practice unconstitutional), *cert. denied*, 138 S. Ct. 2564 (2018).

122. See *id.* at 282 (noting increase social pressures caused by prayer practice, and deviation from historical purpose); Garfield, *supra* note 67, at 803-04 (discussing effects of legislative prayer practice on religious minorities); see also *Town of Greece*, 572 U.S. at 594 (Alito, J., concurring) (suggesting constitutional analysis may differ if adjudicatory sessions follow opening prayers). Professor Garfield further highlights the decision’s religious majority favoritism and coercive impact on religious minorities by opining whether “there [exists] a problem with making Buddhists, Jews, or atheists participate in a prayer acknowledging ‘the saving sacrifice of Jesus Christ’ before they can ask their elected officials for a zoning variance.” Garfield, *supra* note 67, at 804.

123. See Garfield, *supra* note 67, at 804 (discussing legislative prayer’s adverse effect on religious minorities).

124. See *Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014) (holding offense does not equate to coercion in legislative prayer context); Ward, *supra* note 44, at 1649 (stating not all state-required choices with religious implications constitute impermissible coercion). “[G]eneral course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.” *Town of Greece*, 572 U.S. at 590.

125. See Ward, *supra* note 44, at 1648-49 (stating impracticability of forbidding states to create choices involving religion).

126. See *Town of Greece*, 572 U.S. at 578 (requiring consideration of totality of circumstances by courts when analyzing coercion in any given scenario).

D. “Closed-Universe” Elected Prayer Giver Practices in Local Government Are Constitutionally Impermissible

In *Bormuth*, the Sixth Circuit held that the risk of prejudice is no greater if noncompliance is with a prayer delivered by a commissioner or guest chaplain.¹²⁷ It is not the identity of the prayer leader alone, however, that pulls the practice outside of the constitutionally permissible scope; rather, it is the “closed-universe” of elected prayer givers.¹²⁸ Legislator-led prayer practices in local governments effectively allow the majority to define a preferred system of belief within municipalities.¹²⁹ Further, the practice brings religious views to the forefront as an election campaign issue, and causes political division along religious lines because it allows a candidate’s religious views and affiliations to be used as ammunition for or against the candidate in the political process.¹³⁰ Legislator-led prayer is precisely the kind of “threat to the normal political process” that the Supreme Court cautioned against four decades ago in *Lemon v. Kurtzman*.¹³¹

IV. CONCLUSION

Similar to other areas of constitutional law, the Establishment Clause analysis remains a fact-sensitive review of the unique circumstance of each case. While some scholars believe that the best course for our Establishment Clause jurisprudence would be to dispose of the tests the Court has developed over the years and start from a historically deferential approach, it would be naïve to strictly bind this Nation to centuries-old practices and views. Tradition, while important, does not necessarily evolve with society. As such, its current constituents are responsible for supplementing the areas where tradition may lack, using their societal experiences and understandings of human conduct to guide the development of law.

127. See *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 517 (6th Cir. 2017) (en banc) (holding no difference in coercive effects between legislator- and chaplain-led prayer practices), *cert. denied*, 138 S. Ct. 2708 (2018).

128. See *Lund v. Rowan Cty.*, 863 F.3d 268, 282 (4th Cir. 2017) (en banc) (holding prayer practice’s exclusive nature and election requirement key in determining constitutionality), *cert. denied*, 138 S. Ct. 2564 (2018). Furthermore, the prayer practice in *Lund* was perpetuated by the commissioners themselves, who were all Protestant Christian. See *id.* As such, the only recourse for religious minorities in the county was to elect a commissioner with similar religious views, a point that the Fourth Circuit found troubling. See *id.*

129. See *id.* at 281 (stating Rowan County’s prayer practice essentially established preferred religion). The impermissible establishment of religion strictly conflicts with the *Town of Greece* prohibition of a preferred system of belief. See *Town of Greece*, 572 U.S. at 581.

130. See *Lund*, 863 F.3d at 282 (cautioning exclusive, legislator-led prayer practices allow politicization of minority dissent). In jurisdictions that practice exclusive, legislator-led prayer, an election candidate’s failure to join in the prayer of the prevailing faith may be turned into a “tacit political debit.” See *id.* (quoting *Lund v. Rowan Cty.*, 837 F.3d 407, 435 (4th Cir. 2016) (Wilkinson, J., dissenting), *rev’d en banc*, 863 F.3d 268 (4th Cir. 2017)).

131. See *id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971)) (noting risk of political division by prayer practice).

Specifically, the area of legislative prayer requires further clarification by the Supreme Court. It is still unclear to what extent the coercion test applies to legislative prayer, and whether or not indirect coercion has any bearing on the constitutional analysis. Common sense suggests that it must. As religious diversity increases, so should the efforts we take to safeguard the constitutional guarantees set forth by our forefathers.

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