A QUESTION OF COERCION: WHEN DOES LEGISLATOR-LED PRAYER CROSS THE CONSTITUTIONAL LINE?

By: Theresa Holt[†]

INTRODUCTION

Perhaps one of the greatest motivations of the first English settlers in North America was freedom to practice one's religion according to one's conscience.[1] Religious liberty remained a primary concern during the founding of the Republic and, as a result, the Framers enshrined the dual principles of free exercise and disestablishment of religion in the First Amendment to the Constitution of the United States.[2] In the nineteenth century, principles of disestablishment coexisted with local, state, and federal traditions of prayer before legislative sessions and paid legislative chaplains.[3]

Since the twentieth century, however, the constitutionality of legislative prayer has become a source of great debate.[4] Some have challenged the practice of legislator-led prayer, claiming that the practice violates the Establishment Clause because government officials—rather than ministers or

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1. *See, e.g.*, Matthew Spalding, *The Meaning of Religious Liberty*, HERITAGE FOUND. (Dec. 5, 2007), https://www.heritage.org/political-process/report/the-meaning-religious-liberty; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

2. U.S. CONST. amend I; *see Everson*, 330 U.S. at 8–15.

3. *See* Marsh v. Chambers, 463 U.S. 783, 786–87 (1983); Town of Greece v. Galloway, 572 U.S. 565, 575–76 (2014); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2104 (1996); Sean Rose, *Will the Legislature Please Bow Their Heads? How* Town of Greece v. Galloway *Can Reset Legislative Prayer Jurisprudence . . . And Why It Is Necessary*, 15 RUTGERS J. L. & RELIGION 183, 183 (2013).

4. *See* James A. Hill, *Thou Shalt Not Speak: Why the Establishment Clause Should be Concerned with Legislative Prayer in* Bormuth v. County of Jackson, 23 TRINITY L. REV. 1, 6–22 (2018); Joshua N. Turner, Comment, *A Perturbed Prayer Policy: When Past Practice, Not Purpose, Possesses a Preeminent Position*, 9 LIBERTY U. L. REV. 405, 405–08 (2015); Robert M. Slovek, *Constitutional Law—Legislative Prayer and the Establishment Clause: An Exception to the Traditional Analysis*, 17 CREIGHTON L. REV. 157, 157 n.3 (1983).

other religious leaders—lead a religious exercise.[5] In *Lund v. Rowan County*[6] and *Bormuth v. County of Jackson*,[7] the Fourth and Sixth Circuits split concerning the constitutionality of legislator-led prayer, resulting in an absurdity: legislators in one region are permitted to engage in a practice held unconstitutional in the neighboring region.[8] The Supreme Court has declined to review *Lund* and *Bormuth*, leaving the question of legislator-led prayer open.[9]

The purpose of this Note is to consider the practice of legislator-led prayer and the opposing analytical approaches taken by the Fourth and Sixth Circuits to craft a solution to the unresolved questions concerning legislator-led prayer and the Establishment Clause. The first part of this Note will review the history of legislative prayer in Establishment Clause jurisprudence to provide a historical and legal context for the practice of legislative prayer. This part will primarily focus on the analytical frameworks the Supreme Court developed in the two cardinal cases on legislative prayer: *Marsh v. Chambers* and *Town of Greece v. Galloway*.

The second part of this Note will examine the current circuit split regarding legislator-led prayer and the Supreme Court's subsequent denial of certiorari. Although the Fourth and Sixth Circuits applied the tests articulated in *Marsh* and *Town of Greece*, they came to diametrically opposed conclusions because they disagreed on whether the identity of the prayer-giver should be given any weight in the historical and coercion analyses from *Marsh* and the coercion analysis from *Town of Greece*.[10] Furthermore, the Circuits disagreed about the coercive effect of legislators leading prayers according to a single religious tradition.[11]

The third part of this Note will consider a solution to the questions of the extent to which coercion, the identity of the prayer-giver, and religious uniformity should be considered in the legislator-led prayer analysis. After considering whether the prayer practice falls into the established historical practice of legislative prayer outlined in *Marsh* and *Town of Greece*, courts should consider whether the practice is coercive. A prayer practice is coercive if (1) legislators and the public attending the session are required to participate in the prayer; (2) the prayer proselytizes, denigrates other religious beliefs, or

5. *See, e.g.*, Hill, *supra* note 4, at 28.
6. Lund v. Rowan Cty., 863 F.3d 268, 272 (4th Cir. 2017).
7. Bormuth v. Cty. of Jackson, 870 F.3d 494, 497–98 (6th Cir. 2017).
8. *See* Rowan Cty. v. Lund, 138 S. Ct. 2564, 2567 (2018) (Thomas, J., dissenting).
9. Bormuth v. Jackson Cty., 138 S. Ct. 2708, 2708 (2018); *Rowan Cty.*, 138 S. Ct. at 2564.
10. *See Bormuth*, 870 F.3d at 509–12; *Lund*, 863 F.3d at 278, 281.
11. *See Bormuth*, 870 F.3d at 514; *Lund*, 863 F.3d at 281–82.

promotes membership in a particular religion; or (3) a citizen or government official's participation in or dissent from the prayer opportunity influences the governing body's decisions.[12] The identity of the prayer-giver should not be a factor in the analysis because legislator-led prayer has consistently been part of the legislative prayer tradition and is unrelated to voluntariness, the existence of proselytization, and whether the government uses participation in the prayer to allocate government benefits and burdens.[13] Courts should only consider the uniformity of prayer-givers' religious traditions to the extent that it is relevant to determining whether the prayer opportunity has been exploited to proselytize.[14] If the legislative body retains a policy of nondiscrimination concerning the religious belief—or lack thereof—of prayer-givers, mere uniformity of religious traditions represented in the prayer opportunities should not be sufficient to render the prayer practice unconstitutional.[15]

I: THE HISTORY OF LEGISLATIVE PRAYER IN ESTABLISHMENT CLAUSE JURISPRUDENCE

A. *The Founding to the Twentieth Century*

The American tradition of legislative prayer began in the colonial period when legislatures would open their sessions with prayers led by a paid chaplain.[16] Later, the Continental Congress continued this practice by opening its sessions with prayers led by a paid Anglican chaplain.[17] Although legislative prayer was rooted in the established churches of colonial America, it was not abandoned by local, state, and federal legislatures after the United States gained independence from Great Britain.[18] On the federal level, in the same week the First Congress finalized the language of the First Amendment—including the Establishment Clause—it passed a bill establishing the office of chaplain and authorizing the chaplain's salary to be

12. *See* Town of Greece v. Galloway, 572 U.S. 565, 588 (2014).

13. *See Bormuth*, 870 F.3d at 509–12.

14. *Id.* at 512–15; *see also Town of Greece*, 572 U.S. at 579–81.

15. *Bormuth*, 870 F.3d at 514.

16. Marsh v. Chambers, 463 U.S. 783, 786–88 (1983); *see also* Epstein, *supra* note 3, at 2104.

17. *Marsh*, 463 U.S. at 787 (citing 1 J. CONTINENTAL CONG. 26 (1774); 2 J. CONTINENTAL CONG. 12 (1775); 5 J. CONTINENTAL CONG. 530 (1776); 6 J. CONTINENTAL CONG. 887 (1776); 27 J. CONTINENTAL CONG. 683 (1784)); *see also* Epstein, *supra* note 3, at 2104; Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1177 (2009).

18. *Marsh*, 463 U.S. at 787; *see also* Epstein, *supra* note 3, at 2104.

taken from government funds.[19] The practice of appointing chaplains for the House of Representatives and Senate has continued to the present.[20] Although both houses of Congress have chaplains, the task of opening legislative sessions with prayer has not been exclusively reserved to the hired chaplain; the right has also been given to invited guest chaplains[21] and occasionally legislators have led prayers.[22]

Several state legislatures also continued their colonial legislative prayer practices or adopted a legislative prayer practice before or after attaining statehood.[23] Notably, Virginia's legislature hired a paid chaplain to open its sessions even though it had disestablished its state church prior to the adoption of the First Amendment.[24] Many state legislatures have continued their legislative prayer practices to the present.[25] State legislatures have adopted a variety of prayer practices, including paid chaplaincies, inviting guest chaplains, and legislator-led prayer.[26]

Despite its longevity, legislative prayer has been subject to criticism and debate since the Founding Era.[27] At the First Continental Congress, before hiring a chaplain to open the sessions with prayer, the delegates debated the wisdom of opening the sessions with sectarian prayer because the delegates

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19. *Marsh*, 463 U.S. at 787–88; *see also* Epstein, *supra* note 3, at 2104; Lund, *supra* note 17, at 1184; Kathleen Walsh, *The Establishment Clause and Legislative Prayer: Differentiating Tradition from Religion*, 4 FAULKNER L. REV. 485, 489 (2013).

20. *Chaplains of the House*, HIST., ART & ARCHIVES: U.S. HOUSE REPRESENTATIVES, https://history.house.gov/People/Office/Chaplains/ (last visited Feb. 4, 2020) (listing the chaplains of the United States House of Representatives from 1789 to the present); *Senate Chaplain*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm (last visited Feb. 1, 2020) (listing the chaplains of the United States Senate from 1789 to the present); *see also Bormuth*, 870 F.3d at 510.

21. *Guest Chaplains*, OFF. CHAPLAIN: U.S. HOUSE REPRESENTATIVES, https://chaplain.house.gov/chaplaincy/guest_chaplains.html (last visited Feb. 1, 2020); *see also* Brief for Members of Congress as Amici Curiae in Support of Rowan Cty. at *7–*8, Lund v. Rowan Cty., 863 F.3d 268 (4th Cir. 2017) (No. 15-1591), 2015 WL 4692469.

22. 2 ROBERT C. BYRD, THE SENATE, 1789-1989, 297, 305 (1982), https://www.senate.gov/artandhistory/history/resources/pdf/Chaplain.pdf; *see also Bormuth*, 870 F.3d at 509–10; Brief for Members of Congress, *supra* note 21, at *6–*8.

23. *Marsh*, 463 U.S. at 788–89; *see also* Rose, *supra* note 3, at 186.

24. *Marsh*, 463 U.S. at 787 n.5.

25. Brief for State of W. Va. and 12 Other States as Amici Curiae Supporting Defendant-Appellant at *12–*19, Lund v. Rowan Cty., 863 F.3d 268 (4th Cir. 2017) (No. 15-1591), 2015 WL 4692469; *see also* Brief for the National Conference of State Legislatures as Amicus Curiae Not Supporting Either Party at *2–*3, *Marsh*, 463 U.S. at 783 (No. 82–83), 1982 WL 1034560.

26. Brief for Members of Congress, *supra* note 21, at *7–*11; *see also* Brief for the National Conference of State Legislatures, *supra* note 25, at *2–*6.

27. Lund, *supra* note 17, at 1184–87; Walsh, *supra* note 19, at 489–90; *see also Marsh*, 463 U.S. at 788 n.10, 791–92; Slovek, *supra* note 4, at 157 n.3.

held a variety of religious beliefs.[28] Although there is no record of the First Congress's debate on legislative prayer, subsequent Congresses have debated the practice.[29] For example, in 1853, members of the Senate proposed abolishing its chaplaincy and legislative prayer practice.[30] The Senate Judiciary Committee determined the chaplaincies did not violate the Establishment Clause because they did not establish a national church and the First Congress "could not have intended the First Amendment to forbid legislative prayer or viewed prayer as a step toward an established church."[31]

B. *Marsh v. Chambers*

Perhaps the most significant development in modern Establishment Clause jurisprudence occurred in 1971 when the Supreme Court decided *Lemon v. Kurtzman* and established a new test to determine whether a state or the federal government violated the Establishment Clause.[32] Following *Lemon*, lower courts struggled to apply the standard to various traditional practices—including religious themes in official or patriotic rituals, songs, and monuments—resulting in inconsistent application of the *Lemon* test.[33] However, it was not until 1982 that a federal court considered applying *Lemon* to legislative prayer.[34]

The following year, the Supreme Court held that legislative prayer did not violate the Establishment Clause in the landmark decision *Marsh v. Chambers*.[35] Since 1855, the Nebraska State Legislature appointed a paid chaplain to open its sessions with prayer.[36] Twice a year, a committee would appoint a minister to serve as chaplain.[37] In 1965, the committee appointed a

28. *Marsh*, 463 U.S. at 791–92.

29. *Id.* at 788 n.10.

30. *Id.*

31. *Id.*

32. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) ("First, the [government action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion[;] . . . finally, the [government action] must not foster 'an excessive government entanglement with religion.'" (citations omitted)).

33. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J. L. & PUB. POL'Y 219, 228–31 (2008).

34. Chambers v. Marsh, 675 F.2d 228, 233–34 (8th Cir. 1982); *see also* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 983 (2010) (describing "the contrast between principle and practice" in Establishment Clause jurisprudence prior to the Eighth Circuit's decision in *Marsh*).

35. *Marsh*, 463 U.S. at 784.

36. *Id.* at 784–85, 789–91.

37. *Id.* at 784–85.

Presbyterian minister and renewed his appointment every two years for the next sixteen years.[38]

In 1980, a member of the Nebraska State Legislature brought an action under 42 U.S.C. § 1983, arguing Nebraska's chaplaincy practice violated the Establishment Clause because the continually appointed, paid chaplain delivered his prayers according to the Judeo-Christian tradition.[39] The district court upheld the prayer practice but enjoined payment of the chaplain using public funds.[40] On appeal, the Eighth Circuit applied the *Lemon* test and held that the chaplaincy practice as a whole violated the Establishment Clause.[41]

On certiorari, however, the Supreme Court declined to apply *Lemon* because of legislative prayer's "unique history."[42] In the majority opinion, Chief Justice Burger traced the history of legislative prayer from its colonial origins, its adoption by the Continental Congress and the First Congress, and its continuation by federal and state legislatures.[43] The majority emphasized that the First Congress authorized paid legislative chaplains and finalized the wording of the Establishment Clause within the same week, suggesting that the drafters did not intend the Establishment Clause to forbid the practice of legislative prayer by paid chaplains.[44]

Although the Court cautioned that "historical patterns [alone] cannot justify contemporary violations of constitutional guarantees,"[45] it found that an unbroken practice revealing the Framers' intent could not "be lightly cast aside."[46] The historical debates concerning legislative prayer revealed that the Framers did not consider the practice as "placing the government's 'official seal of approval on one religious view.'"[47] Instead, the Framers found "invok[ing] Divine guidance on a public body entrusted with making the laws" to be "a tolerable acknowledgment of beliefs widely held among the people of this country."[48] Therefore, the Court concluded that legislative prayer—even from a single religious perspective—generally did not violate the

38. *Id.* at 785.
39. *Id.* at 785, 793.
40. *Id.* at 785.
41. *Id.* at 785–86.
42. *See id.* at 791.
43. *Id.* at 786–92.
44. *Id.* at 787–88, 790.
45. *Id.* at 790.
46. *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 644, 678 (1970)).
47. *Id.* at 792 (quoting Chambers v. Marsh, 675 F.2d 228, 234 (8th Cir. 1982)).
48. *Id.*

Establishment Clause unless the legislative body had an impermissible motive, such as proselytization.[49]

After evaluating the Nebraska State Legislature's prayer and chaplaincy practices within the historical tradition of legislative prayer, the Court concluded that Nebraska's practices did not violate the Establishment Clause.[50] Since the committee appointed the minister for his satisfactory performance and the legislature periodically allowed guest chaplains to open sessions with prayer, the Court did not find the length of the minister's tenure problematic.[51] Further, the chaplain's salary did not run afoul of the Establishment Clause because compensation had been part of the historical practice.[52] Finally, the Court held "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[53]

C. *Town of Greece v. Galloway*

In the wake of *Marsh*, lower federal courts disagreed on how to apply the decision to different legislative prayer practices.[54] Particularly, the courts struggled to apply *Marsh* to sectarian prayer in light of a statement in the Supreme Court's opinion, *County of Allegheny v. ACLU*, that the legislative prayer in *Marsh* did not violate the Establishment Clause because it "had 'removed all references to Christ.'"[55] In 2014, responding to the varying interpretations of *Marsh*, the Supreme Court revisited legislative prayer in *Town of Greece v. Galloway*.[56]

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49. *Id.* at 793–95.

50. *Id.*

51. *Id.* at 793–94.

52. *Id.* at 794.

53. *Id.* at 794–95.

54. *See* Wynne v. Town of Great Falls, 376 F.3d 292, 298–99 (4th Cir. 2004) (finding sectarian prayers that mentioned the name of Jesus Christ advanced Christianity over other religions and violated the Establishment Clause); Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ., 52 F. App'x 355, 356 (9th Cir. 2002) (holding in an unpublished opinion that prayer "in the Name of Jesus" violated the Establishment Clause because it advanced one faith). *But see* Newdow v. Bush, 355 F. Supp. 2d 265, 289 (D.D.C. 2005) (denying a preliminary injunction against sectarian religious prayer because sectarian references alone are not sufficient to constitute proselytization). *See generally* Hill, *supra* note 4, at 10–19.

55. Cty. of Allegheny v. ACLU, 492 U.S. 573, 603 (1989) (quoting *Marsh*, 463 U.S. at 793 n.14); *see also* Town of Greece v. Galloway, 572 U.S. 565, 573–74 (2014) (quoting Galloway v. Town of Greece, 732 F. Supp. 2d 195, 223 (W.D.N.Y. 2010) (quoting *Allegheny*, 492 U.S. at 603)).

56. *Town of Greece*, 572 U.S. at 569–70.

Greece, a small, predominantly Christian town in New York, opened its town board meetings with a prayer led by a guest chaplain as an opportunity to "place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures."[57] The guest chaplains would lead the prayer after the roll call and the recitation of the Pledge of Allegiance.[58] To find guest chaplains, an employee would call congregations listed in the town directory until someone agreed to serve; as an inadvertent result, the guest chaplains were generally Christians who prayed according to their own religious beliefs, sometimes speaking "in a distinctly Christian idiom[]" and inviting all present to join in the prayer.[59]

After receiving complaints, the town board stated that it would allow any minister or layperson of any faith or no faith to deliver the opening invocation.[60] The town never denied a volunteer prayer-giver the opportunity to give the invocation regardless of the prayer-giver's beliefs.[61] After this clarification, guest chaplains included a Baha'i leader, a Jewish layman, and a Wiccan priestess.[62]

However, the plaintiffs brought an action against the town of Greece in federal court seeking to "limit the town to 'inclusive and ecumenical' prayers that referred only to a 'generic God' and would not associate the government with any one faith or belief."[63] The district court held that the Establishment Clause did not require legislative prayer to be nonsectarian as long as the prayer opportunity did not proselytize.[64] On appeal, the Second Circuit reversed and held that the prayer policy violated the Establishment Clause because it ensured an exclusively Christian viewpoint, created an atmosphere of subtle coercion, and failed to achieve religious balancing.[65] Ultimately, a divided Supreme Court reversed the Second Circuit's judgment and found that Greece's prayer practice did not violate the Establishment Clause.[66] However,

57. *Id.* at 570–71.

58. *Id.* at 570.

59. *Id.* at 571–72; *see also id.* at 593 (Alito, J., concurring) (explaining that all the guest chaplains were Christian because the town directory only listed congregations with addresses in Greece and all the local non-Christian congregations had Rochester addresses).

60. *Id.* at 593–94 (Alito, J., concurring).

61. *Id.* at 571.

62. *Id.* at 572.

63. *Id.* at 572–73 (quoting Galloway v. Town of Greece, 732 F. Supp. 2d 195, 210, 241 (W.D.N.Y. 2010)).

64. *Id.* at 573 (citing Marsh v. Chambers, 463 U.S. 783, 794–95 (1983)).

65. *Id.* at 574 (citing Galloway v. Town of Greece, 681 F.3d 20, 34 (2d Cir. 2012)).

66. *Id.* at 574–75.

the Court did not produce a unified majority opinion; Justice Kennedy wrote for the plurality and Justice Thomas wrote for the main concurrence.[67]

Like in *Marsh*, the Supreme Court declined to apply *Lemon* to legislative prayer.[68] While not as well-documented as federal and state legislative prayer, the plurality found the practice of opening local legislative meetings with prayer "ha[d] historical precedent."[69] In Part II-A of Justice Kennedy's opinion—in which Chief Justice Roberts and Justices Scalia, Alito, and Thomas joined—the Court found Greece's prayer policy consistent with the historical practice of legislative prayer because, in the limited context of opening legislative sessions, sectarian prayers can "coexis[t] with the principles of disestablishment and religious freedom."[70] The Court reasoned that the growth of the historical tradition "acknowledges our growing diversity not by proscribing sectarian content[,] but by welcoming ministers of many creeds."[71]

In Part II-A, Justice Kennedy reasoned that requiring all prayer-givers to deliver nonsectarian invocations would make legislatures and courts "act as supervisors and censors of religious speech," thereby running afoul of both the Establishment Clause, by mandating a "civic religion," and the Free Exercise Clause, by preventing the individual prayer-givers from exercising their religious beliefs.[72] Justice Kennedy concluded that the only relevant restrictions on the content of the prayer are that the prayer "invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing" and does not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."[73]

The Court also rejected the Second Circuit's view that the town's prayer policy violated the Establishment Clause by failing to achieve religious balancing.[74] Although most of the guest chaplains were Christian, the Court held that the Constitution did not "require [the town] to search beyond its borders for non-Christian prayer-givers in an effort to achieve religious balancing" because "[t]he quest to promote 'a "diversity" of religious views' would require the town 'to make wholly inappropriate judgments about the

67. *See id.* at 569 (plurality opinion); *id.* at 604 (Thomas, J., concurring in part and concurring in the judgment).

68. *See id.* at 575–77 (plurality opinion).

69. *Id.* at 576.

70. *Id.* at 578 (alteration in original) (quoting Marsh v. Chambers, 463 U.S. 783, 786 (1983)).

71. *Id.* at 579.

72. *Id.* at 581.

73. *Id.* at 582–83.

74. *Id.* at 585–86.

number of religions [it] should sponsor and the relative frequency with which it should sponsor each.'"[75]

Next, the Court considered the plaintiffs' argument that Greece's prayer policy did not conform to the historical practice of legislative prayer because town board meetings, unlike state and federal legislative sessions, created "social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who . . . will vote on matters citizens bring before the board."[76] Both the plurality and the concurrence rejected this argument because legislative prayer is not directed to the public present at the town board meetings as an attempt to promote religious observance.[77] Rather, legislative prayer is directed to the lawmakers as a call to a higher purpose which may be "an opportunity for them to show who and what they are without denying the right to dissent by those who disagree."[78]

Despite agreeing that Greece's prayer policy conformed to the historical practice of legislative prayer, the plurality and main concurrence diverged in determining the proper test for coercion in the legislative prayer context.[79] The plurality held a prayer practice would violate the Establishment Clause if it was coercive.[80] The prayer practice would be coercive "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."[81] Although the board members stood, bowed their heads, and otherwise actively participated in the prayers, Greece's town board did not tell the public to participate.[82] The plurality found the guest ministers' invitations to rise and join in the prayer were not coercive because the invitations were customary and may have been made in a spirit of inclusion.[83] The plurality also noted that the record did not support any assertions that the town board members singled out those who declined to participate in the prayers or "allocated benefits and burdens based

75. *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 617 (1992) (Souter, J., concurring) (second alteration in original)). The Court noted the government must maintain a policy of nondiscrimination. *Id.* at 585.

76. *Id.* at 577.

77. *Id.* at 587–88.

78. *Id.* at 588.

79. *See id.* at 604 (Thomas, J., concurring in part and concurring in the judgment).

80. *Id.* at 586–87 (plurality opinion).

81. *Id.* at 588.

82. *Id.* at 588–89.

83. *Id.*

on participation in the prayer."[84] Therefore, the practice was not coercive and did not violate the Establishment Clause.[85]

In Justice Thomas's concurrence, he and Justice Scalia rejected the plurality's coercion analysis.[86] First, they argued the Establishment Clause is a federalism provision that prohibits the federal government from establishing a national religion; therefore, the Establishment Clause does not protect individual rights and should not be applied against the states by Fourteenth Amendment incorporation.[87] However, the concurrence found that even if the Establishment Clause applies to the States, it prohibits only "actual legal coercion" by compelling "financial support of the church, . . . religious observance, or control [of] religious doctrine."[88]

II. THE QUESTION OF LEGISLATOR-LED PRAYER

In the wake of *Marsh* and *Town of Greece*, lower federal courts have wrestled with the appropriate application of the *Marsh*/*Town of Greece* framework to local practices that restrict prayer-givers to members of the legislative body because of the prayer-givers' identities as government officials and the potential for religious uniformity among prayer-givers.[89] Two competing schools of thought have emerged—one is embodied in the Fourth Circuit's majority opinion in *Lund v. Rowan County* and the other in the Sixth Circuit's majority opinion in *Bormuth v. County of Jackson*.[90] While the Fourth Circuit has held the identity of the prayer-giver and the uniformity of religious beliefs represented among prayer-givers are relevant to both the historical and coercion analyses, the Sixth Circuit has held neither are relevant.[91]

84. *Id.* at 589.

85. *Id.* at 591–92.

86. *See id.* at 604–10 (Thomas, J., concurring in part and concurring in the judgment).

87. *Id.* at 604–07.

88. *Id.* at 608 (citing Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 (2004)) (quotation marks omitted).

89. *See* Bormuth v. Cty. of Jackson, 870 F.3d 494, 497–98 (6th Cir. 2017); Lund v. Rowan Cty., 863 F.3d 268, 271–72 (4th Cir. 2017).

90. *Bormuth*, 870 F.3d at 509–15; *Lund*, 863 F.3d at 279–80, 289–90.

91. *Bormuth*, 870 F.3d at 509–15; *Lund*, 863 F.3d at 279–80, 289–90.

A. *Lund v. Rowan County*

In *Lund*, the Board of Commissioners consistently opened their bimonthly meetings with a brief prayer.[92] Unlike the Nebraska State Legislature in *Marsh* and the town board in *Town of Greece*, the five board members rotated the prayer opportunity amongst themselves and did not permit any guests to offer the prayer.[93] After calling the meeting to order, a board member would invite those present to rise, deliver the prayer, and recite the Pledge of Allegiance; then, the board would begin the business portion of the meeting.[94] All of the board members were Christian and offered mostly Christian prayers.[95]

Prior to *Town of Greece*, the *Lund* plaintiffs brought suit against Rowan County in federal court and argued the prayer practice violated the Establishment Clause because it advanced and entangled the government with Christianity and "coerced the [public] into participating in religious exercises."[96] Further, the plaintiffs asserted the board members' "prayers 'sen[t] a message that the County and the Board favor Christians' and caused the plaintiffs to feel 'excluded from the community and the local political process.'"[97] The district court preliminarily enjoined Rowan County's prayer practice based on the then-current case law finding sectarian legislative prayer unconstitutional under the Establishment Clause.[98]

After *Town of Greece*, the district court permanently enjoined the prayer practice because "the practice was unconstitutionally coercive and 'deviate[d] from the long-standing history and tradition' of legislative prayer."[99] On appeal, the Fourth Circuit panel reversed the district court's judgment and upheld the prayer practice because "the identity of the prayer-giver was not 'a significant constitutional distinction.'"[100] On rehearing en banc, however, the Fourth Circuit affirmed the district court's judgment.[101] In its decision, the majority focused on four aspects of Rowan County's prayer practice: (1) the

92. *Lund*, 863 F.3d at 272.

93. *Id.* at 272–73.

94. *Id.* at 272.

95. *Id.* at 273–74.

96. *Id.*

97. *Id.* at 274 (alteration in original) (citations omitted).

98. *Id.*; *see also id.* at 301 (Agee, J., dissenting) ("Plaintiffs successfully obtained a preliminary injunction based on now-abrogated case law from this Court which had held that sectarian legislative prayer violated the Establishment Clause.").

99. *Id.* at 274 (alteration in original) (quoting Lund v. Rowan Cty., 103 F. Supp. 3d 712, 723 (M.D.N.C. 2015)).

100. *Id.* at 274–75 (quoting Lund v. Rowan Cty., 837 F.3d 407, 420 (4th Cir. 2017)).

101. *Id.* at 275.

commissioners' role as sole prayer-givers, (2) the sectarian nature of the prayers given, (3) the commissioners' invitations to the attendees to join in the prayers, and (4) the local government setting.[102]

First, the Fourth Circuit found restricting the pool of prayer-givers to the elected commissioners was problematic because the government itself, through the commissioners, selected the prayers to be said before the board meetings.[103] The Fourth Circuit found the government was deeply involved in impermissible "select[ion] and prescri[ption of] sectarian prayers" because the commissioners "maintain[ed] exclusive and complete control over the content of the prayers."[104] Also, restricting the prayer-givers to the commissioners effectively restricted the number of faiths represented in the prayer opportunity, made the content of the prayers dependent solely on election outcomes, and insulated the Board of Commissioners from citizens' requests to diversify the prayer content.[105] Because only elected commissioners could offer prayers in their preferred tradition, the Fourth Circuit was concerned that the Board of Commissioners sent a message of preference for the religious majority and that the religious preference of candidates for the office of commissioner would become an election issue.[106]

Second, the majority found the practice "link[ed] [the government] persistently and relentlessly to a single faith" since all the commissioners were Protestant Christians, their prayers explicitly referenced Christian themes, and their prayers sometimes promoted adherence to Christianity.[107] The Fourth Circuit found that the consistent and exclusive invocation of Christianity in the prayers before board meetings would lead a reasonable observer to conclude that Protestant Christianity is "to be perceived as the [government's] one true faith."[108] Because the prayers "characteriz[ed] the political community as a Christian one" and implicitly established religious orthodoxy, the Fourth Circuit found that Rowan County's prayer practice was used over time to advance Christianity.[109] Therefore, Rowan County's prayer practice did not fall within the tradition of legislative prayer described in *Town of Greece*.[110]

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102. *Id.* at 281.
103. *Id.*
104. *Id.* (second alteration in original) (quoting *Lund*, 837 F.3d at 434 (Wilkinson, J., dissenting)).
105. *Id.* at 281–82.
106. *Id.* at 282.
107. *Id.* at 283–86.
108. *Id.* at 284 (quoting *Lund*, 837 F.3d at 434 (Wilkinson, J., dissenting)).
109. *Id.* at 286.
110. *Id.* at 286–87.

Third, the Fourth Circuit found that because the commissioners invited the audience to participate in the prayer, the government acted "to promote religious observance among the public."[111] Although the Supreme Court did not find guest ministers' invitations to be problematic in *Town of Greece*, the Fourth Circuit distinguished the commissioners' invitations to prayer because such invitations, while reflexive for guest ministers, become requests to participate on behalf of the state when given by government officials.[112]

Fourth, the Fourth Circuit found the local government setting presented a "heightened potential for coercion" because the legislators offered prayers immediately before deciding on citizen petitions.[113] Further, the intimacy of town board meetings may have compelled dissenters to participate or feign participation in the prayer to avoid offending the officials deciding on their petitions and the community at large.[114] While dissenters could arrive late or remain quietly seated during the prayer, these options "serve[] only to marginalize" and, therefore, failed to "advance[] 'the core idea behind legislative prayer, "that people of many faiths may be united in a community of tolerance and devotion."'"[115]

Finally, the Fourth Circuit dismissed Rowan County's arguments because they failed to take into account the totality of the circumstances, rendering the legislative prayer analysis toothless.[116] Further, the Fourth Circuit found any distinction between the commissioners' individual acts and official acts could not withstand scrutiny because the commissioners' power to offer prayers was one of the commissioners' official duties.[117] Therefore, the Fourth Circuit held the practice of legislator-led prayer unconstitutional under the Establishment Clause.[118]

B. *Bormuth v. County of Jackson*

The Sixth Circuit took a different approach in its decision in *Bormuth v. County of Jackson*.[119] Although the Sixth Circuit recognized the Fourth

111. *Id.* at 287 (quoting Town of Greece v. Galloway, 572 U.S. 565, 588 (2014)).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 288, 289 (quoting Lund v. Rowan Cty., 837 F.3d 407, 438 (4th Cir. 2016) (Wilkinson, J., dissenting)).

116. *Id.* at 289.

117. *Id.* at 289–90.

118. *Id.* at 291–92.

119. *See* Bormuth v. Cty. of Jackson, 870 F.3d 494 (6th Cir. 2017).

Circuit's decision in *Lund*, it expressly rejected the Fourth Circuit's analysis as it applied to *Bormuth*.[120]

Jackson County's prayer practice and the religious identity of its county commissioners were virtually identical to those in Rowan County.[121] Before the Supreme Court decided *Town of Greece*, the plaintiff brought suit against Jackson County in federal court, alleging that Jackson County's prayer practice violated the Establishment Clause.[122] After *Town of Greece*, the district court granted summary judgment for Jackson County, and the plaintiff appealed on the merits and discovery grounds.[123] A panel of the Sixth Circuit reversed the district court's judgment on the merits, and the Sixth Circuit sua sponte granted a rehearing en banc.[124] After dismissing the discovery issues,[125] the Sixth Circuit considered the constitutionality of Jackson County's prayer practice and affirmed the district court's judgment.[126] The Sixth Circuit rejected the plaintiff's arguments that legislator-led prayer was unconstitutional per se and that the particular practice endorsed Christianity because these arguments were narrow and unsupported by the historical record, *Marsh*, and *Town of Greece*.[127]

First, the Sixth Circuit held that the prayer-givers' identities as government officials did not necessarily render legislator-led prayer unconstitutional because of the uninterrupted historical practice of legislator-led prayer.[128] Further, legislator-led prayer harmonized with the purpose of legislative prayer because it allowed legislators to actively participate in the historical tradition and more meaningfully accommodate their spiritual needs by allowing them to offer prayers according to their personally held religious

120. *Id.* at 509 n.5 ("We recognize our view regarding Jackson County's invocation practice is in conflict with the Fourth Circuit's recent en banc decision. . . . However, for the reasons stated in the text of this opinion, and as more fully explained by the dissenting judges in *Lund*, . . . we find the Fourth Circuit's majority en banc opinion unpersuasive.").

121. *See id*. at 498 (after the call to order, the chairperson invited those present to stand and one of the nine commissioners led a prayer; commissioners were the only people able to offer prayers; all the commissioners were Christian and offered prayers according to their personal religious practice).

122. *Id.* at 499.

123. *Id.*

124. *Id.*

125. *See id*. at 499–502.

126. *Id.* at 503–19.

127. *Id.* at 509.

128. *Id.* at 509–12.

beliefs.[129] Therefore, the Sixth Circuit found the prayer-givers' identities as legislators irrelevant to the *Marsh*/*Town of Greece* historical analysis.[130]

Next, the Sixth Circuit rejected the plaintiff's argument that the prayers' sectarian nature endorsed Christianity and rendered the practice unconstitutional.[131] Jackson County's prayer policy was facially neutral because it did not require prayers according to a particular faith and each commissioner was allowed to pray according to the dictates of his or her own conscience.[132] The Sixth Circuit found that, although all the commissioners were Christians, the policy would not prevent a newly-elected, non-Christian commissioner from offering prayers or invocations according to his or her conscience.[133] The plaintiff did not provide any convincing evidence that the practice was used over time to denigrate other religions or proselytize.[134] Because the policy was facially neutral and a person of any or no faith may be elected to the Board of Commissioners, the Sixth Circuit did not consider the uniformity of the commissioners' religious tradition to be problematic.[135] The Sixth Circuit also found that considering the religious content of the prayers imports the *Lemon* endorsement test into the legislative prayer analysis, contradicting the Supreme Court's rejection of the *Lemon* test in legislative prayer cases.[136]

Lastly, the Sixth Circuit considered whether Jackson County's prayer practice was coercive under both the plurality and concurrence coercion tests in *Town of Greece*.[137] Under the plurality analysis, the Sixth Circuit rejected the plaintiff's argument that the commissioners' requests for attendees to rise made the prayer practice coercive because the requests were polite, made to adults, and were "commonplace" among people of faith.[138] Moreover, the Sixth Circuit found no significant constitutional difference between a commissioner and an invited chaplain offering a prayer because "the Commissioners are equally capable of observing those who comply and those

129. *Id.* at 511.

130. *Id.* at 509–12.

131. *See id.* at 512–13.

132. *Id.* at 514.

133. *Id.* at 513–14.

134. *Id.* at 512–13.

135. *Id.* at 514.

136. *Id.* at 514–15.

137. *Id.* at 515–16 ("On the issue of coercion, the *Town of Greece* decision produced a majority result, but not a majority rationale. . . . In our panel opinion, we were divided regarding whether Justice Kennedy's three-Justice plurality opinion or Justice Thomas's two-Justice concurring opinion controls . . . the question of coercion. . . . Because Bormuth's challenge fails under either standard, we need not resolve this issue.").

138. *Id.* at 517 (quoting Town of Greece v. Galloway, 572 U.S. 565, 599 (2014) (Alito, J., concurring)).

who do not" regardless of who offers the prayer.[139] Therefore, the risk of prejudice to a dissenter's petition would be no greater if a commissioner or a chaplain asks those present to rise.[140] Further, the commissioners did not single out dissenters and demand that they rise, remain in the room, or participate in the prayer.[141] Therefore, the Sixth Circuit found the commissioners' requests to rise did not constitute coercion under the *Town of Greece* plurality analysis.[142]

Moreover, the Sixth Circuit dismissed plaintiff's argument that certain commissioners' negative reactions to the plaintiff demonstrated a pattern of coercion.[143] The court found the incidents did not amount to coercion because they were isolated, unrelated to the plaintiff's religious views or dissent from the prayer policy, and, at worst, reflected individual commissioners' dislike of the manner in which plaintiff conducted litigation that did not reflect the attitude of the Board of Commissioners as a whole.[144]

Next, the Sixth Circuit dismissed plaintiff's argument that Jackson County's prayer practice was coercive because the commissioners impermissibly considered his non-participation in the prayers when they denied his applications for county jobs.[145] The Sixth Circuit noted that the plaintiff failed to provide evidence that the Board rejected his applications out of animosity toward the plaintiff's religious beliefs or refusal to participate in the prayers.[146]

Lastly, the Sixth Circuit briefly analyzed the plaintiff's arguments under Justice Thomas's concurrence in *Town of Greece*.[147] Because the plaintiff did not allege actual legal coercion and no actual legal coercion existed, the Sixth Circuit concluded that the plaintiff's challenge failed under the concurrence coercion test.[148] Therefore, the Sixth Circuit upheld Jackson County's prayer practice and split with the Fourth Circuit concerning the constitutionality of legislator-led prayer under the Establishment Clause.[149]

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139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 517–18.
144. *Id.*
145. *Id.* at 518–19.
146. *Id.* at 519.
147. *Id.*
148. *Id.*
149. *Id.*

C. *Denial of Certiorari*

In the wake of the appellate decisions in *Lund* and *Bormuth*, the parties filed petitions for certiorari.[150] On June 28, 2018, the Supreme Court denied certiorari in both cases.[151] Justices Thomas and Gorsuch dissented from the denial of certiorari in *Rowan County* and Justice Thomas wrote, "[t]he Fourth Circuit's decision is both unfaithful to our precedents and ahistorical. It also conflicts with a recent en banc decision of the Sixth Circuit."[152]

As a result of the denial of certiorari, the circuit split over legislator-led prayer continues.[153] While legislators in the Sixth Circuit are able to continue leading prayers before their legislative sessions, legislators in the Fourth Circuit are constitutionally prohibited from leading identical prayers before their legislative sessions.[154] Because questions regarding the validity of a government practice under the Establishment Clause are divisive and the circuit split has caused a substantial conflict of interpretation,[155] federal courts should adopt a uniform test that allows legislators to participate in the legislative prayer tradition without running afoul of the Establishment Clause.

III. RESOLVING THE CIRCUIT SPLIT

Since the circuit courts' decisions in *Lund* and *Bormuth* and the Supreme Court's denial of certiorari, legal scholars have considered how to approach legislator-led prayer under the Establishment Clause.[156] Common questions concern whether and to what extent coercion, the prayer-giver's identity as a government official, and the religious uniformity of the legislators' prayers should be considered.[157]

Some commentators follow the Fourth Circuit's reasoning in *Lund*, arguing that "allowing the elected commissioners themselves to give the prayers moves the practice outside of the unique history of *Marsh* . . . [and] *Town of Greece*[.]" Additionally, a selection policy that includes legislator

150. *See* Bormuth v. Jackson Cty., 138 S. Ct. 2708, 2708 (2018); Rowan Cty. v. Lund, 138 S. Ct. 2564, 2564 (2018).

151. *Bormuth*, 138 S. Ct. at 2708; *Rowan Cty.*, 138 S. Ct. at 2564.

152. *Rowan Cty.*, 138 S. Ct. at 2566 (Thomas, J., dissenting).

153. *Id.* at 2567 (Thomas, J., dissenting).

154. *Id.* (Thomas, J., dissenting).

155. *See id.* (Thomas, J., dissenting).

156. *See generally* John Gavin, *Praying for Clarity:* Lund, Bormuth, *and the Split Over Legislator-Led Prayer*, 59 B.C. L. REV. E. SUPP. 103 (2018); Hill, *supra* note 4; Robert W. T. Tucci, *A Moral Minefield: Resolving the Dispute Over Legislator-Led Invocations*, 53 WAKE FOREST L. REV. 601 (2018).

157. *See generally* Gavin, *supra* note 156; Hill, *supra* note 4; Tucci, *supra* note 156.

prayer-givers is problematic, and the prayer-givers' identities as government officials "creates an environment where citizens would feel coerced to participate."[158] They recommend distinguishing legislator-led prayer from other kinds of legislative prayer because the government, through its officials, reviews and selects prayers to be offered[159] and the circumstances surrounding an elected official delivering a prayer in a local—rather than federal or State—legislative session make it unclear who the audience of the prayer is and pressure dissenters to conform.[160] In particular, these commentators recommend considering the identity of the prayer-giver and the religious uniformity of prayers offered in the coercion analysis because they argue a reasonable observer would conclude that the government is aligning itself with a particular religion.[161]

Another commentator advocates for the application of strict scrutiny analysis to legislator-led prayer by requiring the government to demonstrate a compelling interest and that the means—legislator-led prayer—is narrowly tailored to further that interest.[162] This commentator suggests that the strict scrutiny standard is the only means of "prevent[ing] the government from creating a *de facto* establishment of religion, and guards against future sectarian tensions caused by . . . legislator-led . . . prayer policies."[163]

However, despite these recommendations, courts should adopt a test that incorporates *Marsh*'s historical analysis and *Town of Greece*'s coercion analysis because these tests acknowledge the significance of legislative prayer's unbroken history—including legislator-led prayer's unbroken history—while also preventing government officials from using legislative prayer to force religious participation on citizens.[164] Because legislator-led prayer is part of the broader historical practice of legislative prayer, [165] the remaining considerations are whether coercion should be considered in the legislative prayer analysis and, if so, the relevance of the prayer-givers' identities as government officials and the uniformity of the prayer-givers' religious perspectives to the coercion analysis.[166]

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158. Hill, *supra* note 4, at 27; *see also* Gavin, *supra* note 156, at 118.

159. Hill, *supra* note 4, at 30–32; *see also* Gavin, *supra* note 156, at 116–18.

160. Hill, *supra* note 4, at 37–40; *see also* Gavin, *supra* note 156, at 116–18.

161. *See* Hill, *supra* note 4, at 37–40; *see also* Gavin, *supra* note 156, at 116–18.

162. Tucci, *supra* note 156, at 620.

163. *Id.*

164. *See* Bormuth v. Cty. of Jackson, 870 F.3d 494, 503–08 (2017); *see also* Town of Greece, 572 U.S. 565, 586–91 (2014); Marsh v. Chambers, 463 U.S. 783, 786–92 (1983).

165. *See Bormuth*, 870 F.3d at 509–11.

166. *Cf. id.* at 515; Gavin, *supra* note 156; Hill, *supra* note 4; Tucci, *supra* note 156.

A. *Coercion*

Courts should apply a coercion analysis to legislative prayer because such an analysis protects against lawmakers' attempts to encourage citizens "to support or participate in any religion or its exercise" without gutting the historically-grounded practice of legislator-led prayer.[167] Applying a coercion analysis to legislative prayer—and legislator-led prayer in particular—would prevent prayer practices that tend toward proselytization and government preference of a particular religion.[168] Although such proselytizing prayers would not constitute a formal establishment of a state church, these practices could effectively respect an establishment of religion if citizens are required to participate in prayers offered at legislative sessions, the legislators actively promote adherence to a particular faith, or government benefits are reserved for those who participate in the prayer opportunity.[169] Therefore, some coercion analysis should be included in determining whether a legislative prayer practice is constitutional. The coercion analysis applied by the plurality in *Town of Greece* and the majority in *Bormuth* adequately protects against lawmakers' attempts to adopt prayer practices that would respect an establishment of religion without placing a blanket prohibition on legislator-led prayer.[170]

First, the *Town of Greece* plurality's coercion test effectively eliminates any prayer practices that over time respect an establishment of religion because prayer practices mandating all lawmakers or members of the public present to participate in the prayer opportunity would fail the first prong.[171] Although elected officials may invite attendees to join in prayer, these requests do not rise to the level of coercion unless the lawmakers exert their official authority to require attendees to arrive on time, remain in the room, rise, or participate in the prayer; monitor participation; or express official disapproval toward non-participants.[172] Because adults are presumed not to be susceptible to peer pressure, even polite requests from elected officials to join in a prayer

167. Cty. of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *see Town of Greece*, 572 U.S. at 586; Van Orden v. Perry, 545 U.S. 677, 683–84 (2005) (plurality opinion).

168. *See Town of Greece*, 572 U.S. at 586–87.

169. *See id.*

170. *See id.* at 586–91; *Bormuth*, 870 F.3d at 515–19.

171. *See Town of Greece*, 572 U.S. at 586–91; *Bormuth*, 870 F.3d at 515–19.

172. *See Bormuth*, 870 F.3d at 508, 517.

should not constitute coercion without consistent representations from the government officials that participation in the prayer is mandatory.[173]

Second, the *Town of Greece* plurality coercion test appropriately balances the free speech rights of prayer-givers with Establishment Clause principles because it only considers the content of the prayers if the prayers (a) call for conversion, (b) expressly denigrate members of other faiths or people without a faith, or (c) expressly promote membership in a particular religion over all others.[174] Limiting review of the content of prayers to these three considerations allows legislators to pray according to their own conscience and addresses two important concerns under the Establishment Clause: preventing government entanglement with religion and endorsement of a religion.[175] The test achieves the first objective by preventing courts and legislatures from imposing a standard of how nonsectarian a prayer must be to be acceptable under the Establishment Clause.[176] The second objective is met by evaluating the content only insofar as it advances one religion over others or tends to encourage membership in a particular religion.[177]

Third, the plurality coercion test prevents government officials from exploiting the prayer opportunity to impose an unofficial religious test upon lawmakers or members of the public to determine allocation of government benefits.[178] To satisfy this part of the coercion test, the plaintiff should demonstrate by a preponderance of the evidence that his or her nonparticipation or dissent from the prayer opportunity actually influenced the governing body's decision because bare assertions and inferences of improper motive do not warrant invalidation of an otherwise acceptable prayer practice.[179] Because various legitimate factors may influence a governing body's decisions to deny a particular proposal or application, the plaintiff should demonstrate more than a subjective belief that his or her nonparticipation caused the governing body to issue an unfavorable decision.[180] For example, the plaintiff should prove that he or she has the

173. *Id.* at 517.

174. *Town of Greece*, 572 U.S. at 583, 585; *Bormuth*, 870 F.3d at 512.

175. *See Town of Greece*, 572 U.S. at 581, 583, 585.

176. *Id.* at 581.

177. *Id.* at 583.

178. *Id.* at 588–89.

179. *Bormuth*, 870 F.3d at 518–19.

180. *See id. But see* Hill, *supra* note 4, at 40 ("People of faith view people without a proclaimed faith differently than other persons of faith. . . . While there is no direct evidence that the Board members . . . treated the petitioner's claims or concerns any differently because of his dissenting views of the prayer practice, there is some evidence that points to the Board members not being happy with the petitioner's dissent. Whether or not the adjudicative results of the petitioner's claims are a direct result of the Board

necessary qualifications to receive a favorable decision from the governing body, but the governing body chose a less-qualified person or referred to the person's religion or nonparticipation in its unfavorable decision.[181]

Therefore, courts should adopt the *Town of Greece* plurality coercion analysis because it prevents legislators from using the tradition of legislative prayer to manipulate other legislators and members of the public into participating in religious exercises while allowing legislators to participate in the tradition in a more personal and meaningful way.[182] The only remaining considerations are the extent to which the identity of the prayer-giver and the religious uniformity of prayers offered by possible prayer-givers should be considered in the coercion analysis.[183]

B. *Identity of the Prayer-Giver*

The Fourth Circuit in *Lund* and commentators focus on prayer-givers' identities as government officials because the government, through its elected officials, selects and approves a particular prayer.[184] Another concern is that legislators will use their authority to coerce those present to participate in religious exercises through their personal invitations for all present to rise and assume a reverent position.[185] The Fourth Circuit and commentators' position is essentially that a legislator's identity as an elected official necessarily renders any prayer offered by the legislator coercive.[186]

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members' prejudice against him is uncertain. However, shouldn't the courts err on the side of the plaintiff's [sic] when a chance of government establishment exists?").

The inference advanced by this argument would allow a constituent's subjective belief that the governing body has discriminated against him or her to constitute a sufficient showing that a governing body had abused its power. Such a paltry showing should not be sufficient to prevent lawmakers from personally participating in the historical tradition of offering prayers and focusing on their shared purpose as lawmakers. Further, this argument is premised on an assumption about religious people that is just as unreliable as the subjective belief the author claims should have constituted sufficient evidence to invalidate the prayer practice—an assumption which may be true in some instances, but is no more than a generalization or stereotype that is insufficient to "cast aside" an unbroken tradition of legislative prayer. *See* Marsh v. Chambers, 463 U.S. 783, 790 (1983).

181. *See Bormuth*, 870 F.3d at 519.

182. *See generally Town of Greece*, 572 U.S. at 588–89; *Bormuth*, 870 F.3d at 511–12, 516.

183. *See generally Bormuth*, 870 F.3d at 509–15; Lund v. Rowan Cty., 863 F.3d 268, 282–86 (4th Cir. 2017).

184. *Lund*, 863 F.3d at 281–82; Hill, *supra* note 4, at 15–16, 29–31; *see also* Gavin, *supra* note 156, at 116–18.

185. Hill, *supra* note 4, at 37–41.

186. *See Lund*, 863 F.3d at 282; Hill, *supra* note 4, at 30–32, 37–38; *see also* Gavin, *supra* note 156, at 118.

However, even under a policy of legislator-exclusive prayers, the government is not reviewing, selecting, and approving prayers because the legislators compose their prayers as individuals and the legislative body does not officially screen and approve the prayers.[187] Contrary to the Fourth Circuit's arguments, offering prayers does not become one of the legislators' official duties because the legislators are free to refuse to offer prayers at any and all sessions, even though they have the ability to offer prayers under the legislature's policy.[188] The ability to lead prayers does not automatically become an obligation for all legislators to lead prayers. Further, a legislator is free to offer a prayer according to a belief or practice not shared by the other legislators—a legislator is free to express disagreement with the content of a particular prayer or dissent from the entire prayer practice.[189] Therefore, the legislative body does not act as a board of review for the content of the prayers, deciding which prayers should be approved by the government; rather, individual legislators express their personal prayers within the broader historical tradition of legislative prayer.[190]

Although there is validity to the concern that elected officials may use their authority to coerce other legislators and members of the public to participate in religious exercises, this concern is adequately addressed by the coercion analysis applied by the Supreme Court in *Town of Greece* and the Sixth Circuit in *Bormuth*.[191] Legislators need not be categorically excluded from leading legislative prayers to avoid abuses of authority because the *Town of Greece*/*Bormuth* coercion analysis addresses whether the prayer-giver mandates participation in the prayer, uses the opportunity to proselytize, or uses the prayer opportunity as a kind of religious test to determine how government benefits and burdens will be allocated.[192] By subjecting legislator and non-legislator prayer-givers to the same coercion analysis, the purpose of legislative prayer is preserved—legislators can personally reflect on the legislature's higher purpose, meaningfully accommodate their spiritual needs,

187. *Bormuth*, 870 F.3d at 498, 505.

188. *But see Lund*, 863 F.3d at 289–90.

189. *See Bormuth*, 870 F.3d at 511–14.

190. *See id.* at 505, 511.

191. *See* Town of Greece v. Galloway, 572 U.S. 565, 586–91 (2014); *Bormuth*, 870 F.3d at 515–19.

192. *Bormuth*, 870 F.3d at 515–19. Although a policy that restricts prayer-givers to legislators may not fail under the *Town of Greece*/*Bormuth* coercion analysis, a better policy would be to allow any person—guest minister, citizen-volunteer, legislator, or staff person—to open the meeting with an invocation because this would eliminate the concern that elected officials would use their position to coerce nonadherents into participation in the prayer and still give legislators the benefit of personal connection with the historical practice and meaningful accommodation of their own spiritual needs. *See Town of Greece*, 572 U.S. at 575, 587; *Bormuth*, 870 F.3d at 515–19.

and personally connect to the tradition of legislative prayer—while protecting dissenters from abuses of power.[193]

C. *Religious Uniformity of Prayers*

The Fourth Circuit and commentators are also concerned that if all prayers offered by legislators belong to a single religious perspective, the government effectively endorses one religion over others.[194] According to this view, if all legislators offer sectarian prayers according to one tradition, a reasonable observer would conclude that the government endorses that religion and the government becomes entangled with religion.[195] The Fourth Circuit also expressed concern that legislative candidates' religious identity and position on legislative prayer would become a divisive election issue.[196]

However, sectarian content should not be relevant to the coercion analysis beyond the limitations contained in the *Town of Greece* plurality analysis because a reasonable observer would know that sectarian prayer and legislator-led prayer were part of the broader practice of legislative prayer and the identity of legislators in any given election cycle is dynamic.[197] In *Town of Greece*, the Supreme Court explained that the reasonable observer is presumed to be familiar with the general historical practice of legislative prayer and its purpose[198]—a practice that included both sectarian prayer and legislator-led prayer[199] and intended to remind *legislators*, not members of the public, of their higher purpose before beginning the difficult task of governing.[200] Therefore, the reasonable observer would not conclude that a prayer practice including legislator-led prayer would constitute an impermissible government endorsement of religion without evidence of coercion by mandatory participation, proselytization, or discriminatory

193. *See Bormuth*, 870 F.3d at 511–12.

194. Lund v. Rowan Cty., 863 F.3d 268, 283–86 (4th Cir. 2017); Hill, *supra* note 4, at 35; Tucci, *supra* note 156, at 616–18.

195. *Lund*, 863 F.3d at 284; Hill, *supra* note 4, at 35; Tucci, *supra* note 156, at 616–19.

196. *Lund*, 863 F.3d at 282.

197. *See Bormuth*, 870 F.3d at 513–14.

198. Town of Greece v. Galloway, 572 U.S. 565, 587 (2014).

199. BYRD, *supra* note 22, at 297, 305; Epstein, *supra* note 3, at 2104; Lund, *supra* note 17, at 1177, 1184; Brief for State of W. Va. and 12 Other States, *supra* note 25, at *11–*19; *see also Bormuth*, 870 F.3d at 509–10; Brief for Members of Congress, *supra* note 21, at *6–*10; Brief for the National Conference of State Legislatures, *supra* note 25, at *2–*3.

200. *Town of Greece*, 572 U.S. at 575, 587.

allocation of benefits and burdens based on nonparticipation in or dissent from the prayer opportunity.[201]

Further, as explained by the Sixth Circuit in *Bormuth*, concerns about the religious uniformity of prayers offered by legislators are ameliorated by the dynamic nature of democratic government.[202] Because the people have the power to elect their representatives or run for elected office themselves, the composition of a legislature will change over time.[203] Since the composition of the legislature is dynamic, the people may elect representatives for themselves that hold a variety of religious beliefs.[204] As long as the legislative body holds a position of non-discrimination regarding the religious beliefs of those elected to office,[205] allows any legislator of any creed or no creed to offer an invocation according to his or her personally held beliefs, and the invocations do not contain coercive content as described by the *Town of Greece* plurality test, the government's legislative prayer policy does not endorse a particular religion over another, even if all the legislators in a given term all hold similar beliefs and pray according to a similar tradition.[206]

Therefore, the uniformity of the sectarian content of prayers offered by legislators should not give rise to an inference or presumption that the government endorses one religion over others without evidence of coercion through content calling for conversion, promoting membership in one faith over all others, or tending to denigrate people holding other beliefs.

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201. Although a policy that restricts prayer-givers to legislators may not fail under the *Town of Greece*/*Bormuth* coercion analysis, a better policy would be to allow any person—guest minister, citizen-volunteer, legislator, or staff person—to open the meeting with an invocation because this policy would likely prevent complete uniformity of the prayer-givers' religious traditions for an entire election cycle and would eliminate any concerns regarding whether all the given legislators' invocations, taken together, amount to an impermissible endorsement of religion. *See Lund*, 863 F.3d at 283–86.

202. *Bormuth*, 870 F.3d at 513–14.

203. *See id.*

204. *See id.*

205. The Constitution prohibits the use of religious tests for public office by federal, state, and local governments; therefore, Article VI of the Constitution would prohibit a legislative body from restricting elected officials to members of a particular religion. U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); *see also* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'" or require belief or disbelief in a religion as a qualification for public office (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947))).

206. *Bormuth*, 870 F.3d at 513–14; *see also* Town of Greece v. Galloway, 572 U.S. 565, 585 (2014).

IV. CONCLUSION

Since the founding of the United States, American society has changed significantly. The country has expanded, the economy has grown, technology has advanced, the population has become more diverse, and attitudes have changed.[207] Despite these changes, Americans still hold the dual principles of religious liberty and disestablishment dear.[208] In a society that favors secularism and tolerance, some may see legislative prayer—and legislator-led prayer in particular—as a stubborn hold-out of a less tolerant, religiously homogenous society.[209]

However, the purpose of legislative prayer is to call lawmakers together to focus on universal values that transcend the divisive work of politics.[210] The tradition of legislator-led prayer provides legislators the opportunity to personally connect with this tradition and share a part of themselves—the universal principles of their faiths, whether they are theists or atheists, Christians, Muslims, Jews, Hindus, Buddhists, Sikhs, animists, or something else—"without denying the right to dissent by those who disagree."[211]

Although a prayer policy that restricts prayer-givers to the members of the legislative body may not be the "best practice," unless the prayer policy coerces dissenting legislators and members of the public into participating in religious exercises, it should be upheld under the Establishment Clause according to the precedents set in *Marsh v. Chambers* and *Town of Greece v. Galloway*. By applying a test that evaluates whether the particular practice is consistent with the historical tradition of legislative prayer and whether the opportunity has been exploited to coerce dissenters, courts allow a tolerable acknowledgement of beliefs and values held by its citizens and individual lawmakers while preventing the evils the Establishment Clause protects against: government entanglement with religion and *de facto* establishment of a state church.

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207. *See generally* ROBERT P. JONES & DANIEL COX, PUB. RELIGION RES. INST., AMERICA'S CHANGING RELIGIOUS IDENTITY: FINDINGS FROM THE 2016 AMERICAN VALUES ATLAS, (Sept. 6, 2017), https://www.prri.org/research/american-religious-landscape-christian-religiously-unaffiliated/.

208. *See generally Is Freedom of Religion Important?*, HERITAGE FOUND. (Dec. 1, 2018), https://www.heritage.org/what-you-need-know-about-religious-freedom/freedom-religion-important (conservative portal for resources on religious freedom); *Religious Liberty*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/religious-liberty (last visited Aug. 13, 2019) (liberal portal for resources on religious freedom and disestablishment of religion).

209. *See* Tucci, *supra* note 156, at 615.

210. *Town of Greece*, 572 U.S. at 575; *see also* Marsh v. Chambers, 463 U.S. 783, 792 (1983).

211. *Town of Greece*, 572 U.S. at 588.