

Utah Law Review

Volume 2019 | Number 3

Article 5

6-2019

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Recommended Citation

West, Chad (2019) "Legislative Prayer: Historical Tradition and Contemporary Issues," *Utah Law Review*: Vol. 2019 : No. 3 , Article 5.
Available at: <https://dc.law.utah.edu/ulr/vol2019/iss3/5>

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LEGISLATIVE PRAYER: HISTORICAL TRADITION AND CONTEMPORARY ISSUES

Chad West*

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion”¹ There is a great deal of confusion among scholars, lower federal courts, and the Justices of the Supreme Court over appropriate Establishment Clause principles,² but it is at least clear that the government “may not coerce anyone 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.”³ It has long been settled that state and local legislative bodies may, in harmony with the Establishment Clause, open meetings with prayers given by state-employed or volunteer clergy.⁴ Less clear is whether legislators themselves may (1) offer prayers in local government meetings, and (2) restrict the opportunity to give prayers to themselves. This Note reviews the history of legislative prayer in the United States and the Supreme Court’s decisions about clergy-led prayer practices, provides an overview of the current circuit-split on the issue of legislator-led prayer, argues that legislator-led prayer cannot be upheld under the same analysis used to allow clergy-led prayer, and proposes options for resolving the split.

I. A BRIEF HISTORY OF LEGISLATIVE PRAYER IN THE UNITED STATES

The “first American legislative prayer” was offered at the first Continental Congress in 1774 by Reverend Jacob Duché, an Anglican minister from Philadelphia, Pennsylvania.⁵ The Continental Congress invited him to pray over the objection of John Jay and John Rutledge, who thought that the delegates were “so divided in religious Sentiments . . . that [they] could not join in the same Act of

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¹ U.S. CONST. amend. I.

² See, e.g., Eric J. Segall, *Mired in the Marsh: Legislative Prayer, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 724 (2009); Rowan Cty. v. Lund, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting from denial of certiorari) (“This Court’s Establishment Clause jurisprudence is in disarray.”).

³ Lee v. Weisman, 505 U.S. 577, 587 (1992) (internal quotation marks omitted) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

⁴ Marsh v. Chambers, 463 U.S. 783, 786–91 (1983); see also Town of Greece v. Galloway, 572 U.S. 565, 569–70 (2014).

⁵ Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1177 (2009).

Worship.”⁶ John Adams noted that the prayer had a profound positive effect on all of the delegates.⁷ Duché and other chaplains offered prayers for the Continental Congress until the Constitutional Convention of 1787.⁸ The Constitutional Convention was starkly different from the Continental Congress with respect to legislative prayer.⁹ Despite Benjamin Franklin’s insistence that chaplain-led prayer would guide the Framers as they fashioned a new system of government, there is no record of any prayers being offered at the Convention.¹⁰

The First United States Congress, “as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer.”¹¹ Soon after, the House¹² and Senate¹³ elected chaplains. Because there is no record of the vote for the creation of chaplaincies, it is difficult to determine how much consensus existed within Congress about legislative prayer and congressional chaplaincies, but it is clear that there was at least some disagreement about the matter.¹⁴ Despite opposition from various groups,¹⁵ legislative prayer in Congress has continued uninterrupted until today.¹⁶ On the state level, many legislatures have long traditions of legislative prayer.¹⁷ In state legislatures there is wide variation on who offers opening prayers, but “[i]n many chambers, it is a tradition for a chaplain to be selected to serve the body.”¹⁸

⁶ *Letter from John Adams to Abigail Adams, 16 September 1774*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/04-01-02-0101> [https://perma.cc/4T9D-HXDH].

⁷ *Id.*

⁸ Lund, *supra* note 5, at 1182–83.

⁹ *Id.* at 1183.

¹⁰ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 450–52 (Max Farrand ed., 1911); Lund, *supra* note 5, at 1183.

¹¹ *Marsh v. Chambers*, 463 U.S. 783, 787–88 (1983); *see also* 1 ANNALS OF CONG. 18 (1789) (Joseph Gales ed., 1834).

¹² *Marsh*, 463 U.S. at 788.

¹³ 1 ANNALS OF CONG. 24 (1789) (Joseph Gales ed., 1834).

¹⁴ Lund, *supra* note 5, at 1184–85 (noting that some votes were cast to protest the election of chaplains and that James Madison never gave outright approval to congressional chaplaincies); *see discussion infra* Section IV.A.2.

¹⁵ *See* Lund, *supra* note 5, at 1196–1202 (explaining that, because of outside pressures, Congress briefly suspended their regular chaplaincies in the 1850s and instead invited local ministers to pray before congressional proceedings).

¹⁶ *See id.* at 1213; *see also Reverend Patrick J. Conroy, S.J., OFF. CHAPLAIN: U.S. HOUSE REPRESENTATIVES* (Jan. 31, 2019), <https://chaplain.house.gov/archive/index.html?id=2854> [https://perma.cc/U48Z-SCQJ] (archiving a recent prayer given in the U.S. House of Representatives); Jill Colvin et al., *Longest Shutdown Over: Trump Signs Bill to Reopen Government*, ASSOCIATED PRESS (Jan. 25, 2019), <https://www.apnews.com/30769167ab7a4ef9adf880d020b775dd> [https://perma.cc/U6Q7-VTLF] (“[A]s the Senate opened with prayer, Chaplain Barry Black called on high powers . . . to help senators do ‘what is right.’”).

¹⁷ NAT’L CONFERENCE OF STATE LEGISLATURES, *INSIDE THE LEGISLATIVE PROCESS* 5-145 (2002), <http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf> [https://perma.cc/8B54-JF5S].

¹⁸ *Id.* at 5-147.

II. GUIDANCE FROM THE SUPREME COURT ON LEGISLATIVE PRAYER

With this brief history in mind, and taking into account the importance of religion to many United States citizens, it is somewhat surprising that the Supreme Court did not rule on a case challenging a legislative prayer practice on Establishment Clause grounds until *Marsh v. Chambers* in 1983.¹⁹

A. *Marsh v. Chambers* – 1983

Ernest Chambers brought an action under 42 U.S.C. § 1983, alleging that Nebraska's practice of opening each legislative day with a prayer was unconstitutional as a violation of the Establishment Clause of the First Amendment.²⁰ A chaplain, chosen biennially by a state government body, offered prayers each day that the legislature was in session and was paid using public funds.²¹ Writing for the Court, Chief Justice Burger framed the issue in *Marsh* as “whether the Nebraska Legislature’s practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.”²² The Court upheld the Nebraska practice, reasoning that the practice of legislative prayer “is deeply embedded in the history and traditions of this country.”²³ Chief Justice Burger further explained that, absent an indication that legislative prayers were being used “to proselytize or advance any one, or to disparage any other, faith or belief,” the content of specific prayers is not of concern to judges.²⁴ Ultimately, the Court reasoned that, given “[t]he unbroken practice” of legislative prayer in the United States for over two centuries, the practice was not a violation of the Establishment Clause.²⁵

In dissent, Justice Brennan argued that legislative prayer violated the core Establishment Clause principle that “[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice.”²⁶ As Justice Brennan explained, this neutrality principle helps assure that religious issues do not serve as a basis for choosing sides in the political arena.²⁷ When the government “declare[s] or act[s] upon some ‘official’ or ‘authorized’ point of view on a matter of religion” citizens may feel alienated and cut off from the political

¹⁹ Scott W. Gaylord, *When the Exception Becomes the Rule: Marsh and Sectarian Legislative Prayer Post-Summum*, 79 U. CIN. L. REV. 1017, 1022 (2011).

²⁰ *Marsh v. Chambers*, 463 U.S. 783, 784–85 (1983).

²¹ *Id.*

²² *Id.* at 784.

²³ *Id.* at 786.

²⁴ *Id.* at 794–95.

²⁵ *Id.* at 795.

²⁶ *Id.* at 808 (Brennan, J., dissenting) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968)).

²⁷ *Id.* at 805.

processes of their own government.²⁸ Perhaps most importantly, Justice Brennan noted that the Court, by using a historical tradition analysis, sidestepped all of the traditional Establishment Clause tests that were in use at the time and “carv[ed] out an exception to the Establishment Clause”²⁹

1. Traditional Establishment Clause Analysis and the Marsh Carve-Out

If one were to read the *Marsh* majority opinion without any knowledge of the Supreme Court’s previous Establishment Clause jurisprudence, it would be entirely reasonable to conclude that all Establishment Clause issues are analyzed using a historical tradition analysis. The *Marsh* majority mentions the *Lemon* test,³⁰ “[t]he most commonly cited formulation of prevailing Establishment Clause doctrine”³¹ of the day, only once.³² The majority’s brief mention of this landmark decision was simply to note that the Eighth Circuit Court of Appeals had applied the *Lemon* test and found that Nebraska’s chaplaincy practice violated the Establishment Clause.³³ The *Marsh* majority completely failed to reference *Larson v. Valente*,³⁴ in which the Supreme Court formulated another Establishment Clause test, used to evaluate “state program[s] that discriminate[] among religious faiths, and not merely in favor of all religious faiths”³⁵ Much has been written about these and other Establishment Clause tests,³⁶ so no space will be dedicated to discussing them here, but it is clear that *Marsh* need not have been decided by using historical tradition.³⁷ Other avenues of Establishment Clause analysis were well-established.³⁸ Significantly, Justice

²⁸ *Id.* at 805–06.

²⁹ *Id.* at 796.

³⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (stating that, to be consistent with the Establishment Clause, a government action must meet the following criteria: it must have a “secular legislative purpose”; its “principal or primary effect must be one that neither advances nor inhibits religion”; and it must not “foster an excessive entanglement with religion”).

³¹ *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting).

³² *Id.* at 786 (majority opinion).

³³ *Id.*

³⁴ 456 U.S. 228 (1982).

³⁵ *Marsh*, 463 U.S. at 801 n.11 (Brennan, J., dissenting); *Larson*, 456 U.S. at 246 (“[W]hen [courts] are presented with a state law granting a denominational preference, [they must] treat the law as suspect and . . . apply strict scrutiny in adjudging its constitutionality.”).

³⁶ See, e.g., Russell W. Galloway, *Basic Establishment Clause Analysis*, 29 SANTA CLARA L. REV. 845, 850–62 (1989) (outlining the primary Establishment Clause tests that were in use around the time *Marsh* was decided).

³⁷ See *Marsh*, 463 U.S. at 796–801 (Brennan, J., dissenting) (explaining that the Court could have used settled Establishment Clause tests and applying the *Lemon* test to the facts of *Marsh*).

³⁸ See Galloway, *supra* note 36, at 851.

Brennan determined that Nebraska's practice would violate the Establishment Clause under *Lemon*³⁹ and *Larson*.⁴⁰

B. *Town of Greece v. Galloway* – 2014

The Supreme Court revisited the issue of legislative prayer in *Town of Greece*.⁴¹ In 1999, Greece, a town in upstate New York, began starting its monthly town board meetings with a prayer offered by local clergymen.⁴² To find clergy to give prayers, a town employee called local congregations listed in a town directory until she found someone willing to pray at the board meeting.⁴³ The town never denied any minister the opportunity to pray at a town meeting, but because the vast majority of congregations in Greece were Christian, the prayers offered to open meetings often invoked Christian themes.⁴⁴ After Susan Galloway, who attended town board meetings to discuss local issues, “complained that Christian themes pervaded the prayers,” the town invited clergy from two other faith groups to deliver prayers.⁴⁵ Galloway eventually filed suit, claiming that the town’s prayer practice violated the Establishment Clause because it sponsored Christian prayers to the exclusion of other faiths.⁴⁶

Applying *Marsh*, the Supreme Court held that the Greece’s practice was not in violation of the Establishment Clause because it comported with the historical tradition of legislative prayer in the United States.⁴⁷ The Court determined that the tradition reflected in *Marsh* permits chaplains to give prayers as they see fit and that sectarian references do not remove prayers from that tradition.⁴⁸ The *Town of Greece* majority thus confirmed that “a challenge based solely on the content of a prayer will not likely establish a constitutional violation” unless, over time, prayers “denigrate [nonbelievers], proselytize, or betray an impermissible government purpose.”⁴⁹ The plaintiff in *Town of Greece* also challenged the town’s prayer practice because it coerced participation by non-Christians and others who may not have wanted to participate in a prayer ritual.⁵⁰ The Court did not produce a majority holding on the coercion issue and there has been some disagreement about which

³⁹ *Marsh*, 463 U.S. at 800–01 (Brennan, J., dissenting) (“I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”).

⁴⁰ *Id.* at 801 n.11 (“I have little doubt that the Nebraska practice . . . would fail the *Larson* test.”).

⁴¹ *Town of Greece v. Galloway*, 572 U.S. 565, 569–70 (2014).

⁴² *Id.* at 570–71.

⁴³ *Id.* at 571.

⁴⁴ *Id.* at 571–72.

⁴⁵ *Id.* at 572.

⁴⁶ *Id.*

⁴⁷ *Id.* at 591–92.

⁴⁸ *Id.* at 582–83.

⁴⁹ *Id.* at 585.

⁵⁰ *Id.* at 586.

opinion controls.⁵¹ Justice Kennedy determined that Greece’s prayer practice was not coercive, but stated that “[t]he analysis would be different if the town board members directed the public to participate in the prayers, singled out dissidents for opprobrium,⁵² or indicated that their decisions might be influenced by a person’s acquiescence in the prayer opportunity.”⁵³ Justice Thomas disagreed, indicating that, “to the extent that coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts”⁵⁴

In dissent, Justice Kagan argued that in the United States, “when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter the picture.”⁵⁵ In Justice Kagan’s view, a town board meeting is different from a meeting of the federal Congress or a state legislature, taking it outside of what *Marsh* recognized as appropriate.⁵⁶ In town board meetings, ordinary citizens have an opportunity to engage with town leaders in an intimate setting and petition for town action that could directly affect their day-to-day lives.⁵⁷ This is usually not the case in Congress and state assemblies.⁵⁸ Justice Kagan reasoned that prayers in such an intimate setting are very different from the tradition outlined in *Marsh* and could lead some citizens to stop engaging with the local democratic process.⁵⁹

III. THE CURRENT CIRCUIT SPLIT ON LEGISLATOR-LED PRAYER

Marsh and *Town of Greece* addressed the issue of clergy-led prayer in state legislatures and town board meetings.⁶⁰ Lower federal courts have applied the

⁵¹ *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 515 (6th Cir. 2017) (en banc) (“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 . . . on the question of coercion.”).

⁵² “Public disgrace or ill fame that follows from conduct considered grossly wrong or vicious.” *Opprobrium*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (9th ed. 1986).

⁵³ *Town of Greece*, 572 U.S. at 588 (plurality opinion).

⁵⁴ *Id.* at 610 (Thomas, J., concurring).

⁵⁵ *Id.* at 621 (Kagan, J., dissenting) (citing THOMAS JEFFERSON, VIRGINIA ACT FOR ESTABLISHING RELIGIOUS FREEDOM (Oct. 31, 1785), reprinted in 5 THE FOUNDERS’ CONSTITUTION 85 (P. Kurland & R. Lerner eds., 1987)).

⁵⁶ *Town of Greece*, 572 U.S. at 622–24 (Kagan, J., dissenting).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See id.* at 630–31 (giving the hypothetical example of a Muslim citizen petitioning a town board and having to make a choice between joining in a prayer practice she does not believe in or not participating and possibly offending the board members that she will soon be attempting to persuade).

⁶⁰ *Marsh v. Chambers*, 463 U.S. 783, 784 (1983) (presenting the issue in the case as whether a “practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause”); *Town of Greece*, 572 U.S. at 577.

standards from these cases, coming to mixed results.⁶¹ The issue now making its way through the federal court system is whether the identity of the prayer-giver is relevant to the constitutionality of legislative prayer practices.⁶² For the remainder of this Note, practices that involve prayers in government meetings given by anyone other than a legislator or local commissioner will be referred to as “clergy-led prayer” and prayer that is offered by government leaders will be called “legislator-led prayer” or “lawmaker-led prayer.”

A. *Lund v. Rowan County, North Carolina – 2017*

In *Lund*, the Fourth Circuit Court of Appeals decided “whether Rowan County’s practice of lawmaker-led sectarian prayer r[an] afoul of the Establishment Clause.”⁶³ Rowan County is governed by an elected board of commissioners.⁶⁴ During bi-monthly board meetings, the Rowan County commissioners sit at the front of the room facing county residents.⁶⁵ Each board meeting starts with one of the commissioners saying “[I]et us pray,” or a similar phrase, followed by a prayer offered by a board member.⁶⁶ The board members take turns offering prayers on a rotation system and “[n]o one outside the board is permitted to offer an invocation.”⁶⁷ Board meetings are recorded, and an examination of the years for which recordings are available reveals that 97% of the board’s prayers used the words “Jesus,” “Christ,” or “Savior.”⁶⁸ The plaintiffs in *Lund*, none of whom are Christian, actively participated in board meetings to speak about education issues.⁶⁹ They brought suit, alleging that the prayer practice “advanced Christianity and coerced [them] into participating in religious exercises.”⁷⁰

In holding that Rowan County’s prayer practice violated the Establishment Clause, the majority in *Lund* focused on four factors: “commissioners as the sole prayer-givers;⁷¹ invocations that drew exclusively on Christianity and sometimes

⁶¹ Compare *Coleman v. Hamilton Cty.*, 104 F. Supp. 3d 877, 888–90 (E.D. Tenn. 2015) (concluding that a county’s clergy-led prayer practice did not violate the Establishment Clause), with *Hudson v. Pittsylvania Cty.*, 107 F. Supp. 3d 524, 536 (W.D. Va. 2015) (concluding that a board’s prayer practice violated the Establishment Clause because it was unconstitutionally coercive).

⁶² *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 537 (6th Cir. 2017) (en banc); *Lund v. Rowan Cty.*, 863 F.3d 268, 280 (4th Cir. 2017) (en banc).

⁶³ *Lund*, 268 F.3d at 271–72.

⁶⁴ *Id.* at 272.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 273.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 273–74.

⁷¹ *Id.* at 273–74, 281 (“By arrogating the prayer opportunity to itself, the Board . . . restricted the number of faiths that could be referenced at its meetings.”).

served to advance that faith,⁷² invitations to attendees to participate,⁷³ and the local government setting.⁷⁴ The Fourth Circuit noted that legislator-led prayer could take place without creating an Establishment Clause violation,⁷⁵ but that the combination of the abovementioned factors “blur[red] the line between church and state” in a way not contemplated by *Town of Greece*.⁷⁶

The dissenting judges in *Lund* noted that, of the four factors outlined by the majority, only the identity of the prayer-giver was distinguishable from *Town of Greece*.⁷⁷ Noting that *Town of Greece* made no mention of a requirement for outside clergy to give legislative prayers, the dissent claimed that “[p]ractically speaking, the public is unlikely to draw any meaningful distinction between a state-paid chaplain (*Marsh*) or state-invited cleric (*Town of Greece*) and members of the legislative body that appoints him.”⁷⁸ The dissent also relied on historical tradition to support legislator-led prayer.⁷⁹ The South Carolina Provincial Congress, South Carolina’s first self-sustaining legislature, regularly allowed its elected members to give opening prayers as early as 1775.⁸⁰ In addition, the dissent noted the contemporary prevalence of legislator-led prayer in state and federal government meetings.⁸¹ In short, the dissent declared that Rowan County’s prayer practice was largely indistinguishable from what the Supreme Court dealt with in *Town of Greece*.⁸² The four factors relied upon by the majority were each constitutional standing alone and did not combine to create an Establishment Clause violation.⁸³

⁷² *Id.* at 281, 284–85 (“Not only did the Board’s invocations convey its singular approval of Christianity, the prayer opportunity on occasion served to advance that faith . . . by characteriz[ing] Christianity as the one and only way to salvation . . .”).

⁷³ *Id.* at 281, 287 (“[W]hen [phrases like ‘Let us pray’] are uttered by elected representatives acting in their official capacity, they become a request on behalf of the state.”).

⁷⁴ *Id.* at 281, 287 (“Relative to sessions of Congress and state legislatures, the intimate setting of a municipal board meeting presents a heightened potential for coercion. Local governments possess the power to directly influence both individual and community interests.”).

⁷⁵ *Id.* at 290.

⁷⁶ *Id.* at 281 (quoting *Lund v. Rowan Cty.*, 837 F.3d 407, 435 (4th Cir. 2016) (Wilkinson, J., dissenting)).

⁷⁷ *Id.* at 306 (Agee, J., dissenting).

⁷⁸ *Id.* at 308.

⁷⁹ *See id.* at 308.

⁸⁰ *Id.* at 309.

⁸¹ *Id.* (noting that a majority of states allow individual legislators to give invocations when they request to do so and that United States senators have occasionally delivered prayers in meetings of Congress).

⁸² *Id.* at 306.

⁸³ *Id.*

B. Bormuth v. County of Jackson – 2017

In *Bormuth*, the Sixth Circuit Court of Appeals decided that a county’s legislator-led prayer practice did not violate the Establishment Clause.⁸⁴ Jackson County, Michigan is governed by an elected board of nine commissioners.⁸⁵ To start monthly board meetings, a commissioner typically asks that the other commissioners and the members of the public in attendance “rise and assume a reverent position.”⁸⁶ One of the nine commissioners then says a prayer that is “generally Christian in tone”⁸⁷ The Plaintiff, a Pagan and Animist, first vocally objected to the prayer practice during the public comment portion of a board meeting.⁸⁸ While he was commenting about the prayers, “one of the Commissioners ‘swiveled his chair and turned his back to [the plaintiff.]’”⁸⁹ There was a dispute on appeal as to whether certain video evidence of the board meetings could be considered.⁹⁰ One video shows a county commissioner calling Bormuth a “nitwit” for speaking out against the prayer practice.⁹¹ Other commissioners categorized Bormuth’s comments as an attack on “my lord and savior Jesus Christ,”⁹² and “an attack on Christianity and Jesus Christ, period.”⁹³ The majority did not consider the video evidence because Bormuth’s complaint only referenced the videos’ general availability and did not direct the district court to the specific portions on which Bormuth was relying.⁹⁴ The dissent argued that Bormuth drew the district court’s attention to the videos, and even if he did not do so correctly, the Federal Rules of Evidence required the court of appeals to take judicial notice of them.⁹⁵

Relying on many of the same pieces of historical evidence as the dissenting justices in *Lund*, the *Bormuth* majority determined that the board’s prayer practice fit within the historical tradition of legislative prayer as outlined in *Marsh* and *Town of Greece*.⁹⁶ The majority also relied on the proposition that legislative prayer exists “largely to accommodate the spiritual needs of lawmakers and connect them to a

⁸⁴ *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017) (en banc).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 498–99.

⁸⁹ *Id.* at 499.

⁹⁰ *Id.* at 499–501.

⁹¹ *Id.* at 525 (Moore, J., dissenting); Cty. of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YOUTUBE 43:29–43:40 (Dec. 19, 2013), <https://www.youtube.com/watch?v=yOOClwZpaXc> [<https://perma.cc/S3NP-EHFK>].

⁹² *Bormuth*, 870 F.3d at 525 (Moore, J., dissenting).

⁹³ *Id.*; Cty. of Jackson, *supra* note 91, at 32:50–32:59.

⁹⁴ *Bormuth*, 870 F.3d at 500.

⁹⁵ *Id.* at 530–31 (Moore, J., dissenting); *see also* FED. R. EVID. 201(b), (c) (noting that courts must take judicial notice of “a fact that is not subject to reasonable dispute . . . if a party requests it and the court is supplied with the necessary information”).

⁹⁶ *Bormuth*, 870 F.3d at 509–10 (referring to legislator-led prayer in the South Carolina legislature in 1775).

tradition dating to the time of the Framers.”⁹⁷ Preventing legislators from giving prayers detracts from their ability to show what they believe in and set their minds to a higher purpose while governing.⁹⁸ In addition, the majority rejected Bormuth’s claim that Jackson County’s prayer practice was coercive, stating that “polite requests by [lawmakers] to stand for invocations do not coerce prayer.”⁹⁹ Similarly, incidents where the commissioners spoke negatively about Bormuth were not related to his religious beliefs, but were in response to Bormuth’s hostility towards them.¹⁰⁰

Using the “nitwit” clip and other video evidence, the dissent argued that the prayer practice was coercive because Bormuth was singled out for opprobrium,¹⁰¹ but claimed that even without the video evidence, the practice was a violation of the Establishment Clause.¹⁰² In doing so, the dissent invoked many of the same factors used by the majority in *Lund*.¹⁰³ Finally, the dissent pointed out what it considered to be a particularly troubling suggestion by the majority: that if the people of Jackson County want a more diverse prayer practice, they can elect commissioners of different faiths.¹⁰⁴ This idea suggests that it would be permissible for prayer and religion to become campaign issues, which is a scenario that the Bill of Rights was adopted to prevent.¹⁰⁵

⁹⁷ *Id.* at 511 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 588 (2014) (plurality opinion)).

⁹⁸ *Bormuth*, 870 F.3d at 511 (citing *Town of Greece*, 572 U.S. at 587 (plurality opinion)).

⁹⁹ *Bormuth*, 870 F.3d at 517 (citing *Am. Humanist Ass’n v. McCarty*, 851 F.3d 521, 526 (5th Cir. 2017)).

¹⁰⁰ *Bormuth*, 870 F.3d at 518 (explaining that the commissioners reacted poorly to the litigious way in which Bormuth expressed himself, but not to his personal religious beliefs). Peter Bormuth does have a history of suing Jackson City and County and has been threatened with sanctions by one federal judge. *Bormuth v. City of Jackson*, No. 12-11235, 2013 WL 1944574, at *2 (E.D. Mich. May 9, 2013); see also *Court Cases*, PETER BORMUTH, <http://peterbormuth.com/about/> [<https://perma.cc/7TCV-2TFV>].

¹⁰¹ *Bormuth*, 870 F.3d at 539–42 (Moore, J., dissenting).

¹⁰² *Id.* at 537.

¹⁰³ *Id.* at 537–39 (“Legislator-led prayer at the local level falls far afield of the historical tradition upheld in *Marsh* and *Town of Greece*. The setting—a local government meeting with constituent petitioners in the audience—amplifies the importance of the identity of the prayer giver in our analysis, and heightens the risks of coercion . . .”).

¹⁰⁴ *Id.* at 539.

¹⁰⁵ *Id.*; see *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”).

C. The Supreme Court's Denial of Certiorari in Rowan County v. Lund – 2018

Both Rowan County and Peter Bormuth appealed these rulings.¹⁰⁶ On June 28, 2018, the United States Supreme Court denied certiorari in both cases.¹⁰⁷ Interestingly, Justice Clarence Thomas, joined by Justice Neil Gorsuch, dissented from the Court's denial of certiorari in *Lund* and wrote an opinion.¹⁰⁸ Stating that the Fourth Circuit's analysis "failed to appreciate the long history of legislator-led prayer" in the United States, Justice Thomas acknowledged that he would have granted Rowan County's petition for certiorari and ruled in its favor.¹⁰⁹ Justice Thomas brought up the example of the South Carolina Provincial Congress (also mentioned by the dissenters in *Lund*) and the fact that "[s]everal States, including West Virginia and Illinois, opened their constitutional conventions with prayers led by convention members instead of chaplains."¹¹⁰ Apparently based only on these examples, Justice Thomas declared that "[f]or as long as this country has had legislative prayer, legislators have led it."¹¹¹

IV. THE PROBLEMS WITH ANALYZING LEGISLATOR-LED PRAYER
UNDER THE *MARSH* AND *TOWN OF GREECE* STANDARDS

The majority in *Bormuth* and the dissenters in *Lund* analyzed legislator-led prayer as if it were the same thing as the clergy-led prayer practices upheld in *Marsh* and *Town of Greece*.¹¹² One group of dissenters in *Lund* even stated that "[t]he majority's pro forma distinction of *Town of Greece* can only be driven by its desire to reach a different end, because the nature of Rowan County's prayer practice is . . . virtually indistinguishable from the practice upheld by the Supreme Court in *Town of Greece*."¹¹³ Despite the categorical nature of this assertion, some key differences between legislator-led and clergy-led prayer and the potential effects of each are easily recognizable. For one, legislator-led prayer poses a much greater threat to the democratic process than clergy-led prayer. The most obvious difference, the identity of the prayer-giver, is hugely important, because history (the tool used by the Supreme Court to evaluate legislative prayer cases¹¹⁴) does not support the practice of legislator-led prayer. These differences will be evaluated below.

¹⁰⁶ Petition for Writ of Certiorari at 1, *Rowan Cty. v. Lund*, 138 S. Ct. 2564 (2018) (No. 17-565); Petition for Writ of Certiorari at 1, *Bormuth v. Cty. of Jackson*, 138 S. Ct. 2708 (2018) (No. 17-7220).

¹⁰⁷ *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2564 (2018) (denying cert.); *Bormuth v. Cty. of Jackson*, 138 S. Ct. 2708, 2708 (2018) (denying cert.).

¹⁰⁸ *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting from denial of certiorari).

¹⁰⁹ *Id.* at 2565–66.

¹¹⁰ *Id.* at 2566.

¹¹¹ *Id.*

¹¹² *Lund*, 863 F.3d at 298–99; see *Bormuth*, 870 F.3d at 509.

¹¹³ *Lund*, 863 F.3d at 299.

¹¹⁴ *Town of Greece v. Galloway*, 572 U.S. 565, 576–77 (2014).

A. *Historical Tradition Does Not Support Legislator-Led Prayer*

The Supreme Court has determined 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.”¹¹⁵ With this acknowledgement, courts must “determine whether the prayer practice [at issue] fits within the tradition long followed in Congress and the state legislatures.”¹¹⁶ Noting that the “[First] Congress authorized the appointment of paid chaplains” only three days before they agreed on the final language of the Bill of Rights,¹¹⁷ the *Marsh* majority relied heavily on the premise that the Framers of the First Amendment would not have forbidden legislative prayer when they had just declared the practice acceptable.¹¹⁸ This argument is compelling with respect to clergy-led prayer, but the *Lund* dissent and *Bormuth* majority misused this analysis and attempted to “shoehorn the legislator-led prayer . . . issue” into the tradition started by the First Congress.¹¹⁹ The following sections will outline the prayer practices used in the Constitutional Convention and during the meetings of the First Congress to show that legislator-led prayer is not supported by the historical tradition relied upon in *Marsh*.

1. *The Constitutional Convention*

The Establishment Clause was not drafted at the Constitutional Convention,¹²⁰ but because many of the delegates at the Convention eventually served on the First Congress¹²¹ it is useful to analyze their attitudes about legislative prayer.¹²² There is no record of any prayers being offered at the Constitutional Convention.¹²³ On June 28, 1787, a little over one month after the Convention started, Benjamin Franklin lamented that the Convention had made very little progress and suggested that

¹¹⁵ *Id.* at 577.

¹¹⁶ *Id.*

¹¹⁷ *Marsh v. Chambers*, 463 U.S. 783, 788 (1983).

¹¹⁸ *Id.* at 790. *But see* Michael Bhargava, *The First Congress and the Supreme Court’s Use of History*, 94 CAL. L. REV. 1745, 1762 (2006) (noting that this assumption may not hold up because many of the actions of the First Congress “may have resulted from political compromises or expedients that even many Framers believed to be unconstitutional”).

¹¹⁹ *Lund v. Rowan Cty.*, 863 F.3d 268, 294 (4th Cir. 2017) (en banc) (Motz, J., concurring).

¹²⁰ William French Smith, *Some Observations on the Establishment Clause*, 11 PEPP. L. REV. 457, 458–59 (1984) (noting that James Madison, a member of the First Congress, drafted and submitted the initial proposal for the Establishment Clause, which was adopted after some adjustments by other members of the First Congress).

¹²¹ *Marsh*, 463 U.S. at 790 (citing *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

¹²² *See, e.g.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884). *But see* Bhargava, *supra* note 118, at 1766 (stating that the Framers of the Constitution only constituted a substantial minority of the members of the First Congress).

¹²³ *Marsh*, 463 U.S. at 787.

“henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service.”¹²⁴ The motion was opposed by Alexander Hamilton and others, and it failed to pass.¹²⁵ It is somewhat unclear why Hamilton and others were unwilling to allow a prayer practice, but there is some evidence that delegates were worried that starting the practice so late into the Convention could “lead the public to believe that embarrassments and dissensions within the convention” had given rise to Franklin’s motion.¹²⁶ It is, however, extremely doubtful that this was the real reason for the opposition. “One of the earliest rules established by the Convention restrained the members from any disclosure whatever of its proceedings”¹²⁷ There is evidence that this was a very significant rule and that it was adhered to rigidly.¹²⁸ Because of this, it is somewhat unlikely that Hamilton and others were actually worried about what the public might perceive. This assertion is bolstered by the fact that Hugh Williamson, a delegate from North Carolina, observed that the true cause of the lack of prayer was that “[t]he Convention had no funds” to pay a member of the local clergy.¹²⁹

The records available from the Convention show that no delegates were opposed to the prayer practice *itself*, they were merely concerned about appearances or an inability to get a chaplain.¹³⁰ Indeed, Benjamin Franklin thought that “imploring the assistance of Heaven, and its blessings” was essential because without the “concurring aid [of God]” the delegates would not succeed in crafting the new government.¹³¹ Franklin and others clearly thought that prayers were extremely important, and reading Franklin’s passionate speech advocating for prayer 232 years later, it is logical to ask, why didn’t one of the Framers simply start their meetings with a prayer? It seems that the Framers were more willing to accept going without an opening prayer than having a delegate to the Convention offer one. Perhaps, even at this early stage in the founding of our country, they recognized the importance of a principle later articulated by Justice Brennan: that essentially

¹²⁴ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 450–52.

¹²⁵ *Id.* at 452.

¹²⁶ *Id.*

¹²⁷ *Letter from James Madison to James Monroe, June 10, 1787*, TEACHINGAMERICANHISTORY.ORG, <http://teachingamericanhistory.org/library/document/james-madison-to-james-monroe/> [<https://perma.cc/5X9V-PBUN>].

¹²⁸ *Id.* (quoting *Letter from Robert Burton to John Blount, May 30, 1787*, in SUPPLEMENT TO MAX FARRAND’S RECORDS OF THE FEDERAL CONVENTION OF 1787 35 (James Hutson ed., 1987) (“[T]he Convention sitting here are so very private that there is no telling what business they are on”).

¹²⁹ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 452.

¹³⁰ *See id.* at 452 (noting that Alexander Hamilton and several others thought that having prayers might have been proper at the beginning of the convention, but were concerned about what the public might think if they started the practice a month after their meetings started).

¹³¹ *Id.* at 451–52.

religious issues should remain, to some degree, separate from government activity and “not become the occasion for battle in the political arena.”¹³² In short, there is strong evidence from the time of the Framers to suggest that the identity of a prayer-giver in governmental proceedings is relevant to the legislative prayer analysis.

2. *The First Congress*

As noted above, a core assumption relied upon by the Supreme Court in its legislative prayer decisions is that, because the “First Congress provided for the appointment of chaplains only days after approving language for the First Amendment, . . . the Framers considered legislative prayer a benign acknowledgement of religion’s role in society.”¹³³ It must first be expressed that, though useful in some circumstances, looking to the actions of the First Congress is a very problematic tool of constitutional interpretation.¹³⁴ First, because many actions of the First Congress may have been the result of political compromises,¹³⁵ it is possible that the results of some of these decisions “may have been one[s] that a majority of [the] members of Congress considered unconstitutional.”¹³⁶ A 1789 debate on the power of the President to remove officers illustrates this point. In the debate,

James Madison led a group, call it A, who believed that the Constitution granted removal power to the President alone. He had two groups of opponents: B, who thought that Congress, rather than the Constitution, determined the issue, and C, who thought that the Constitution provided for joint power of removal shared by the executive branch and the Senate . . . Madison engineered two votes on amendments. One vote divided his two opponent groups one way (A was joined by B and opposed by C); the second vote divided them the other way (A was joined by C and opposed by B). The result was that Madison’s group, A, was the only faction to get its way both times, so its view prevailed—even though there was no majority that supported both amendments proposed by Madison. The combined effect of the amendments was to create a congressional “decision” suggesting that, as a constitutional matter, the President has the sole power to remove executive officials.¹³⁷

In a 1926 decision, a majority of the Supreme Court used Congress’ 1789 decision to show “that it was ‘very clear from this history’ that the Framers believed

¹³² *Marsh v. Chambers*, 463 U.S. 783, 805 (1983) (Brennan, J., dissenting).

¹³³ *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014).

¹³⁴ Bhargava, *supra* note 118, at 1745.

¹³⁵ *Id.* at 1762.

¹³⁶ *Id.* at 1777.

¹³⁷ *Id.* (quoting Rebecca L. Brown, *Tradition and Insight*, 103 *YALE L.J.* 177, 186–87 (1993)).

the President held the sole power to remove officers¹³⁸ This conclusion is simply not supported by what actually happened in the vote.¹³⁹

Using the actions of the First Congress to inform present-day judicial decisions becomes even more difficult when there is little information about the debates and votes on bills.¹⁴⁰ This is undoubtedly the case with the legislative prayer debate in the First Congress.¹⁴¹ No complete record of the vote for the creation of chaplaincies has survived,¹⁴² making it difficult to know whether there was overwhelming support for the proposition or if it was the result of a compromise like the 1789 removal power debate. There is, however, evidence of at least some strong dissent to the creation of congressional chaplaincies in the First Congress.¹⁴³ Thomas Paine, who was not even living in the United States when the vote was held,¹⁴⁴ received three votes to be chaplain.¹⁴⁵ Because Paine was not available to fill the post and was a well-known critic of organized religion, it seems clear that these were votes cast in protest of the chaplaincies.¹⁴⁶

Even assuming that acts of the First Congress were believed to be constitutional by members of that group and not merely the result of political compromises, it does not necessarily follow that “[those actions] are presumptively consistent with the Bill of Rights”¹⁴⁷ The classic example supporting this proposition is the passage of the Judiciary Act of 1789. When the First Congress voted on the Act, none of the original Framers or any other member expressed concerns that any portion of it was unconstitutional.¹⁴⁸ Famously, the Supreme Court found the Judiciary Act unconstitutional because it attempted to expand the Court’s original jurisdiction beyond what was allowed under Article III of the Constitution.¹⁴⁹ “Thus, while the views of those closest to the process that led to and followed the framing of the Constitution *may* provide insight into its meaning, the views of [the First] Congress

¹³⁸ *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 60 (1926)).

¹³⁹ See Bhargava, *supra* note 118, at 1777–78.

¹⁴⁰ *Id.* at 1774–75.

¹⁴¹ See Lund, *supra* note 5, at 1184.

¹⁴² *Id.*; see also 1 ANNALS OF CONG. 24 (1789) (Joseph Gales ed., 1834).

¹⁴³ Lund, *supra* note 5, at 1184.

¹⁴⁴ Steven Kreis, *Thomas Paine, 1737–1809*, THE HISTORY GUIDE: LECTURES ON MODERN EUROPEAN INTELLECTUAL HISTORY (May 30, 2013), <http://www.historyguide.org/intellect/paine.html> [<https://perma.cc/FF4S-79XZ>].

¹⁴⁵ Lund, *supra* note 5, at 1184 (citing 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 457 (1950)).

¹⁴⁶ Lund, *supra* note 5, at 1184.

¹⁴⁷ *Town of Greece v. Galloway*, 572 U.S. 565, 602 (2014) (Alito, J., concurring).

¹⁴⁸ Paul Taylor, *Congress’s Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today’s Congress and Courts*, 37 PEPP. L. REV. 847, 868 (2010).

¹⁴⁹ *Marbury v. Madison*, 5 U.S. 137, 138, 147 (1803); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1589 (2001).

or of its individual members cannot provide irrebuttable evidence of the ‘meaning’ of the Constitution.”¹⁵⁰

Even if the premise that the acts of the First Congress should be given great weight is accepted, the actions of the First Congress do not support legislator-led prayer, especially not in the way it is more recently presented in *Lund* and *Bormuth*.¹⁵¹ A search of the records of the First Congress does not show a single example of legislator-led prayer, showing that “[t]he Framers apparently relied exclusively on chaplain-led prayer to solemnize their proceedings.”¹⁵² As stressed by the majority in *Marsh*, the actions of Congress at this early moment in the history of the United States surely reveal what the Framers intended the Establishment Clause to mean.¹⁵³ Thus, it is telling not only that they did not give opening invocations themselves, but also that they imposed limits on clergy-led prayer to ensure that the practice remained religiously neutral.¹⁵⁴ The House and Senate formed committees to “take under consideration the manner of electing chaplains.”¹⁵⁵ It was agreed a week later “[t]hat two chaplains of *different denominations*, be appointed to Congress for the present session, the Senate appoint one, and give notice thereof to the House of Representatives, who shall, thereupon, appoint the other; which chaplains shall commence their services in the Houses that appoint them, but *shall interchange weekly*.”¹⁵⁶ The care taken by the Framers on this issue reflects their concern with avoiding even a thought that the government favored a single religion.¹⁵⁷ There is no other coherent reason why the First Congress would have “bound themselves to select chaplains of different denominations and to rotate the chaplains so often.”¹⁵⁸

The local governments in *Lund* and *Bormuth* took no such precautions and risked alienating county residents by showing favoritism to Christianity.¹⁵⁹ In Jackson County, the commissioners not only endorsed a specific religion, but made an intentional decision to control the content of prayers at board meetings by not allowing anyone other than a board member to pray.¹⁶⁰ At one board meeting, a Jackson County Commissioner speculated about what might occur if any county resident could lead an opening prayer:

¹⁵⁰ Brown, *supra* note 137, at 188 (emphasis added).

¹⁵¹ See *Lund v. Rowan Cty.*, 863 F.3d 268, 294 (4th Cir. 2017) (en banc) (Motz, J., concurring).

¹⁵² *Id.*

¹⁵³ *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

¹⁵⁴ *Lund*, 863 F.3d at 295 (Motz, J., concurring).

¹⁵⁵ 1 ANNALS OF CONG. 18 (1789) (Joseph Gales ed., 1834).

¹⁵⁶ *Id.* at 19 (emphasis added).

¹⁵⁷ *Lund*, 863 F.3d at 295 (Motz, J., concurring).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*; *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 537–38 (6th Cir. 2017) (en banc) (Moore, J., dissenting).

¹⁶⁰ *Bormuth*, 870 F.3d at 537–38 (Moore, J. dissenting).

We all know that any one . . . could go online and become an ordained minister in about ten minutes. Um, so if somebody from the public wants to come before us and say that they are an ordained minister we are going to have to allow them as well . . . I think we are opening a Pandora's Box here because you are going to get members of the public who are going to come up at public comment and we are going to create a lot of problems here when certain people come up here and say things that they are not going to like.¹⁶¹

These comments show that the board was limiting who could give prayers to control the content of invocations.¹⁶² To say, as did the Sixth Circuit *en banc*, that such a prayer practice comports with the actions of the First Congress ignores the care taken by the Framers to avoid even the appearance of a sectarian preference. In brief, the prayer practices in *Lund* and *Bormuth* are completely different from what was authorized by the First Congress. Because of this, prayer practices like these can be “cast aside” without disrupting more than “two centuries of national practice.”¹⁶³

3. *Specific Historical Examples of Legislator-Led Prayer*

As noted by The *Bormuth* majority, the *Lund* dissent, and Justice Thomas in his dissent from the Supreme Court's denial of certiorari in *Lund*, there is some historical evidence of legislator-led prayer in the United States.¹⁶⁴ In 1776, “Reverend Mr. Turquand,” a member of the South Carolina Provincial Congress, performed “divine service” prior to some sessions of the Congress.¹⁶⁵ As Justice Thomas acknowledges, these instances of legislator-led prayer were “prior to Independence” and certainly long before the drafting and adoption of the First Amendment's Establishment Clause.¹⁶⁶ Using a few references to “divine service”¹⁶⁷ being offered by one legislator in one state prior to the signing of the United States Constitution or the adoption of the Bill of Rights seems like an attempt by Justice Thomas and the *en banc* Sixth Circuit to find historical support that simply is not there.

¹⁶¹ *Cty. of Jackson*, *supra* note 91, at 37:47–38:16.

¹⁶² *Bormuth*, 870 F.3d at 538 (Moore, J., dissenting).

¹⁶³ *Marsh*, 463 U.S. at 790 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)).

¹⁶⁴ *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2566–66 (2018) (Thomas, J., dissenting from denial of certiorari); *see also* Brief for Members of Congress as *Amici Curiae* in Support of Rowan County, North Carolina at 8, *Lund v. Rowan Cty.*, 863 F.3d 268 (2017) (No. 05-1631) [hereinafter Brief for Members of Congress].

¹⁶⁵ Brief for Members of Congress, *supra* note 164, at 8 (*citing* 1 JOURNAL OF THE PROVINCIAL CONGRESS OF SOUTH CAROLINA, 1776, at 35, 52, 75 (1776)).

¹⁶⁶ *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2566 (2018) (Thomas, J., dissenting from denial of certiorari).

¹⁶⁷ 1 JOURNAL OF THE PROVINCIAL CONGRESS OF SOUTH CAROLINA, 1776, at 21–75 (1776) (showing only four references to “divine service” being offered in the Congress).

The other evidence cited by Justice Thomas, that West Virginia and Illinois started their state constitutional conventions with invocations led by legislators, is also not persuasive evidence to back up his claim that “[f]or as long as this country has had legislative prayer, legislators have led it.”¹⁶⁸ The Constitutional Convention for the State of Illinois took place in 1818¹⁶⁹ and the West Virginia Convention did not begin until November 1861.¹⁷⁰ The inquiry of courts in legislative prayer cases must focus on “whether the prayer practice . . . fits within the tradition long followed in Congress and the state legislatures.”¹⁷¹ Practices that date back to the time of the Framers have unique importance within this inquiry.¹⁷² As outlined above, legislator-led prayer is not a part of the “tradition long followed in Congress”¹⁷³ The states also do not have a long tradition of legislator-led prayer.¹⁷⁴

Though legislator-led prayer has recently become prevalent in many states,¹⁷⁵ Justice Thomas was only able to point to two concrete examples of states (West Virginia and Illinois) that have a long history of legislator-led prayer.¹⁷⁶ Even these examples, the best historical evidence that can be gathered by proponents of legislator-led prayer, do not come close to dating back to the time of the Founding Fathers. As colorfully noted by a concurring Judge in *Lund*, these historical instances of legislator-led prayer are “very thin gruel” when compared to the historical tradition of clergy-led prayer discussed in *Marsh* and *Town of Greece* and are “certainly no substitute for the Framers’ own practice and understandings.”¹⁷⁷

B. Prayer Practices Similar to Those Evaluated in Lund and Bormuth Pose a Greater Threat to the Democratic Process than Clergy-Led Prayer

The *Lund* majority reasoned that “[l]egislator-led prayer is not inherently unconstitutional,”¹⁷⁸ but simply that, as the above discussion of history indicates,

¹⁶⁸ *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2566 (2018) (Thomas, J., dissenting from denial of certiorari).

¹⁶⁹ See Ill. State Historical Soc’y, *The Illinois Constitutional Convention of 1818*, 6 J. ILL. ST. HIST. SOC’Y 327, 327 (1913), <http://www.archive.org/stream/journalishs06illiuoft#page/n351/mode/2up> [<https://perma.cc/MK62-2EEJ>].

¹⁷⁰ W. Va. Dept. of Arts, Culture, & Hist., *West Virginia Constitutional Convention*, W. VA. ARCHIVES & HIST., <http://www.wvculture.org/history/statehood/statehood11.html> [<https://perma.cc/8EAE-WFYN>].

¹⁷¹ *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014).

¹⁷² See *Marsh v. Chambers*, 463 U.S. 783, 787–91 (1983).

¹⁷³ *Town of Greece*, 572 U.S. at 577; see discussion *supra* Section IV.A.2.

¹⁷⁴ See *Lund v. Rowan Cty.*, 863 F.3d 268, 294 (4th Cir. 2017) (en banc) (Motz, J., concurring).

¹⁷⁵ Brief for Members of Congress, *supra* note 164, at 10 (noting that, as of 2002, legislators lead at least some prayers in thirty-one states).

¹⁷⁶ *Rowan Cty. v. Lund*, 138 S.Ct. 2564, 2566 (2018) (Thomas, J., dissenting from denial of certiorari).

¹⁷⁷ *Lund*, 863 F.3d at 294 (Motz, J., concurring).

¹⁷⁸ *Id.* at 280 (majority opinion).

“the identity of the prayer-giver is relevant to the constitutional inquiry.”¹⁷⁹ Because the historical tradition relied upon in *Marsh* and *Town of Greece* cannot support legislator-led prayer, other tools must be used to evaluate such prayer practices.¹⁸⁰ As a separate prong of analysis, courts in legislative prayer cases must conduct a “fact-sensitive” review of “the setting in which the prayer arises and the audience to whom it is directed.”¹⁸¹ Within this fact-sensitive inquiry, the content of prayers is often not of concern to judges,¹⁸² but the Establishment Clause does constrain the content of even clergy-led prayers to some extent.¹⁸³ The Establishment Clause does not allow prayers that “denigrate nonbelievers or religious minorities, threaten damnation, preach conversion, proselytize, or advance or disparage a particular faith.”¹⁸⁴ Thus, legislative prayers that include any of the listed characteristics can violate the Establishment Clause even if they are clergy-led.¹⁸⁵ In addition, it is a core principle of the First Amendment that governments may not coerce citizens “to support or participate in any religion or its exercise.”¹⁸⁶ The following sections will examine these issues to show that prayer practices like those used in *Lund* and *Bormuth* are not constitutionally permissible, and that legislator-led prayer in general creates greater potential for Establishment Clause problems.

1. *The Setting of Legislative Prayer and Coercion*

Distinct from *Marsh*, which dealt with clergy-led prayer in a state legislature, the facts of *Lund* and *Bormuth* involve legislator-led prayers in local town meetings.¹⁸⁷ *Town of Greece* made clear that, at least in the context of clergy-led prayer, it makes no constitutional difference whether the prayers are offered in a state legislature or a local town board meeting.¹⁸⁸ In her dissent, Justice Kagan sharply criticized this view.¹⁸⁹ Justice Kagan would have distinguished the *Marsh* practice of prayers in a state legislature directed primarily at the lawmakers from what occurred in *Town of Greece*.¹⁹⁰ She noted that in *Marsh*, the prayers were an internal act for the benefit the lawmakers, a practice completely different from *Town of Greece* where “[a] chaplain face[d] the Town’s residents—with the Board

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* at 279–81; *see also* *Town of Greece v. Galloway*, 572 U.S. 565, 581–83 (2014).

¹⁸¹ *Town of Greece*, 572 U.S. at 587 (plurality opinion).

¹⁸² *Id.* at 581 (majority opinion).

¹⁸³ *Id.* at 582–83.

¹⁸⁴ *Id.* at 583; *see also* *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983).

¹⁸⁵ *See Town of Greece*, 572 U.S. at 582–83.

¹⁸⁶ *Id.* at 586 (plurality opinion) (citation omitted).

¹⁸⁷ *Lund v. Rowan Cty.*, 863 F.3d 268, 271–73 (4th Cir. 2017) (en banc); *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 497–98 (6th Cir. 2017) (en banc).

¹⁸⁸ *See Town of Greece*, 572 U.S. at 575–76.

¹⁸⁹ *Id.* at 632–34 (Kagan, J., dissenting).

¹⁹⁰ *Id.*

watching from on high—and call[ed] on them to pray together.”¹⁹¹ Justice Kagan and three other members of the Supreme Court found legislative prayer in the “highly intimate” setting of a town meeting problematic *even when clergy-led*.¹⁹²

What occurred in *Lund* and *Bormuth* is even more troubling. First, it seems clear that the prayers offered in Rowan and Jackson county town meetings were not solely for the benefit of lawmakers.¹⁹³ The *Bormuth* majority’s statement that “[l]egislative prayer exists ‘largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating back to the time of the Framers’”¹⁹⁴ simply does not reflect the way prayer was being used in these counties. Video evidence from Jackson County meetings shows that the town commissioners offered prayers at every single board meeting “except the one that no members of the public attended.”¹⁹⁵ Second, legislator-led prayer as it was practiced in *Lund* and *Bormuth* can alienate citizens from the local democratic process.¹⁹⁶ Citizens attend local government meetings to “participate in democracy” and to petition the town’s elected representatives for rights and benefits.¹⁹⁷ In *Lund*, these citizen petitions occurred shortly after the invocation given by a board member.¹⁹⁸ Non-Christian citizens attending a town meeting with the hopes of addressing meaningful local issues may face the choice of participating in a prayer practice they do not believe in or offending the very government leader that they will soon be attempting to persuade.¹⁹⁹

Addressing the specific situation of town board meetings, Justice Kennedy’s opinion in *Town of Greece* envisioned certain hypothetical situations that would make a town’s prayer practice coercive.²⁰⁰ After determining that the prayer practice in *Town of Greece* was not coercive, Justice Kennedy explained that “[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person’s acquiescence in the prayer opportunity.”²⁰¹ These issues might have been hypothetical in *Town of Greece*, but they became reality for the citizens involved in *Lund* and *Bormuth*. The first time that Peter Bormuth raised his concerns about legislator-led prayer in a board meeting, a commissioner “made

¹⁹¹ *Id.* at 634.

¹⁹² *Id.* at 627–36.

¹⁹³ *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 530 (en banc) (Moore, J., dissenting).

¹⁹⁴ *Id.* at 511 (majority opinion) (citation omitted).

¹⁹⁵ *Id.* at 530 (Moore, J., dissenting).

¹⁹⁶ *See Lund v. Rowan Cty.*, 863 F.3d 268, 287–88 (4th Cir. 2017) (en banc).

¹⁹⁷ *Id.* at 287.

¹⁹⁸ *Id.* at 288.

¹⁹⁹ *Bormuth*, 870 F.3d at 541 (Moore, J., dissenting); *see also Town of Greece v. Galloway*, 572 U.S. 565, 628–32 (2014) (Kagan, J., dissenting) (expressing that for non-Christians in these situations, the choice between simply praying alongside the majority and risking offense by leaving the room can be extremely difficult).

²⁰⁰ *Town of Greece*, 572 U.S. at 588 (plurality opinion).

²⁰¹ *Id.*

a disgusted face” at him and “turned his chair around, refusing to listen.”²⁰² On a separate occasion, a board member called Bormuth a “nitwit” for voicing objection the town prayer practice.²⁰³ In *Lund*, a citizen that questioned the board’s prayer practice was “booed and jeered by her fellow citizens.”²⁰⁴

As already noted, the town board members in both of these cases were giving the prayers and in charge of directing the public to participate.²⁰⁵ The Fourth Circuit weighed these factors appropriately in holding that “Rowan County’s prayer practice violated the Establishment Clause.”²⁰⁶ The Sixth Circuit, dealing with government conduct that was arguably more coercive and egregious, explained it away by stating that the board members were not expressing antagonism for Bormuth’s religious beliefs, but simply reacting to Bormuth’s negative attitude toward them.²⁰⁷ In sum, in addition to falling outside of the historical tradition delineated in *Marsh*, the insults, heckling, and government direction over prayer present in *Lund* and *Bormuth* coerced and intimidated citizens in violation of the principles outlined in *Town of Greece*. Compounding these concerns, the commissioners in both these cases “maintained exclusive and complete control over the content of the prayers”²⁰⁸ by prohibiting anyone other than town board members from offering invocations.²⁰⁹

2. *The Content of Prayers*

“If members of a legislative body recite[] one religion’s creed month after month, year after year, allowing no opportunity for members of any other religion to lead a prayer, a reasonable observer c[an] only conclude that the legislative body prefer[s] that religion over all others.”²¹⁰ According to the plaintiffs in *Lund*, the almost exclusively Christian prayers given by Rowan County Commissioners “sent a message that the County and Board favor[ed] Christians”²¹¹ Courts analyzing these issues often downplay the effect of prayer and religious practices on listeners

²⁰² *Bormuth*, 870 F.3d at 525 (Moore, J., dissenting).

²⁰³ *Cty. of Jackson*, *supra* note 91, at 43:29–43:40.

²⁰⁴ *Lund v. Rowan Cty.*, 863 F.3d 268, 288 (4th Cir. 2017) (en banc).

²⁰⁵ *Id.* at 272 (“After calling the meeting to order, the chairperson asks everyone in attendance—commissioners and constituents alike—to stand up. All five Board members rise and bow their heads, along with most of the attendees. A commissioner then asks the community to join him in worship, using phrases such as . . . ‘Please pray with me.’”); *Bormuth*, 870 F.3d at 498 (“Following a call to order, the Board’s Chairman typically requests Commissioners and the public alike to . . . ‘Please bow your heads and let us pray’ . . .”).

²⁰⁶ *Lund*, 863 F.3d at 275.

²⁰⁷ *Bormuth*, 870 F.3d at 518.

²⁰⁸ *Lund*, 863 F.3d at 274; *see also Bormuth*, 870 F.3d at 538 (Moore, J., dissenting).

²⁰⁹ *Lund*, 863 F.3d at 273; *Bormuth*, 870 F.3d at 498.

²¹⁰ *Lund*, 863 F.3d at 293 (Motz, J., concurring) (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

²¹¹ *Lund*, 863 F.3d at 274.

and participants.²¹² Politically conscious citizens are not being “hypersensitive”²¹³ for objecting to years of exclusively Christian prayers, but merely expressing a core part of who they are.²¹⁴ Contrary to the *Town of Greece* majority view, the content of prayers does matter. Phrases like “the saving sacrifice of Jesus Christ on the cross, [and] . . . the plan of redemption that is fulfilled in Jesus Christ”²¹⁵ are “statements of profound belief and deep meaning” to the prayer-giver.²¹⁶

Maintaining that the content of prayers in government meetings plays only a minor role in the constitutional analysis trivializes the beliefs of devout religious people who truly believe that they are communicating with a divine being. To prayer-givers in these instances, the content of individual prayers is of supreme importance,²¹⁷ but listeners are simply expected to deal with whatever comes, even when prayers are clearly advocating that others in the community take up a particular faith.²¹⁸ This can cause citizens to feel excluded from their communities and the local political process.²¹⁹ In brief, though the content of legislative prayers is not dispositive,²²⁰ it is much more important where government leaders are the only prayer-givers and prayers are used to advance a particular faith.

V. OPTIONS FOR RESOLVING THE CIRCUIT SPLIT

Many cities and counties around the United States rely on legislator-led prayer because it is convenient and less expensive than retaining a full-time chaplain,²²¹ and two *en banc* circuit courts have reached opposite conclusions on the issues discussed above.²²² Both Rowan County and Peter Bormuth appealed these rulings,²²³ but despite the direct conflict between the rulings of the two circuits, the Supreme Court denied certiorari in both cases in June 2018.²²⁴ Because of this denial of certiorari

²¹² See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565, 589–90 (2014).

²¹³ *Bormuth v. Cty. of Jackson*, 116 F. Supp. 3d 850, 855 (E.D. Mich. 2015).

²¹⁴ See *Town of Greece*, 572 U.S. at 635–36 (Kagan, J., dissenting).

²¹⁵ Examples of phrases used in the prayers at issue in *Town of Greece*, 572 U.S. 565 (2014).

²¹⁶ *Town of Greece*, 572 U.S. at 635 (Kagan, J., dissenting).

²¹⁷ See, e.g., *Bormuth*, 870 F.3d 494, 518 (en banc) (quoting a Jackson County Commissioner as saying “[w]e commissioners, as individuals, have a right to pray as we believe”).

²¹⁸ *Lund v. Rowan Cty.*, 863 F.3d 268, 287 (4th Cir. 2017) (en banc) (concluding that several prayers said by the Rowan County Commissioners “placed Christianity on a higher plane than other faiths and urged attendees to embrace that religion”).

²¹⁹ *Id.* at 274.

²²⁰ *Town of Greece*, 572 U.S. at 580–81.

²²¹ Petition for Writ of Certiorari at 16, *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2564 (2018) (No 17-565).

²²² *Id.*

²²³ *Id.* at 1; Petition for a Writ of Certiorari at 1, *Bormuth v. Cty. of Jackson*, 138 S. Ct. 2708, 2708 (2018) (No 17-7220).

²²⁴ *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2564 (2018) (denying certiorari); *Bormuth v. Cty. of Jackson*, 138 S.Ct. 2708, 2708 (2018) (denying certiorari).

“[s]tate and local lawmakers can lead prayers in Tennessee, Kentucky, Ohio, and Michigan, but not in South Carolina, North Carolina, Virginia, Maryland, or West Virginia.”²²⁵ A Supreme Court ruling will eventually be necessary to provide state and local officials with guidance on this issue,²²⁶ but until the Court steps in to resolve the conflict, federal courts in other circuits have a variety of avenues available for dealing with challenges to legislator-led prayer practices.

A. Analysis Using the Marsh and Town of Greece Frameworks

The most likely course of action for federal courts outside of the Fourth and Sixth Circuits in legislator-led prayer challenges would be rulings using the analysis of *Marsh* and *Town of Greece*. Even if courts were to determine that the identity of the prayer-giver is not dispositive to the constitutional equation, prayer practices like those in *Lund* and *Bormuth* should still be considered unconstitutional because they coerce participation by all present and actively promote the practice and spread of Christianity.²²⁷ More far-reaching rulings would track the Fourth Circuit’s analysis, recognizing the clear differences between legislator-led and clergy-led prayer practices, and hold legislator-led prayer practices like those in *Lund* and *Bormuth* to be violations of the Establishment Clause. The *Town of Greece* majority opinion would allow for this type of ruling.²²⁸ It noted that the main issue in legislative prayer cases is to determine whether the prayer practice “fits within the tradition long followed in Congress and the state legislatures.”²²⁹

Evidence of long-standing tradition is part of this analysis, but *key* to the inquiry is whether the tradition dates back to the time of the Framers.²³⁰ If other federal courts recognize a meaningful difference between legislator-led and clergy-led prayers coupled with findings of coercion or proselytizing, the inquiry would almost certainly end there, and practices like those used in Rowan and Jackson counties would be held unconstitutional under *Town of Greece*.²³¹ If, on the other hand, courts are presented with situations where the practice is not coercive or are unwilling to recognize the relevance of “subtle coercive pressures” to the legislative prayer

²²⁵ *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2567 (2018) (Thomas, J., dissenting from denial of certiorari).

²²⁶ Petition for Writ of Certiorari, *supra* note 221, at 25.

²²⁷ See *infra* Section IV.B (referencing the coercive nature of the prayer practices at issue in *Lund* and *Bormuth*).

²²⁸ *Town of Greece*, 572 U.S. at 576–79.

²²⁹ *Id.* at 577.

²³⁰ *Id.* at 588 (plurality opinion) (providing that the “purpose [of legislative prayer] is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers”); *Marsh v. Chambers*, 463 U.S. 783, 787–91 (1983) (noting the unique importance of evidence that a practice dates back to the time of the Framers).

²³¹ *Town of Greece*, 572 U.S. at 584–86.

analysis,²³² it is plausible that they would turn to a traditional Establishment Clause test to resolve the issue.

B. Applying the Lemon Test to Legislator-Led Prayer

It may seem unlikely that lower federal courts would use the *Lemon* test for a legislative prayer case in the future, but it is not out of the question. *Marsh* “carv[ed] out an exception” to the Supreme Court’s Establishment Clause jurisprudence by not subjecting it to any of the formal tests in use at the time.²³³ The *Marsh* Court found those tests unnecessary because government bodies dating back to the First Congress have started meetings with clergy-led prayer, assuring that the practice is compatible with the Establishment Clause.²³⁴ A historical tradition analysis has been used by the Supreme Court in other Establishment Clause cases, but only when dealing with passive government displays that were supported by historical tradition.²³⁵

Contrary to the assertion of the *Bormuth* majority, applying the *Lemon* test to the issue of legislator-led prayer would not be “rewriting thirty-plus years of Supreme Court jurisprudence,”²³⁶ because *Marsh* and *Town of Greece* were addressing a completely different issue than the Fourth and Sixth Circuits.²³⁷ History should be used to analyze legislative prayer when the practice actually has a history that dates back to the time of the Framers. Though the *Lemon* test has not been applied with rigid consistency by federal courts,²³⁸ it is still recognized as a key part of the analysis in many Establishment Clause cases.²³⁹

Under the *Lemon* test, “a governmental practice violates the Establishment Clause if it (1) lacks a legitimate secular purpose; (2) has the primary effect of

²³² This might happen if, for example, a lower federal court were to accept Justice Thomas’s view that “to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not subtle coercive pressures” *Id.* at 610 (Thomas, J., concurring).

²³³ *Id.* at 575 (majority opinion).

²³⁴ *Id.*; see also *Marsh*, 463 U.S. at 788 (“[C]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains . . . as a violation of that Amendment . . .”).

²³⁵ See *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (using history to analyze whether a Ten Commandments monument on the grounds of a state capitol created an Establishment Clause violation).

²³⁶ *Contra Bormuth v. Cty. of Jackson*, 870 F.3d 494, 514 (6th Cir. 2017) (en banc).

²³⁷ See *Lund v. Rowan Cty.*, 863 F.3d 268, 292 (4th Cir. 2017) (en banc) (Motz, J., concurring).

²³⁸ See, e.g., *Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 603–09 (3d Cir. 2009) (noting that the *Lemon* test continues to “stalk[] our Establishment Clause jurisprudence” like “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried” (quoting *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring))).

²³⁹ See *Stratechuk*, 587 F.3d at 603–09; see generally *McCreary Cty. v. ACLU of Kentucky*, 545 U.S. 844 (2005) (applying the *Lemon* test).

advancing or inhibiting religion; or (3) fosters an excessive entanglement with religion.”²⁴⁰ In his dissent in *Marsh*, Justice Brennan applied *Lemon* to the Nebraska legislature’s prayer practice and determined that it violated all three elements.²⁴¹ It was “self-evident” to him that the purpose of legislative prayer was not secular, but religious.²⁴² It is not clear whether this assertion would hold up in all legislative prayer cases today, because the Supreme Court stated in *Town of Greece* that legislative prayer exists “largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers.”²⁴³ Whether this purpose would be considered secular is unclear, but when legislative prayers are not for the benefit of lawmakers at all, the analysis is easier.

The prayers in *Lund* and *Bormuth* were at least partly directed at the members of the public that were present at town meetings.²⁴⁴ In *Bormuth*, the board of commissioners prayed at every meeting over a two-year span *except* the one where no members of the public were present, undermining the argument that legislator-led prayer is primarily for the benefit of lawmakers.²⁴⁵ Justice Brennan also observed that the primary effect of legislative prayer is advancing religion.²⁴⁶ Prayers in government settings explicitly link religious beliefs to the power of the State, and even if citizens can choose not to participate, they place coercive pressure on religious minorities.²⁴⁷ It is important to note that Justice Brennan was referencing clergy-led prayer in his dissent, but his concerns about coercion and linking religion to the state are magnified when the prayer-giver is an elected government official facing constituent citizens.

Finally, legislative prayer generally, and certainly legislator-led prayer as it was practiced in *Lund* and *Bormuth*, “leads to excessive entanglement between the State and religion.”²⁴⁸ When a town board opens monthly meetings with prayers given by a board member, “there is no distinction between the government and the prayer giver: they are one and the same.”²⁴⁹ In addition, legislator-led prayer fosters government entanglement with religion because it creates a risk of religious beliefs becoming a campaign issue in elections.²⁵⁰ In sum, because historical tradition does

²⁴⁰ *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

²⁴¹ *Marsh v. Chambers*, 463 U.S. 783, 797–801 (1983) (Brennan, J., dissenting).

²⁴² *Id.* at 797.

²⁴³ *Town of Greece v. Galloway*, 572 U.S. 565, 588 (2014) (plurality opinion).

²⁴⁴ *Lund v. Rowan Cty.*, 863 F.3d 268, 272 (4th Cir. 2017) (en banc) (noting that the commissioners sit at the front of a room facing their constituents and a member of the board stands up and asks the community to join him in worship); *see Bormuth v. Cty. of Jackson*, 870 F.3d 494, 530 (6th Cir. 2017) (en banc) (Moore, J., dissenting).

²⁴⁵ *Bormuth*, 870 F.3d at 530 (Moore, J., dissenting).

²⁴⁶ *Marsh*, 463 U.S. at 798 (Brennan, J., dissenting).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Bormuth*, 870 F.3d at 537 (Moore, J., dissenting).

²⁵⁰ *Lund*, 863 F.3d at 282 (“[T]he prayer practice became a campaign issue in the 2016 Board elections”).

not support legislator-led prayer, federal courts hearing legislator-led prayer challenges could apply the *Lemon* test and hold that prayer practices similar to those in *Lund* and *Bormuth* violate the Establishment Clause.

VI. CONCLUSION

In a time of ever-increasing division along political and religious lines,²⁵¹ Justice Kagan's dissenting remarks in *Town of Greece* about what the Establishment Clause should guarantee ring true: "[w]hen the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines."²⁵² Legislator-led prayer as it was practiced in *Lund* and *Bormuth* impermissibly leads to treatment of citizens solely as members of faiths in a way that clergy-led prayer does not. Because the historical tradition relied on in *Marsh* and *Town of Greece* cannot save legislator-led prayer practices where the legislators reserve prayer opportunities exclusively for themselves, federal courts should adopt the view taken in *Lund* and recognize that the identity of the prayer-givers in legislative meetings is relevant to the legislative prayer analysis.

²⁵¹ See generally Tara Isabella Burton, *Christianity in America Is More Politically Polarized than Ever*, VOX (Oct. 11, 2017, 10:40 AM), <https://www.vox.com/identities/2017/10/11/16447008/christianity-america-politically-polarized> [<https://perma.cc/VGS5-BU72>] (asserting that Americans are becoming more polarized than ever, especially when it comes to politics and religion).

²⁵² *Town of Greece v. Galloway*, 572 U.S. 565, 637–38 (2014) (Kagan, J., dissenting).