

Tulsa Law Review

Volume 54 | Issue 1

Article 5

Fall 2018

Let Us Pray: The Case for Legislator-Led Prayer

Nicholas J. Hunt

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Nicholas J. Hunt, *Let Us Pray: The Case for Legislator-Led Prayer*, 54 Tulsa L. Rev. 49 (2018).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol54/iss1/5>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

**LET US PRAY:
THE CASE FOR LEGISLATOR-LED PRAYER**

Nicholas J. Hunt

The annals of American history paint the picture of a government influenced by religion. The Founders of this nation believed in the nonpreferential treatment of religion, which entailed rigid neutrality amongst the various denominations but did not eliminate religion from the public square. For the last sixty years, the Supreme Court’s capacious reading of the Establishment Clause brought a great divide between religion and government. Case-by-case and brick-by-brick, courts continue to raise Thomas Jefferson’s metaphorical wall of separation between church and state.

This faulty interpretation of the Establishment Clause led to the current split between the Fourth and Sixth Circuits over legislator-led prayer. The split correlates with the Supreme Court’s failure to set an interpretive standard for the lower courts to follow on the issue. Now, judicial declarations of opposition to legislator-led prayer threaten to halt a tradition that has echoed through the chambers of legislatures and town halls since the founding of the United States.

This paper proposes that there is a constitutional analog between legislative prayer and legislator-led prayer. I argue that antiquated Establishment Clause tests such as “Lemon,” “Endorsement,” and “Psychological Coercion,” bear no constitutional footing in evaluating legislator-led prayer. Rather, the Court should look to a test that connects with the historical underpinnings of the First Amendment and reflects the original meaning of the Establishment Clause regarding government prayer. The evaluation includes: 1) a look to the history and tradition of legislator-led prayer in this country; and 2) an actual legal coercion standard, which is congruent with the original meaning of the establishment of a religion. This historically accurate inquiry proves that legislator-led prayer invokes a tradition intricately embedded in the fabric of this nation.

I. INTRODUCTION 50

II. MISTAKEN HISTORY AND A MYTHICAL WALL..... 52

 A. Let History Decide 52

 B. The Framers’ Debate 52

 C. A History of God and Government 54

 D. The Defective Use of a Metaphor in *Everson v. Board of Education* 56

III. JURISPRUDENTIAL DEVELOPMENT OF THE ESTABLISHMENT CLAUSE TESTS 58

50	<i>TULSA LAW REVIEW</i>	[Vol. 54:49]
	A. Lemon Test	58
	B. Historical Approach	59
	C. Endorsement Test.....	59
	D. The Two Coercions.....	60
	1. Psychological Coercion.....	60
	2. Actual Legal Coercion	61
	IV. LEGISLATIVE PRAYER IN THE SUPREME COURT	62
	A. <i>County of Allegheny v. ACLU</i>	62
	B. <i>Town of Greece v. Galloway</i>	63
	1. Justice Thomas' Concurrence: The Original Meaning of Coercion.....	65
	V. THE CIRCUIT SPLIT	65
	A. The Fourth Circuit's Approach	66
	B. The Sixth Circuit's Approach	67
	VI. THE CASE FOR LEGISLATOR-LED PRAYER.....	69
	A. The Hybrid Assessment of History and Coercion.....	70
	1. A Historical Guide to Legislator-Led Prayer	70
	a. Federal Legislators.....	70
	b. State Legislators	71
	c. Prayers Invoked by Presidents	72
	B. Actual Legal Coercion and Legislator-Led Prayer.....	73
	1. The Original Meaning of the Establishment of Religion and its Interplay with Coercion.....	74
	a. Establishment of Religion.....	74
	b. Coercion and Establishment	75
	2. Clarity for Legislator-Led Prayer	76
	a. Actual Legal Coercion Brings Uniformity to the Courts	76
	b. Actual Legal Coercion: A Simple Alternative to the Psycho-Coercion Test.....	78
	VII. CONCLUSION	78

I. INTRODUCTION

“Let us pray.” This is a not an uncommon phrase in American culture. Many people would expect to hear it while attending church services or other religious events. Likewise, it was not an uncommon phrase during the events surrounding the birth of America. The historical record proves the profound religious convictions possessed by founders of our nation and the framers of our Constitution. This phrase rings loudly through the corridors of our history, voiced by honorable and devout men as they assumed the mantle of nation builders. It is a phrase uttered in haloed tones by the courageous military leaders of the Revolutionary War, men like George Washington who stole away to offer prayers in supplication for Divine intervention. Our forefathers offered these words of supplication

2018]

LET US PRAY

51

to a Divine Being—whose blessings and guidance they sought—as they engaged in writing the United States Constitution. Five weeks into the Constitutional Convention, Benjamin Franklin stood and reminded the attendees of how many times they prayed together in the past:

In the beginning of the Contest with Great Britain, when we were sensible of danger we had daily prayer in this room for the divine protection. Our prayers, Sir, were heard, & they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending providence in our favor.¹

In present day, these words of invitation and prayer uttered by government officials set off waves of litigation by those who object to legislator-led prayer at public meetings on the basis that it violates the Establishment Clause of the Constitution.² The appearance of such cases birthed a renewed judicial embrace of the history surrounding the development of the Clause. Twentieth Century jurisprudence has had a discombobulated approach to the history and interpretation of the religion clauses of the First Amendment. This murky historical interpretation by the Supreme Court is directly responsible for the current judicial disagreement on the topic of legislator-led prayer between the Fourth and Sixth Circuits.

This paper examines the history surrounding the framing of the First Amendment and the history of legislator-led prayer. It proposes that the Fourth and Sixth Circuit split provides the Supreme Court with the perfect opportunity to clarify the meaning of the Establishment Clause and affirm the constitutionality of legislator-led prayer.

Part II of this paper gives a comprehensive overview of the history surrounding the debates and drafting of the Establishment Clause of the First Amendment. This section delves into the actions of the Founders and Framers and sheds light on the truth that our government was never intended to be devoid of religious influence. It ends with a discussion of how the misinterpretation of a metaphor caused half a century of Establishment Clause jurisprudence to be mired in confusion. Part III examines the inner turmoil of the Supreme Court, which led to a plethora of conflicting tests used to evaluate alleged Establishment Clause violations. Part IV gives a summary of Supreme Court cases that shaped Establishment Clause jurisprudence and legislative prayer and the ambiguity the cases have left the lower courts to interpret. Part V discusses the circuit split between the Fourth and Sixth Circuits on legislator-led prayer. It analyzes how the two circuits use the same Supreme Court case to draw two polar-opposite conclusions on the issue. Part VI proposes that the Supreme Court should rely on history through a two-part evaluation of whether legislator-led prayer violates the Establishment Clause. The test 1) looks to the history and tradition of legislator-led prayer, and 2) evaluates fact-specific inquiries under an actual legal coercion test. By adopting this approach, the Court can find that legislator-led prayer holds a constitutional analog to legislative-prayer, thus making the practice per se constitutional.

1. MARK A. BELILES & DOUGLAS S. ANDERSON, *CONTENDING FOR THE CONSTITUTION, RECALLING THE CHRISTIAN INFLUENCE ON THE WRITING OF THE CONSTITUTION AND THE BIBLICAL BASIS OF AMERICAN LAW AND LIBERTY* 27 (2005).

2. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion.”).

II. MISTAKEN HISTORY AND A MYTHICAL WALL

A. *Let History Decide*

Seventy-one years ago, the Supreme Court, in *Everson v. Board of Education*, encapsulated its explanation of the Establishment Clause firmly within the parameters of Thomas Jefferson's famous "wall of separation," which he described in his Letter to the Danbury Baptist Association.³ *Reynolds v. U.S.* was the only authority cited in *Everson* as direct precedent for the "wall of separation between Church and State theory" laid down by the Court.⁴ And almost forty years after *Everson*, Justice Rehnquist wrote a blistering dissent.

The true meaning of the Establishment Clause can only be seen in its history. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decision making that has plagued our Establishment Clause cases since *Everson*.⁵

Existing historical documents and testimonies paint a compelling portrait of Framers who "intended the Establishment Clause to prohibit the designation of any church as the 'national' one, and designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others."⁶ The abundance of First Amendment historical record does not contain one piece of evidence indicative of the Framers' intent to abolish religion from government by constructing an inviolable wall between the two, prohibiting Congress from using nondiscriminatory sectarian means to accomplish legitimate nonreligious ends.⁷ The Court's reliance on Jefferson's metaphor shrouded future Establishment Clause cases in a dismal judicial mist, which served the purpose of obstructing and preventing a pure historical interpretation of the First Amendment.

B. *The Framers' Debate*

Throughout the arduous and heated debates over ratification of the Constitution, the gentlemen opposing it were doing so on the basis that a Constitution should have clearly defined individual freedoms. Without these established rights, the Framers saw potential for a tyrannical government emerging and ruling the new nation.⁸ James Madison championed the defense that it would be impossible for the Federal Government to violate individual freedoms because it would only possess limited delegated powers.⁹ By 1789, eleven colonies ratified the Constitution, five of which had already suggested individual freedom amendments.¹⁰ New Hampshire, New York, and Virginia included declarations

3. See *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

4. See *Wallace v. Jaffree*, 472 U.S. 38, 92 n.1 (1985) (Rehnquist, J., dissenting) ("*Reynolds* is the only authority cited as direct precedent for the 'wall of separation theory.' *Reynolds* is truly inapt; it dealt with a Mormon's Free Exercise Clause challenge to a federal polygamy law.>").

5. *Id.* at 113 (citations omitted).

6. *Id.*

7. *Id.*

8. *Id.* at 92-93.

9. *Wallace*, 472 U.S. at 93.

10. *Id.*

of religious freedom, while ratification failed in Rhode Island and North Carolina, due to the lack of individual freedom amendments.¹¹

Figuratively, historical myth might paint a picture of a zealous James Madison mounted on a white steed and riding into a ratification battle carrying the banner of the Bill of Rights, as if the fight for their inclusion in the Constitution was a mountain upon which he was willing to die. However, this could not be further from fact. Madison staunchly believed that the Bill of Rights was not necessary and referred to the entire ratification process as the “nauseous project of amendments.”¹² A large group of supporters joined him in the House of Representatives, describing the Bill of Rights as “milk and water amendments,” “bread pills,” and “a little flourish and dressing.”¹³

The Anti-Federalists’ strong rhetoric against the Constitution appeared to be solely due to the Constitution’s lack of language guaranteeing the personal religious freedoms of the individual, but their objections were to the commerce regulation and taxation powers of Congress rather than the lack of religious freedom guarantees.¹⁴ Many scholars think the complaints about the absence of personal religious liberties written into the Constitution, and the proposal of amendments to remedy this omission, were designed to create a smokescreen to disguise the true economic motive of forcing changes limiting Congress’s commerce regulation and taxation powers.¹⁵

Nevertheless, on June 8, 1789, James Madison took the floor of the House of Representatives and brought forth the promised list of Amendments.¹⁶

It appears to me that this House is bound by every motive of prudence, not to let the first session pass over without proposing to the State Legislatures, some things to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons why something should be done, that those who had been friendly to the adoption of this Constitution may have the opportunity of proving to those who were opposed to it that they were as sincerely devoted to liberty and a Republican Government, as those who charged them with wishing the adoption of this Constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished.¹⁷

Instead of the words of a Framer determined to see the amendments passed because of a heartfelt belief in their necessity, Madison’s words appear as those of a seasoned

11. *Id.*

12. Letter from James Madison to Richard Peters (Aug. 19, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 346–47 (Charles F. Hobson & Robert A. Rutland eds., 1979).

13. JAMES H. HUTSON, *CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES* 150, 152 (2008).

14. *Id.* at 153.

15. *See generally*, Paul Finkleman, *Turning Losers Into Winners: What Can We Learn, If Anything, From the Antifederalists?*, 79 TEX. L. REV. 849 (2001) (book review).

16. *Wallace v. Jaffree*, 472 U.S. 38, 94 (1985) (citing 1 ANNALS OF CONG. 424, 431–32 (1789)).

17. *Id.* at 94 (quoting 1 ANNALS OF CONG. 424, 431–32 (1789)).

politician seeking to successfully pass measures desired by his fellow countrymen, ones that “could surely do no harm and might do a great deal of good.”¹⁸

Madison’s original language for the First Amendment Religion Clauses read, “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”¹⁹ These were not the words of a politician attempting to erect an impenetrable wall between Church and State.

The first revision of the Clauses read, “No religion shall be established by law, nor shall the equal rights of conscience be infringed.”²⁰ Representative Peter Sylvester of New York particularly disliked this revised version because he feared it might serve “to abolish religion altogether,” and Roger Sherman vehemently objected to the inclusion of any such amendment referencing religious freedom.²¹ Inordinately dissatisfied with Madison’s proposed amendment, Representative Samuel Livermore sought to alter the language to read that “Congress shall make no laws touching religion, or infringing the rights of conscience[,]” while the Senate revised version read, “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.”²²

These few glimpses into history and the Framers’ thoughts and actions support the view that they sought to avoid the establishment of a national religion and to prevent discrimination of citizens who were members of different religious sects than the state religions already established in nine of the eleven ratified states, as well as citizens possessing no religion.²³ It is unjust to think that the recorded statements of ninety Framers could be summed up to conclude that they were erecting a wall of separation between the Church and the State.

C. A History of God and Government

The Founding Fathers of our nation and the Framers of the U.S. Constitution enriched the annals of American History with illuminating commentary concerning their thoughts about the abiding and necessary presence of God in the governmental affairs of man. Further, “[t]he [same] Congress that passed the First Amendment also reenacted the Northwest Ordinance, which declared: ‘Religion, morality, and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged.’”²⁴ Note that this was five years prior to the ratification of the Bill of Rights.²⁵ Founder, Framers, and President John Adams thought the exercise of genuine religious liberty called for the State to balance the establishment

18. *Id.*

19. *Id.*

20. *Wallace*, 472 U.S. at 94.

21. *Id.*

22. *Id.* at 97.

23. *Id.* at 98.

24. Matthew D. Fridy, Comment, *What Wall? Government Neutrality and the Cleveland Voucher Program*, 31 CUMB. L. REV. 709, 720 (2001) (quoting Ordinance of the Northwest Territory art. III (1787)).

25. See an ordinance for the government of the territory of the United States, North-west of the river Ohio Art. III (July 13, 1787), reprinted in 32 Journals of the Continental Congress 1774–1789, at 340 (1937).

of one civil religion with the free exercise of many private ones and that every political system must establish some “form of public religion,” and some commonality of values and beliefs to provide a foundation of support for the “plurality of private religions.”²⁶

The thought that society and government could exist with all vestiges of religion eradicated was a foreign idea to these statesmen. It was with this heightened awareness that religion and morality were essential cornerstones in the foundation of good government that President George Washington included the following words in his 1796 Farewell Address to the nation:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation deserts the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.²⁷

At the outset of the New World’s birth, the immigrants who founded the Colonies brought with them a rich tradition of Christianity.²⁸ This tradition was one so deeply entrenched in every aspect of their lives that only the most steadfast of Massachusetts Bay Colony Puritans could participate in the affairs of government.²⁹ Historical knowledge of these spiritually devout environments, where public conciliations to religious beliefs were commonplace, led the Supreme Court to state that the Religion Clauses of the First Amendment were irrevocably grounded in the historical context of their adoption.³⁰

It was due to this staunch belief in the ability of strong religious morals and principles to maintain civic government’s operation at the “highest plane” that George Washington urged the appropriation of funds for the teaching of religion in Virginia.³¹ Included by the authors of the First Charter of Virginia was the precept that the people founded the colony to serve “the Glory of his Divine Majesty.”³² The drafters believed that men of strong religion in service to God would function with the highest morals and

26. Letter from John Adams to Benjamin Rush (Feb. 2, 1807), *reprinted in* OUR SACRED HONOR 408–09 (William J. Bennett ed., 1997); *See also* Letter from John Adams to Zabdiel Adams (June 21, 1776), *in* 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 401 (Charles Francis Adams ed., 1854) (“[I]t is religion and morality alone, which can establish the principles upon which freedom can securely stand. The only foundation of a free constitution is pure virtue.”).

27. George Washington, Farewell Address to the People of the United States (Sept. 19, 1796).

28. *See generally* MICHAEL CORBETT & JULIA MITCHELL CORBETT, POLITICS AND RELIGION IN THE UNITED STATES (2014).

29. *Id.*

30. Patrick M. Garry, *The Myth of Separation: America’s Historical Experience with Church and State*, 33 HOFSTRA L. REV. 475, 476 (2004) (citing *Engel v. Vitale*, 370 U.S. 421, 429–30 (1962) and *McGowan v. Maryland*, 366 U.S. 420, 437–40 (1961)).

31. ANSON PHELPS STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 515 (1950).

32. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2186 (2003) [hereinafter “McConnell Establishment”].

resist the temptation to fall prey to amoral vices, thus, guaranteeing society an existence in an orderly state of peace.³³

It is impossible to imagine a scenario where the Founders and Framers would have espoused the formation of a government for the new nation that was completely devoid of the presence of religion and where a wall existed that separated God from government. It is not possible, nor is it plausible to think this, and it is certainly not historically accurate.

D. The Defective Use of a Metaphor in Everson v. Board of Education

It is often said that “a new broom sweeps clean.” In *Everson v. Board of Education*,³⁴ the Supreme Court acted in a similar capacity when, with one sweeping motion, it ignored the intent of the Framers’ in drafting the Establishment Clause. Especially egregious was the Court’s misplaced dependence on Thomas Jefferson’s metaphorical “wall of separation between church and state” in the landmark decision to incorporate the Establishment Clause to apply to the states.³⁵ Justice Black’s steadfast declaration provided the basis for the onset of misguided Establishment Clause jurisprudence, the likes of which the Framers would not recognize,³⁶ when he stated, “[i]n the words of Jefferson,” the First Amendment was intended to erect “a wall of separation between church and State” that must be kept high and impregnable. We could not approve the slightest breach.”³⁷

Over the next sixty years, the invocation of Jefferson’s words in *Everson* opened the Court to an onslaught of cases with decisions that systematically attempt to remove every fiber of religious influence from the fabric of our nation’s governmental institutions.³⁸ It is ironic that the Court in *Everson* paid homage to the words of Thomas Jefferson’s

33. *Id.* at 2197.

34. 330 U.S. 1 (1947).

35. Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), reprinted in 16 WRITINGS OF THOMAS JEFFERSON 281–82 (Albert Ellery Bergh & Washington D.C.: The Thomas Jefferson Memorial Association eds., 1904).

36. See J. Clifford Wallace, *The Framers’ Establishment Clause: How High the Wall?*, 2001 B.Y.U. L. REV. 755, 755 (2001) (arguing that “[r]eligion has long been a part of our country’s fabric. The possibility of restraints on the development of this religious heritage was an early concern of our forefathers.”); McConnell Establishment, *supra* note 32, at 2207 (“[T]he history of the founding period shows that free exercise and disestablishment were supported politically by the same people, with the strongest support for disestablishment coming from the most evangelical denominations of Americans. How can this be squared with the conventional explanation?”).

37. *Everson*, 330 U.S. at 16.

38. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (holding that a law is constitutional under the Establishment Clause if it 1) has a legitimate, secular purpose; 2) does not have the primary effect of either advancing or inhibiting religion; and 3) does not result in excessive entanglement of government and religion); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (holding that displays of the Ten Commandments in public schools is unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985) (holding a school prayer statute to be unconstitutional because its purpose was to express the state’s endorsement of prayer); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (holding that the teaching of Creationism in public schools violates the Establishment Clause); *County of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989) (holding a Nativity scene placed in a grand staircase of a courthouse endorsed religion); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (holding public school graduation prayer practices violate the Establishment Clause); *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 317 (2000) (holding high school prayer policies for football games violated the Establishment Clause); *McCreary County v. ACLU*, 545 U.S. 844, 858 (2005) (holding that a Ten Commandment display was unconstitutional because it was not integrated in a display with a secular purpose).

interpretation of the Establishment Clause given that he neither participated in the debates of the First Amendment nor maintained a presence at the ratification debates of the State Legislatures.³⁹

Today, Jefferson’s figure of speech—written two days before he and most of the other U.S. Congressmen attended, without protest, a religious service held in the Hall of the House of Representatives—is the foundational stone of the separationist belief.⁴⁰ In contrast to the intent of the Framers, the adherents to this belief continue to wage a judicial war, which seeks to achieve the removal of all religious influence on government, and the banishment of all religious practices from every vestige of public life.⁴¹

In awarding such heavy weight to Jefferson’s ten words, “thus building a wall of separation between Church & State,”⁴² written ten years after the Bill of Rights was ratified, the Supreme Court has identified Jefferson as a champion of its slash-and-burn jurisprudence regarding the presence of religion in the public square.⁴³ The Court relied on a misinterpreted metaphor to justify decisions that constructed new borders for the First Amendment, systematically limiting, or outright removing, the rights the Amendment was written to protect, and expanding the federal powers which it was written to limit.

In its reliance on Jefferson’s wall as the foundation for assuming this role, the Court heavy-handedly disregarded Jefferson’s opposition to the federal regulation of religion expressed in his letter to Samuel Miller.⁴⁴ In the letter, he explains his refusal to declare a national day of fasting and prayer:

I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, disciplines, or exercises...this results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly no power to prescribe any religious exercise or to assume any authority in any religious discipline has been delegated to the General [Federal] Government. It must then rest with the States as far as it can be in any human authority.⁴⁵

However, Jefferson felt no such compunction against government prayer declarations while Governor of Virginia. In 1779, he forwarded to the Virginia House of Delegates a circular that all state executives received from the Continental Congress recommending a day of public thanksgiving.⁴⁶ The Virginia House of Delegates then

39. See generally 1 ANNALS OF CONG. (Joseph Gales ed., 1834).

40. JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 56 (1896).

41. Joe Wolverton II, J. D., *The Establishment Clause*, THE NEW AMERICAN (June 24, 2011), <https://www.thenewamerican.com/usnews/constitution/item/7996-the-establishment-clause>, (last visited Jan. 20, 2018).

42. *Supra* note 12.

43. *But see* David E. Steinberg, *Thomas Jefferson’s Establishment Clause Federalism*, 40 HASTINGS CONST. L.Q. 277, 318 (2013) (“[T]he Supreme Court’s claims that Jefferson himself advocated a federally mandated separation of church and state are simply wrong. The Court’s misuse of Jefferson’s writings has been either ill-informed and inaccurate, or an intentionally misleading creation intended to support the Court’s extension of its own power and authority.”).

44. See Letter from Thomas Jefferson to the Reverend Samuel Miller (Jan. 23, 1808), *reprinted in* 11 THE WRITINGS OF THOMAS JEFFERSON 428–30 (Andrew A. Lipscomb ed., 1905).

45. *Id.*

46. See *supra* note 43 at 306.

composed a proclamation and sent it to Governor Jefferson who signed it into effect.⁴⁷

In *Everson*, the Court laid the foundation for gross judicial overreach when it cherry-picked the Danbury metaphor from the writings and executive actions of Thomas Jefferson. By deciding to quote a letter containing such low hanging fruit and misapplying what was contained therein, the Court granted itself the authority to oversee all state legislation and regulation about the intermingling of religion and government. It has taken the Establishment Clause, which, according to Justice Clarence Thomas, “probably prohibits Congress from establishing a national religion[,]”⁴⁸ and perverted it to justify the elimination of constitutionally sound legislation and policy.

III. JURISPRUDENTIAL DEVELOPMENT OF THE ESTABLISHMENT CLAUSE TESTS

A. *Lemon Test*

In 1971, the Burger Court heralded a new, bright-line rule for Establishment Clause cases.⁴⁹ In *Lemon v. Kurtzman*, Pennsylvania adopted a statutory program providing financial support to parochial schools by reimbursement for the cost of teachers’ salaries, textbooks, and instructional materials in specified secular subjects.⁵⁰ Similarly, Rhode Island adopted a statute in which the State directly paid a 15% supplement of an annual salary to teachers in nonpublic elementary schools.⁵¹ The Court found that each statute gave aid to church-related educational institutions and, therefore, was unconstitutional.⁵²

Writing for the majority, Justice Burger drew from the Court’s preceding Establishment Clause decisions (ruling for and against various claims) and formulated a three-part test for challenges to the Establishment Clause.⁵³ To survive such a challenge, the Court opined that a statute “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 government entanglement with religion.’”⁵⁴ Thus, in one fell swoop the Court caused a sea change for Establishment Clause jurisprudence for years to come, and the *Lemon Test* became the leading method for challenges to the Establishment Clause.⁵⁵

47. GEN. ASSEMB., REPORT OF THE COMMITTEE OF REVISERS, at 59–60 (Va. 1784).

48. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1835 (2014) (Thomas, J., concurring in part).

49. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

50. *Id.* at 606–07.

51. *Id.* at 607.

52. *Id.*

53. *Lemon*, 403 U.S. at 612–13.

54. *Id.* (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

55. Since its inception, the *Lemon Test* caused division across the federal judiciary. Supreme Court Justices, judges, and scholars continue to criticize the vague test. In *Lamb’s Chapel v. Center Moriches Union Free School District*, Justice Scalia expressed his disdain for the test and the majority’s reliance on it. “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, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.” 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment). Former Chief Judge of the Court of Appeals for the Seventh Circuit, Frank Easterbrook, characterized *Lemon* as hopelessly open-ended, lacking support in history or the text of the First Amendment, and “made up” by the Justices. *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting). First Amendment scholars have also criticized *Lemon*’s lack of textual foundation in the words of the Establishment Clause. See, e.g., Porth & George, *The Ivy: A Bicentennial Re-Examination of*

2018]

LET US PRAY

59

B. Historical Approach

The Court heard *Marsh v. Chambers* a mere twelve years after the inception of its neutrality test.⁵⁶ This case dealt with another Establishment Clause claim.⁵⁷ In this case, the question posed was whether the Nebraska Legislature’s practice of opening each legislative day with a prayer by a chaplain paid by the State violated the Establishment Clause of the First Amendment.⁵⁸ Once again, the opinion came from Justice Burger.⁵⁹ Rather than using the test he contrived in *Lemon*, he disregarded the standard altogether and relied on history and the intent of the Founding Fathers.⁶⁰

The majority commented that, “[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society,”⁶¹ and that the people of the United States “are a religious people whose institutions presuppose a Supreme Being.”⁶² With its ruling, the Court brought an exception for Establishment Clause challenges, one that looked to the deeply embedded history and tradition of an event or practice in this country.⁶³

C. Endorsement Test

In 1984, the *Lemon* Test met more opposition when the Court’s newest justice proposed an alternative test.⁶⁴ In *Lynch v. Donnelly*, citizens and local members of the American Civil Liberties Union sued the City of Pawtucket, Rhode Island, for displaying a crèche and Nativity scene in its annual Christmas display.⁶⁵ Once again writing for the majority, Chief Justice Burger found the display did not violate the Establishment Clause.⁶⁶ He wrote that when the crèche was considered “in the context of the Christmas season,” the display did not violate any of the three prongs of *Lemon*⁶⁷ and that the “primary effect” of the display did not benefit religion.⁶⁸

Justice O’Connor’s concurrence proffered a clarification to the Establishment Clause doctrine⁶⁹ by looking at the objective and subjective meanings of the message conveyed by the display.⁷⁰ Justice O’Connor suggested that the Court examine 1) whether there was an “excessive [government] entanglement with religious institutions,”⁷¹ and 2)

the Establishment Clause, 90 W. VA. L. REV. 109, 129 (1987).

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

57. *Id.*

58. *Id.* at 784.

59. *Id.*

60. *Id.* at 790–91.

61. *Marsh*, 463 U.S. at 792.

62. *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

63. *Id.* at 786.

64. *See Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

65. *Id.* at 671.

66. *Id.* at 687.

67. *Id.* at 679–80.

68. *Id.* at 681–82.

69. *Lynch*, 465 U.S. at 687–94. (O’Connor, J., concurring).

70. *Id.* at 687–95.

71. *Id.* at 687–88.

whether the government was endorsing or disapproving of religion.⁷²

In her concurrence, she reasoned that “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”⁷³

Justice O’Connor suggested that endorsement brought forth the same conclusion as the majority and that the crèche should be interpreted as an acknowledgment of religion, but not an endorsement.⁷⁴ After the birth of the *Lemon* Test, and within the next thirteen years, the Court proposed two more tests by which to examine the Establishment Clause. Members of the Court have found favor with the Endorsement Test,⁷⁵ but like *Lemon*, it also brought criticism.⁷⁶

D. The Two Coercions

1. Psychological Coercion

In 1992, the Court found itself creating another standard to evaluate Establishment Clause claims. This time, the opinion came from a younger member of the Court, Justice Anthony Kennedy.⁷⁷ In *Lee v. Weisman*, the Court took up the issue of prayer conducted during graduation ceremonies.⁷⁸ The principals of Providence, Rhode Island’s public-school system were permitted to extend invitations to members of the clergy to offer the benediction.⁷⁹ A father of one of the graduates objected to the prayers “to no avail.”⁸⁰

Writing for the majority, Justice Kennedy ruled that the prayers were coercive in nature, especially since children were the main audience, which violated the Establishment Clause.⁸¹ Looking to past precedent,⁸² he wrote “that prayer exercises in public schools carry a particular risk of indirect coercion.”⁸³ And in the context of school prayer, Justice Kennedy reasoned that the requests for a nonbeliever or dissenter to join in prayer may be seen as “an attempt to employ the machinery of the State to enforce a religious orthodoxy.”⁸⁴

72. *Id.* at 688.

73. *Id.*

74. *Lynch*, 465 U.S. at 691.

75. Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 504 (2002).

76. See *County of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., dissenting) (claiming the Endorsement Test “threatens to trivialize constitutional adjudication”); *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting) (suggesting the test “require[d] scrutiny more commonly associated with interior decorators than with the judiciary”).

77. See *Lee v. Weisman*, 505 U.S. 577 (1992).

78. *Id.* at 580.

79. *Id.*

80. *Id.* at 581.

81. *Id.* at 587. (citing *Lynch v. Donnelly*, 465 U.S. 668, 678) (“It is beyond dispute that, at a minimum, the Constitution guarantees that 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.’”).

82. See *Lee*, 505 U.S. at 592 (citing *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 307 (1963)).

83. *Id.* at 592.

84. *Id.*

Justice Kennedy also addressed the psychological pressures such acts could impose on children.⁸⁵ He reasoned that while a student’s attendance to a graduation ceremony is not “required by official decree,”⁸⁶ the student’s declination to attend because of the religious ceremony would constitute a “forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.”⁸⁷ The majority ruled that the prayer: 1) constituted government speech; 2) intruded and violated the objectors’ rights; 3) isolated the objectors; and 4) induced the objectors to conform to the practice.⁸⁸ Thus, the Court now looked to the “subtle coercive pressures”⁸⁹ imposed by the government, and ruled the prayer violated the Establishment Clause.⁹⁰

2. Actual Legal Coercion

Justice Scalia found little issue in criticizing the majority’s psychological coercion test, writing that it was “conspicuously bereft of any reference to history.”⁹¹ The criticism continued, as he found the test to be “boundless” and “boundlessly manipulable.”⁹² Justice Scalia found the rule bore no reflection of our nation’s historic practices, was socially charged, and brought to life by the “changeable philosophical predilections” of his colleagues.⁹³

Looking to the history and traditions of our country, Justice Scalia discussed the origins of the Establishment Clause and its original meaning when drafted by the Framers.⁹⁴ He explained that at the time of the clause’s drafting, coercion reared its head in tandem with historical establishments of religion.⁹⁵ At that time, the general public understood coercion to mean government compulsion by “force of law and threat of penalty.”⁹⁶ Justice Scalia found the original meaning of coercion to be a far cry from the graduation prayer,⁹⁷ and wholly disagreed with the historically unfounded psycho-coercion test.⁹⁸

85. *Id.* at 593–94. (citing Brittain, *Adolescent Choices and Parent–Peer Cross–Pressures*, 28 AM. SOCIOLOGICAL REV. 385 (June 1963); Clasen & Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J. OF YOUTH AND ADOLESCENCE 451 (Dec.1985); Brown, Clasen, & Eicher, *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self–Reported Behavior Among Adolescents*, 22 DEVELOPMENTAL PSYCHOLOGY 521 (July 1986) (“Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”).

86. *Id.* at 595.

87. *Lee*, 505 U.S. at 595 (“Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect. . . .”)

88. *Id.*

89. *Id.* at 592.

90. *Id.* at 599.

91. *Id.* at 631.

92. *Lee*, 505 U.S. at 632.

93. *Id.*

94. *Id.* at 640–44.

95. *Id.* at 640.

96. *Id.* at 641.

97. *Lee*, 505 U.S. at 646.

98. *Id.* at 641; *see also*, Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417, 483 (2009) (“As currently described, it is impossible to know whether the coercion test is very forgiving, very demanding, or somewhere in between. . . . [I]t is simply unconscionable for the Court

IV. LEGISLATIVE PRAYER IN THE SUPREME COURT

Over the course of the Supreme Court's Establishment Clause jurisprudence, the issue of legislative prayer arose two times, once in *Marsh v. Chambers*,⁹⁹ and again in *Town of Greece v. Galloway*.¹⁰⁰ The Court in *Marsh* ruled that chaplain-led prayer performed during the outset of sessions held by the Nebraska Legislature did not violate the Establishment Clause of the Constitution.¹⁰¹ But a footnote within the opinion provided ambiguity amongst the Court and lower courts as to the constitutionality of sectarian prayer.¹⁰² The Court addressed this issue in *Town of Greece*, abrogating *Allegheny v. ACLU*. This section undertakes an analysis of *Allegheny*, as well as *Town of Greece*, the Supreme Court's most recent case on legislative prayer.

A. County of Allegheny v. ACLU

Six years after the Court's ruling in *Marsh*, it clarified the case based on a footnote. In 1989, the Court heard *Allegheny*, a case concerning two holiday displays located on public property in Pittsburg, Pennsylvania.¹⁰³ The first display was an eighteen-foot Chanukah menorah placed outside of the City-County building beside a Christmas tree, and the second display was a crèche depicting the Christian Nativity Scene.¹⁰⁴

While the case dealt with religious symbols, it had a lasting effect on legislative prayer cases. Attempting to quash Justice Kennedy's concurring/dissenting opinions,¹⁰⁵ the majority delved into a discussion of *Marsh* through dicta.¹⁰⁶ In this, the majority suggested that footnote fourteen of *Marsh*¹⁰⁷ prevented the government from engaging in sectarian prayers.¹⁰⁸ Prior to the Court's decision in *Town of Greece*, *Allegheny*'s misinterpretation of a footnote led to lower courts splitting on the constitutionality of sectarian prayer.¹⁰⁹

to offer such a confused and confusing jurisprudence.”).

99. 463 U.S. 783 (1983).

100. 134 S. Ct. 1811 (2014).

101. See *supra* notes 13–19 and accompanying text.

102. See *County of Allegheny v. ACLU*, 492 U.S. 573, 602 (1989) (citing *Marsh v. Chambers*, 463 U.S. 783, 793 n.14 (1983) (opining that footnote fourteen of *Marsh* prevented the legitimacy of “practices that demonstrate government’s allegiance to particular sect or creed”)).

103. *Id.*

104. *Id.*

105. *Id.* at 662, 664–65 (Kennedy, J., dissenting).

106. *Id.* at 603.

107. *County of Allegheny*, 492 U.S. at 603 (citing *Marsh*, 463 U.S. at 793, n.14.) (“The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had ‘removed all references to Christ.’”).

108. *Id.* at 603 n.52 (“Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct.”).

109. Compare *Wynne v. Town of Great Falls*, 376 F.3d 292, 298–99 (4th Cir. 2004) (holding that prayers invoking the name of Jesus Christ promoted Christianity over other religions, thus, violating the Establishment Clause) with *Pelphrey v. Cobb Cty.* 547 F.3d 1263, 1271 (11th Cir. 2008) (holding that “[t]he ‘nonsectarian’ nature of the chaplain’s prayers [in *Marsh*] was one factor in this fact-intensive analysis; it did not form the basis for a bright-line rule”).

B. Town of Greece v. Galloway

Since 1999, the citizens of Greece, New York, held town board meetings that began with an invocation by a local clergyman.¹¹⁰ After a roll call and recitation of the Pledge of Allegiance, the town supervisor invited a local clergyman to lead the meeting in a prayer.¹¹¹ All prayer-givers were unpaid, and their selection process consisted of a town employee calling local religious institutions until she found a minister available for the month.¹¹² The town neither excluded nor denied an opportunity to a prospective prayer-giver, stating that “a minister or layperson of any persuasion, including an atheist, could give the invocation.”¹¹³ While this offer stood, all participating prayer-givers were Christian.¹¹⁴

Susan Galloway and Linda Stephens attended these town meetings, listening to municipal developments and speaking about local issues.¹¹⁵ The two did not belong to the Christian faith, and at one meeting, “admonished board members that [they] found the prayers ‘offensive,’ ‘intolerable,’ and an affront to a ‘diverse community.’”¹¹⁶ In 2010, Galloway and Stephens sued the town in federal court for violating the Establishment Clause by preferring Christians over other prayer-givers and by sponsoring sectarian prayers.¹¹⁷ The plaintiffs requested an injunction, which would “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.”¹¹⁸

Over the next sixty years, the invocation of Jefferson’s words in *Everson* opened the Court to an onslaught of cases with decisions the Court specifically addressed the constitutionality of sectarian prayer.¹¹⁹ Writing for the plurality, Justice Kennedy opined that 1) legislative prayer extended to municipal board meetings; 2) the prayers conducted at the meetings did not have to be non-sectarian, abrogating *Alleghany*; and 3) the prayers did not coerce or compel the audience to participate in the religious observance.¹²⁰

Justice Kennedy first looked to *Marsh*, which demonstrated that legislative prayer comported with this nation’s history and the Founders’ original intent.¹²¹ He found no issues analogizing the town’s prayer practice to the legislative prayers in *Marsh*, writing that the practice had “historical precedent.”¹²² In addition, he turned his analysis to the

110. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014). In years prior, the town meetings began with a moment of silence. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Town of Greece*, 134 S. Ct. at 1817.

116. *Id.* The prayers in question invoked Christian themes and ended with phrases such as “in Jesus’ name.” *Id.* (citing 732 F. Supp. 2d 195, 203 (2010)).

117. *Id.*

118. *Id.* It is worth noting that the plaintiffs did not wish to end the prayer practice in its entirety.

119. *Id.* at 1818. The district court ruled in the town’s favor, while the Second Circuit reversed the trial court’s decision. *Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010), rev’d, 681 F.3d 20 (2d Cir. 2012).

120. *Town of Greece*, 134 S. Ct. at 1811.

121. *Id.* at 1819 (“*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.”).

122. *Id.* at 1819 (“In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society.”)

content of the prayers.¹²³ Placing the Framers' actions into historical context, Justice Kennedy found that an aberration from sectarian prayers did not accord with history.¹²⁴ In this, the Court abrogated *Allegheny* and established a rule in tune with history and a correct understanding of the decision in *Marsh*.¹²⁵

While finding sectarian prayer *per se* constitutional, the plurality observed that it still has constraints.¹²⁶ The plurality called for prayers to be "solemn and respectful in tone," inviting reflection by lawmakers on "shared ideals and common ends before they embark on the fractious business of governing."¹²⁷ To conclude this portion of the opinion, Justice Kennedy addressed the prayers that plaintiffs described as "disparage[ing] those who did not accept the town's prayer practice."¹²⁸ He determined that while remarks "strayed from the rationale set out in *Marsh*," they did not despoil the practice in its entirety, which reflected and embraced our tradition.¹²⁹ The plurality opined that the prayers must "denigrate, proselytize, or betray an impermissible government purpose" to constitute a constitutional violation.¹³⁰

Turning from the earlier line of analysis, the plurality addressed whether the prayers presented a coercive tone or message,¹³¹ and found that no acts by the town constituted coercion.¹³² Once again looking to historical practice, Justice Kennedy evaluated the prayers under a "reasonable observer" standard.¹³³ He further expounded that the prayer practice showed no signs of denigration or exclusion, but a practice of inclusion.¹³⁴ In sum, the plurality found the prayer practice to fall within the confines of the nation's history and the rationale of *Marsh*.¹³⁵

(citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

123. *Id.* at 1820.

124. *Id.* ("An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable.")

125. *Town of Greece, 134 S. Ct.* at 1821–22 (citing *Marsh*, 463 U.S., at 794–95) ("[T]he Court instructed that the 'content of the prayer is not of concern to judges,' provided '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.'")

126. *Id.* at 1823.

127. *Id.*

128. *Id.* at 1824. (Such prayers included: 1) characterizing prayer objectors as a 'minority' who are 'ignorant of the history of our country; and 2) stating other towns did not have 'God-fearing' leaders).

129. *Id.*

130. *Town of Greece, N.Y.*, 134 S. Ct. at 1824.

131. *Id.* at 1825 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., dissenting in part) ("[G]overnment may not coerce its citizens 'to support or participate in any religion or its exercise.'"). *See also* *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (plurality opinion) (opining that the nation's "institutions must not press religious observances upon their citizens").

132. *Id.*

133. *Id.* Justice Kennedy reasoned that "the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.*

134. *Id.* at 1826. Typical prayers included phrases like "let us join our hearts and minds together in prayer"; "would you join me in a moment of prayer"; and "[t]hose who are willing may join me now in prayer." *Id.*

135. *Town of Greece, 134 S. Ct.* at 1827–28 ("Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs

1. Justice Thomas’s Concurrence: The Original Meaning of Coercion

And from *Town of Greece* rode the horseman, Clarence Thomas, atop his noble steed, Originalism.¹³⁶ Justice Thomas concurred in part and concurred in the judgment in *Town of Greece*.¹³⁷ Part I of his concurrence reiterated that the Establishment Clause was a federalism provision, as evidenced by the “variety of church-state arrangements that existed at the Founding.”¹³⁸ Part II discussed a narrower view of the coercion test, one steeped in history and the original meaning of coercion.¹³⁹

First heralded by Justice Scalia in *Lee*,¹⁴⁰ Justice Thomas also argued that “the coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.”¹⁴¹ During the age of the Founding, coercive pressures from state establishments entailed mandatory attendance at an established church, levied taxes that generated church revenue, prevented dissenting ministers from preaching, and political participation exclusive to members of the established church.¹⁴² Thus, the original meaning of coercion, in applicability to the Establishment Clause, was “actual legal coercion,”¹⁴³ not mere “subtle coercive pressures”¹⁴⁴ as perceived by a “reasonable observer.”¹⁴⁵

In his concurrence, Justice Thomas applied an originalist principle to the Establishment Clause. The conclusion was the same. Under this test, “[p]eer pressure, unpleasant as it may be, is not coercion.”¹⁴⁶ But Justice Thomas’ rationale denotes a narrower test for Establishment Clause claims—one rooted in this nation’s history.

V. THE CIRCUIT SPLIT

In the past year, federal Courts of Appeals rendered split decisions on the constitutionality of sectarian, legislator-led prayers.¹⁴⁷ In the wake of *Town of Greece* (and

can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs.”).

136. See Olivia Beavers, *Senate Dem: ‘Gorsuch,’ ‘Thomas,’ and ‘Alito’ like Horseman of the Apocalypse*, THE HILL (June 26, 2017, 3:30 PM), <http://thehill.com/homenews/senate/339522-senate-dem-gorsuch-thomas-and-alito-like-horseman-of-the-apocalypse> (U.S. Senator likens Justices Alito, Gorsuch, and Thomas to the ‘horsemen of the apocalypse.’); See also David R. Stras, *Pierce Butler: A Supreme Technician*, 62 VAND. L. REV. 695, 727 (2009) (explaining how four justices of the Supreme Court were given the name the ‘Four Horsemen,’ due to their impeding actions against President Roosevelt’s New Deal reforms).

137. *Town of Greece*, 134 S. Ct. at 1835–37 (Thomas, J., concurring).

138. *Id.* For the purposes of this paper, there is no need for further discussion of this section. Justice Thomas proffered his position on this subject at least two more times while on the Court. See generally *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 50–51 (2004) (Thomas, J., concurring in the judgment); *Van Orden v. Perry*, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring).

139. *Town of Greece*, 134 S. Ct. at 1837–38.

140. *Lee v. Weisman*, 505 U.S. 577 (1992); See *infra* Part III D and accompanying text.

141. *Id.* at 640 (Scalia, J. dissenting). See also *Perry*, 545 U.S., at 693–94 (Thomas, J., concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 729 (Thomas, J., concurring); *Newdow*, 124 S. Ct. 2301 (Thomas, J., writing for the Court).

142. *Town of Greece, N.Y.*, 134 S.Ct. at 1838.

143. *Id.*

144. *Id.* at 1819–20.

145. *Id.* at 1824–25

146. *Id.* at 1838 (quoting *Newdow*, 542 U.S. at 49 (opinion of Thomas, J.)).

147. See Patrick L. Gregory, *Circuit Split on Legislator-Led Prayer Could Entice Supreme Court*, Bloomberg

its tidal waves of ambiguity), both courts used the plurality opinion to its advantage. The Fourth Circuit struck down a prayer practice held during the outset of county board meetings as a violation of the Establishment Clause,¹⁴⁸ while the Sixth Circuit held that a similar practice by a Michigan county board was consistent with the holding in *Town of Greece* and the original meaning of the Establishment Clause.¹⁴⁹

A. *The Fourth Circuit's Approach*

In Rowan County, N.C., an elected body known as the Rowan County Board of Commissioners governs the County.¹⁵⁰ The five-commissioner board meets twice a month.¹⁵¹ At the outset of each meeting, one of the five Commissioners leads the audience and fellow officials in prayer.¹⁵² The Commissioner ask the audience to join in prayer, usually with phrases like “Let us pray,” “Let’s pray together,” or “Please pray with me.”¹⁵³ Given that all members of the Board have been members of the Christian faith, the majority of the prayers were sectarian and Christian-based in content.¹⁵⁴

Three longtime residents of Rowan County sued the Board for violating the Establishment Clause.¹⁵⁵ The district court ruled in favor of the plaintiffs, but on appeal, a Fourth Circuit panel reversed the ruling.¹⁵⁶ In 2017, the Fourth Circuit reheard the case en banc and reversed the panel’s ruling.¹⁵⁷

In the rehearing’s majority opinion, the Fourth Circuit ruled that the Board’s prayer violated the Establishment Clause for being sectarian, coercing the intended audience, and representing government sponsorship of religion.¹⁵⁸ The court remarked that the present case and its progeny are fact-specific and “by their nature ‘matter[s] of degree.’”¹⁵⁹ Under

Bureau of National Affairs (Sep. 13, 2017) (“The split could lead the Supreme Court to take up the issue of legislative prayer for a third time, though the court may let the issue ‘germinate a bit more to see what other circuits do.’”).

148. *Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017).

149. *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017).

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

151. *Id.*

152. *Id.*

153. *Id.* at 272–73 (“Over the five-and-a-half years for which video recordings are available, 97% of the Board’s prayers mentioned “Jesus,” “Christ,” or the “Savior.”).

154. *See Lund*, 863 F.3d at 273. Several prayers confessed sin and asked for forgiveness on the community’s behalf: “Lord, we confess that we have not loved you with all our heart, and mind and strength, and that we have not loved one another as Christ loves us. We have also neglected to follow the guidance of your Holy Spirit, and have allowed sin to enter into our lives.” *Id.* Other prayers implied that Christianity was superior to other faiths: “[A]s we pick up the Cross, we will proclaim His name above all names, as the only way to eternal life.” *Id.* On occasion, Board members appeared to implore attendees to accept Christianity. “Father, I pray that all may be one as you, Father, are in Jesus, and He in you. I pray that they may be one in you, that the world may believe that you sent Jesus to save us from our sins.” *Id.*

155. *Id.*

156. *Lund*, 837 F.3d at 411–31.

157. *Lund*, 863 F.3d at 268.

158. *Id.* at 281 (“We conclude that it is the combination of these elements—not any particular feature alone—that ‘threatens to blur the line between church and state to a degree unimaginable in *Town of Greece*.’”) (quoting *Lund*, 837 F.3d at 435 (Wilkinson, J., dissenting)).

159. *Id.* at 280. (“Establishment Clause questions are by their nature ‘matter[s] of degree,’ presupposing some acceptable practices and others that cross the line. . . . Prayers led by lawmakers, like sectarian prayers, may violate the Establishment Clause in some circumstances. And just as sectarian prayer has its limits, so, too, does legislator-led prayer.”).

this fact-sensitive inquiry, the court authored an opinion that veered from a specific inquiry into *Marsh* and *Town of Greece* to a haphazard evaluation of an array of Establishment Clause jurisprudence.¹⁶⁰

In stark disagreement with the plurality’s definition of coercion in *Town of Greece*,¹⁶¹ the Fourth Circuit concluded the Commissioners “press[ed] religious observances upon their citizens.”¹⁶² It included that the plaintiffs had “no trivial choice, involving, as it does, the pressures of civic life and the intimate precincts of the spirit.”¹⁶³ The court ended with the reiteration that this case was “one specific practice in one specific setting with one specific history and one specific confluence of circumstances.”¹⁶⁴ It made a final point, noting that “legislator-led prayer can operate meaningfully within constitutional bounds.”¹⁶⁵

In its decision, the Fourth Circuit deterred from an analysis confined by history and coercion. Rather, its rationale drew a hardline distinction between legislative and legislator-led prayer by encompassing over forty years of Establishment Clause jurisprudence and tests. By doing this, the court drew back from *Marsh*’s legislative-prayer exception to Establishment Clause claims, rendering a ruling that gives little structure or guidance for similar cases within its circuit and fellow circuits.

B. The Sixth Circuit’s Approach

In *Bormuth v. County of Jackson*, Jackson, MI County Board of Commissioners opened its public meetings with a prayer.¹⁶⁶ Akin to other municipal practices across the nation, the Commissioners themselves offered the invocations on a rotating basis.¹⁶⁷ After the meeting’s call to order, the Board’s Chairman usually requested Commissioners and the audience to “rise and assume a reverent position,” in preparation for the coming

160. *Id.* at 275–86 (using a totality of the circumstances approach to analyze a myriad of Supreme Court cases and conducting its analysis by the likes of the Coercion and *Lemon* tests); *See First Amendment—Establishment Clause—Fourth Circuit Holds That County Commissioners’ Practice of Offering Sectarian Prayers at Public Meetings Is Unconstitutional—Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017), 131 HARV. L. REV. 626, 632 (2017) (stating that the “lack of framework [in Lund] makes balancing competing implications opaque, difficult to replicate, and unpredictable”).

161. Justice Kennedy described the minister’s requests for the audience to join in prayer as an inclusive action, not coercion. *Town of Greece*, 134 S. Ct. at 1811, 1826. While the court found no ground in paralleling the ministers’/chaplains’ requests in *Town of Greece* to the Commissioners requests (which were nearly identical), a closer inquiry reveals the comparison to be far from inapposite. *See* 863 F.3d at 307 (“Straightaway—and without any legal support for doing so—the majority attaches near-dispositive meaning to the fact that lawmakers, as opposed to clergy, gave the legislative prayers at issue in this case. Neither *Marsh* nor *Town of Greece* attached particular significance to the identity of the speakers.”).

162. *Lund*, 863 F.3d at 286 (quoting *Van Orden v. Perry*, 545 U.S. 677, 683 (2005)).

163. *Id.* at 288. The court explained that, “[d]ue to the Board’s requests, the plaintiffs also felt compelled to stand so that they would not stand out.” *Id.* at 288. Once again, the court veered from the plurality’s decision. Justice Kennedy explained that “offense does not equate to coercion.” *Town of Greece*, 134 S. Ct. at 1815.

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

165. *Id.*; *but see id.* at 296 (Niemeyer, J., dissenting) (stating that by ruling the prayer practice unconstitutional, “essentially because the prayers were sectarian, the majority opinion’s reasoning strikes at the very trunk of religion, seeking to outlaw most prayer given in governmental assemblies, even though such prayer has always been an important part of the fabric of our democracy and civic life”).

166. 870 F.3d 494, 497 (6th Cir. 2017)

167. *Id.* at 498.

prayer.¹⁶⁸ The Chairman's requests varied, also including the following phrases: "Everyone please stand. Please bow your heads"; "Please bow your heads and let us pray"; and, "If everyone could stand and please take a reverent stance."¹⁶⁹ The prayers were usually Christian in nature and tone, often invoking the name of "God," "Lord," and "Jesus Christ."¹⁷⁰

Peter Bormuth, a "self-professed Pagan and Animist,"¹⁷¹ sued the Michigan County for violations of First Amendment Establishment Clause by the Jackson County Commissioners.¹⁷² Bormuth based his claims on seven invocations, which he claimed were unconstitutional because they included sectarian references.¹⁷³

Upon rehearing of the appeal *en banc*, the Sixth Circuit found the actions of the commissioners themselves conducting prayer at town meetings, rather than a chaplain, did not violate the Establishment Clause.¹⁷⁴ The majority found the *en banc* decision of the Fourth Circuit unpersuasive, thus, disregarded its holding.¹⁷⁵ Writing for the majority, Judge Griffin opined that the invocations of the Jackson County Commissioners were consistent with the accepted standards for prayer practices in *Marsh* and *Town of Greece*.¹⁷⁶

In its ruling, the majority first addressed whether the prayers must be neutral in content, i.e., non-sectarian.¹⁷⁷ Following the plurality's ruling in *Town of Greece*, the majority ruled that the constitutionality of legislator-led prayer does not turn on the neutrality of its content.¹⁷⁸ The court further opined that the county's prayer practice fell within the confines of the nation's history, as espoused in *Marsh* and *Town of Greece*,¹⁷⁹ which "[fell] within the religious idiom accepted by our Founders."¹⁸⁰ Finally, the majority looked to the issue of coercion.¹⁸¹ In its rationale, the majority found itself divided (much like the Supreme Court), regarding whether to use the 'psychological

168. *Id.*

169. *Id.*

170. *Id.*

171. *Bormuth*, 870 F.3d at 498.

172. *Bormuth v. Cty. of Jackson*, No. 13-13726, 2015 WL 4477840, at *1 (E.D. Mich. Mar. 31, 2015), report and recommendation adopted in part, 116 F. Supp. 3d 850 (E.D. Mich. 2015).

173. *Id.* The seven prayers included phrases such as "in your holy name," "bless our troops," as well as names and words including "amen," "heavenly father," "lord," and "Jesus."

174. *Bormuth*, 870 F.3d at 498.

175. *Id.* at 547 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.") (internal citations omitted).

176. *Id.* at 519.

177. *Id.* at 505.

178. *Id.* at 506. ("[O]nce the government has 'invite[d] prayer into the public sphere,' it 'must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.'" (citing *Town of Greece v. Galloway*, 134 S. Ct. 1822-23 (2014)).

179. *Bormuth*, 870 F.3d at 509 ("Most significantly, history shows that legislator-led prayer is a long-standing tradition. Before the founding of our Republic, legislators offered prayers to commence legislative sessions.").

180. *Id.* at 512. Unlike the Fourth Circuit, the court found a long-standing tradition of legislator-led prayer, stating, "[b]efore the founding of our Republic, legislators offered prayers to commence legislative sessions," and "[l]egislator-led prayer has persisted in various state capitals since at least 1849." *Id.* at 509.

181. *Id.* at 515-16.

coercion test’ or the ‘actual legal coercion test.’¹⁸² Finding that *Bormuth* failed under both tests, the court opted out of “resolv[ing] [the] issue.”¹⁸³ But, like *Town of Greece*, the majority found the Commissioner’s requests for the audience to “rise” and “remain quiet in a reverent position” fell far from the level of coercion.¹⁸⁴

With this decision, *Bormuth* created a split amongst the circuits regarding whether legislator-led prayer is per se constitutional. The confusion comes on many fronts. First, *Town of Greece*’s plurality left the lower courts in a haze of disarray. In doing so, two circuit courts divided on whether the historical tradition of legislative prayer by chaplains extends to legislator-led prayer. Second, the lower courts exacerbated the confusion in both cases, displaying fervent disagreement in the application of a ‘psychological’ or ‘actual legal’ coercion test.¹⁸⁵ If the Court does not address these issues and clarify *Town of Greece*’s ambiguity, legislator-led prayer will share the same fate as prior Court decided Establishment Clause activities, that is, it will exist in the murkiness of poorly rendered jurisprudence.

VI. THE CASE FOR LEGISLATOR-LED PRAYER

Evidence of turmoil amongst the federal judiciary is never more prevalent than on religious issues. One only need look to the lower courts to see the permeation of confusion. The Fourth and Sixth Circuits added to the turbid mess through the split decisions regarding legislator-led prayer. In this section, I call for the Supreme Court to address the questions left unanswered from *Town of Greece* and bring coherence to its ambiguity. The Court can achieve this by adopting a hybrid assessment, looking to history and the original meaning of legislator-led prayer in accordance with the Establishment Clause. Like *Marsh* and *Town of Greece*, this assessment should start with a historical inquiry of legislator-led prayer. In line with the historical pretexts of this evaluation, my proposition also calls for an ‘actual legal coercion’ test when looking at the actions of the prayer-givers. Through this two-part assessment, the Court can evaluate prayer cases through a lens of historical

182. *Id.* at 515–19. This division amongst the majority is rooted in a debate taking place in the Supreme Court. As exemplified in *Town of Greece*, the Court finds itself at odds as to which coercion test to use in Establishment Clause cases. In *Town of Greece*’s plurality opinion, Chief Justice Roberts, Justice Alito, and Justice Kennedy advocated for a coercion test that “remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed,” and “must be evaluated against the backdrop of historical practice.” *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (Kennedy, J.). In vehement disagreement, Justices Thomas and Scalia led the originalist charge for a test that conveyed the original meaning of religious coercion, which was “coercive state establishments” “by force of law or threat of penalty” *Id.* at 1837.

183. *Id.* at 516.

184. *Bormuth*, 870 F.3d at 517.

185. *See Bormuth*, 870 F.3d 494, 540 (6th Cir. 2017) (“I emphasize that Justice Kennedy’s concurrence is the controlling *Town of Greece* N.Y. opinion. A majority of this court appears to agree that Justice Kennedy’s opinion controls.”); *See also Lund v. Rowan County*, 863 F.3d 268, 297–99 (4th Cir. 2017) (Niemeyer, J., dissenting). But this argument goes far beyond the quarrelling and ideological differences between “conservative leaning” and “liberal leaning” judges. Judges in the Sixth Circuit, whom many would consider ideologically conservative, argue over the precedence of Justice Kennedy’s coercion test. *Compare Smith v. Jefferson Cty. Bd. of Sch. Comm’rs*, 788 F.3d 580, 602 n.9 (6th Cir. 2015) (Batchelder, J., concurring in part) (proffering that Justice Kennedy’s plurality opinion “is controlling on the lower courts, as it is narrower than the accompanying two-justice concurring opinion”) *with Bormuth v. Cty. of Jackson*, 849 F.3d 266, 304 (6th Cir. 2017) (Griffin, J., dissenting) (“The majority opinion applies . . . Justice Kennedy’s opinion as if it were the opinion of the Court. It is not.”).

context and the original meaning of legislator-led prayer.

A. *The Hybrid Assessment of History and Coercion*

It is useful to remember that history is to the nation as memory is to the individual. As persons deprived of memory become disoriented and lost, not knowing where they have been and where they are going, so a nation denied a conception of the past will be disabled in dealing with its present and its future.

- Arthur M. Schlesinger, Jr.¹⁸⁶

1. A Historical Guide to Legislator-Led Prayer

Like Mr. Schlesinger, many Supreme Court Justices lamented these beliefs as they dissented to their colleagues' capacious reading of the Establishment Clause.¹⁸⁷ Since *Everson*, Justices, as well as many lower court judges, have called for a strict separation of Church and State. Based on this holding, the future of sectarian, legislator-led prayer is now at stake.¹⁸⁸ If the Court looks to history, as it did in *Marsh* and *Town of Greece*, it will see that legislator-led prayer "comports with our [nation's] tradition."¹⁸⁹ Based on the rationale of *Marsh* used in *Town of Greece*,¹⁹⁰ history provides a constitutional analog between legislative prayer and legislator-led prayer.

a. *Federal Legislators*

As one Sixth Circuit judge noted in his dissent, there is "no doubt" that legislator-led prayer finds root in the guidelines of the Establishment Clause.¹⁹¹ Members of Congress prove this historical trend when they, instead of the chaplain, invoke prayers.¹⁹² Lawmakers often led their colleagues in prayer during some of the most gripping moments in the nation's last half-century. Specific instances of these prayers include Senator John Danforth of Missouri leading the U.S. Senate in three prayers following the assassination attempt on President Reagan,¹⁹³ and Senator Akaka leading his colleagues in prayer as they prepared for deliberations on "how the impeachment trial of President Bill Clinton

186. Arthur M. Schlesinger, Jr., *Folly's Antidote*, N.Y. TIMES (Jan. 1, 2007), <http://www.nytimes.com/2007/01/01/opinion/01schlesinger.html> (last accessed/visited Jan. 19, 2018).

187. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.").

188. See *Lund*, 863 F.3d 268 (4th Cir. 2017); Compare Kristopher L. Caudle, Unanswered Prayers: *Lund v. Rowan County* and the Permissiveness of Sectarian Prayer in Municipalities, 12 FIRST AMEND. L. REV. 625, 632 (2014) (calling for an end to sectarian legislator-led prayer) with Amona Al-Refai, *The End of Legislator-Led Prayers?*, U. CIN. L. REV. (Oct. 2017), <https://uclawreview.org/2017/10/25/the-end-of-legislator-led-prayers/> (last visited Jan. 19, 2018) (advocating for the Supreme Court to overturn the Fourth Circuit's *en banc* ruling in *Lund*).

189. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014).

190. *Id.* at 1819 ("*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.").

191. *Bormuth v. Jackson Cty.*, 870 F.3d 494, 525 (6th Cir. 2017) (Moore, J., dissenting).

192. *Lund*, 863 F.3d at 298 (Niemeyer, J., dissenting).

193. Brief of Members of Cong. as Amici Curiae Supporting Petitioners at 18–19, *Lund v. Rowan Cty., N.C.*, 138 S. Ct. 2564 (2018), On Writ for Petition of Certiorari (2017) (No. 17-565), *cert denied* (hereinafter "Brief of Members, Rowan County") (citing 129 Cong. Rec. 7630 (1983)).

should proceed.”¹⁹⁴ Furthermore, solidifying these prayers in history is the 1853 Senate Judiciary Committee report, as Congress argued in its amicus brief in *Bormuth*, “*the Establishment Clause was not ‘intend[ed] to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators.’*”¹⁹⁵ These are but a few examples of our nation’s lawmakers “ask[ing] their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths.”¹⁹⁶

b. State Legislators

When looking at the practices of our State Legislatures, one can see “a majority of state and territorial legislators rely on *lawmaker-led* invocations.”¹⁹⁷ This is proven by a survey conducted by the National Conference of State Legislatures (“NCSL”), which found at least “[forty-seven] chambers that allow people other than appointed or visiting chaplains to offer the opening prayer.”¹⁹⁸ Some state legislative bodies, such as the Rhode Island Senate, permit only its *members* to deliver prayers before the deliberative body.¹⁹⁹

Like the federal government, state legislatures maintain a prayer practice the likes of which the *Marsh* Court would have upheld. The Court’s knowledge of the legislator-led practice by the Nebraska Legislature in *Marsh* solidifies this to be fact.²⁰⁰ While *Marsh* dealt with chaplain-led prayers, the Nebraska “legislative journal shows that the Nebraska Unicameral also opened its sessions with member-led prayer.”²⁰¹ The *Marsh* Court held

194. *Id.* (citing 145 CONG. REC. 1408 (1999)).

195. Brief of Members of Cong. as Amici Curiae Supporting Jackson Cty. at 2, *Bormuth v. Jackson Cty.*, 138 S. Ct. 2708 (2018), *cert denied* (hereinafter “Brief of Members, *Bormuth*”) (quoting S. Rep. No. 32-376, at 4 (1853)).

196. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014).

197. *Lund v. Rowan Cty.*, 863 F.3d 268, 289 (4th Cir. 2017) (Niemeyer, J., dissenting).

198. Member of Congress made similar points in there brief. See Brief of Members, Rowan County, *supra* note 193, at 19; see also Brief of Members, *Bormuth*, *supra* note 195, at 4:

At the state and local levels, member-led prayer is commonplace, and stretches back to the Founding . . . the South Carolina Provincial Congress—South Carolina’s first independent legislature—welcomed member-led prayer from before the signing of the Declaration of Independence. It requested “[t]hat the Reverend Mr. Turquand, a Member, be desired to celebrate divine service in Provincial Congress.” American Archives, *Documents of the American Revolutionary Period 1774-1776*, at 1112 (1776); see also, e.g., *Journal of the Provincial Congress of South Carolina, 1776*, at 35, 52, 75 (1776) (examples of “Divine Service” led by Rev. Turquand). Similarly, the annals of state constitutional conventions abound with examples of *delegates* (not chaplains) offering a prayer to begin deliberations. See, e.g., *Journal of the Constitutional Convention of the State of Ohio* 5, 45, 53, 63 (1912); 1 *Official Report of the Proceedings and Debates* [Ohio] 100, 345, 358 (1873); *Debates and Proceedings of the Convention* [Arkansas] 44, 57, 68, 75, 77 (1868); 1 *Debates and Proceedings of the Constitutional Convention* [Illinois] 166 (1870); 2 *Report of the Debates and Proceedings of the Convention* [Indiana] 1141, 1294, 1311, 1431 (1850); 1 *Official Report of the Proceedings and Debates* [Utah] 59, 975 (1898).

199. Brief of Members, *Bormuth*, *supra* note 195, at 6.

200. *Id.* at 4–5 (“The Nebraska prayer practice at issue in (and approved by) *Marsh* encompassed member-led prayer.”).

201. *Id.* (citing 1 Legislative Journal of the State of Nebraska, 85th Leg., 1st Sess. 2087 (May 17, 1977), <http://nebraskalegislature.gov/FloorDocs/85/PDF/Journal/r1journal.pdf>; *id.* at v; 1 Legislative Journal of the State of Nebraska, 85th Leg., 2d Sess. 640 (Feb. 13, 1978), <http://nebraskalegislature.gov/FloorDocs/85/PDF/Journal/r2journal.pdf>).

that “most of the states” participated in a legislative prayer practice.²⁰² The Court supported this claim by citing an NCSL survey, which included a notation stating that lawmakers often led prayer sessions before the deliberative body.²⁰³ Thus, while not explicitly stating it, the Court deemed a prayer practice constitutional that included legislator-led prayer.

c. Prayers Invoked by Presidents

From the floor of the U.S. Senate to the nation’s highest office, individuals seek to call upon a “Supreme Being”²⁰⁴ and “harmoniz[e] with religious canons.”²⁰⁵ While Presidential prayers are not completely analogous to legislator-led prayer, the acts by our Commanders-in-Chief give light to a practice “deeply embedded in the history and tradition of this country.”²⁰⁶

Many of the Framers and Founders invoked prayers on the nation’s grandest stage. For example, George Washington’s inaugural address included this prayer:

[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that *Almighty Being* who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes.²⁰⁷

Washington offered another prayer during his 1789 Thanksgiving Day Proclamation. He began the invocation by stating, “it is the duty of all Nations to acknowledge the providence of Almighty God [and] to obey his will.”²⁰⁸

From the same office, Presidents Madison and Jefferson offered similar prayers. President Jefferson prayed in his inaugural address, “may that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity.”²⁰⁹ Mimicking the rhetoric of his fellow presidents and founders with his inaugural address, President Madison called upon the “guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have

202. *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783, 788–89 & n.11 (1983) (citing Brief of National Conference of State Legislatures (“NCSL”) as Amicus Curiae)).

203. *Id.* (“The survey . . . explained that the ‘opening legislative prayer’ in various states may be given by various individuals, including ‘chaplains, guest clergymen, *legislators*, and legislative staff members.’”). The NCSL brief further outlined that “[a]ll bodies, including those with regular chaplains, *honor requests from individual legislators either to give the opening prayer or to invite a constituent minister to conduct the prayer.*”*Id.*

204. *See Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (Douglas, J.) (“[We] are ‘a religious people whose institutions presuppose a Supreme Being.’ We guarantee the freedom to worship as one chooses.”).

205. *See Marsh*, 463 U.S. at 792 (citing *McGowan v. Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) (“The *Establishment Clause* does not always bar a state from regulating conduct simply because it “harmonizes with religious canons.”).

206. *Marsh*, 463 U.S. at 786.

207. J. CONG. COMM. ON INAUGURAL CEREMONIES, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 2 (1989) (emphasis added).

208. George Washington, *Thanksgiving Proclamation* (Oct. 3, 1789), in *THE SPIRIT OF AMERICA* 386, 386–87 (William J. Bennett ed., 1997).

209. J. CONG. COMM. ON INAUGURAL CEREMONIES, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 7 (1989).

2018]

LET US PRAY

73

been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.”²¹⁰

In present day, President Donald Trump continues the pattern of his predecessors in invoking a Higher Power. During the 2017 Christmas Ceremony, President Trump offered to the American people the meaning of Christmas:

For Christians, we remember the story of Jesus, Mary and Joseph that began more than 2,000 years ago. As the book of Isaiah tells us, for to us a child is born, to us a son is given and the government will be on his shoulders and he will be called Wonderful Counselor, Mighty God, Everlasting Father, Prince of Peace. This good news is the greatest Christmas gift of all, the reason for our joy and the true source of our hope.²¹¹

As Justice Scalia declared in *Lee*, “The history and tradition of our Nation are replete with public ceremonies featuring prayers.”²¹² Through these examples, it is evident that legislator-led prayer is a practice that is in accord with “unambiguous and unbroken history of more than 200 years.”²¹³

B. Actual Legal Coercion and Legislator-Led Prayer²¹⁴

“[W]hat interferes with religious liberty, is an establishment of religion.”²¹⁵ James Madison solidified this fact, stating “Congress should not establish a religion and enforce the legal observation of it by law.”²¹⁶ When undergoing analysis of the Establishment Clause, the Court explicitly held that it “must be interpreted ‘by reference to historical practices and understandings.’”²¹⁷ Thus, when evaluating the constitutionality of legislator-led prayer, the Court should adopt a test that is congruent with the original meaning of the establishment of a religion and employ an actual legal coercion test.²¹⁸

210. Engel v. Vitale, 370 U.S. 447, n.3 (1962) (Stewart, J., dissenting).

211. Lauren Gill, *Trump Christmas Message: What Does the President’s Book of Isaiah Passage Mean?*, NEWSWEEK (Dec. 25, 2017), <http://www.newsweek.com/trump-christmas-message-what-does-presidents-book-isaiah-passage-mean-758633>.

212. Lee v. Weisman, 505 U.S. 577, 633 (1992) at 633 (Scalia, J., dissenting).

213. Marsh v. Chambers, 463 U.S. 783, 792 (1983).

214. For the purpose of this analysis, I do not address the current debate regarding the precedential authority that Justice Thomas’s concurrence may have on lower courts. Instead, I call for the Court to adopt the actual legal coercion test. See Bormuth, 849 F.3d at 304 (citing Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)). The dissent explains that in *Marks v. United States*, the Supreme Court held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”)

215. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 941 (1986).

216. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 21 (Univ. of N.C. Press 2d ed. 1994).

217. Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014). (citing *Cty. of Allegheny v. ACLU of Greater Pittsburgh Chapter*, 492 U.S. at 670) (Kennedy, J., concurring in judgment in part and dissenting in part).

218. See James A. Campbell, Note, *Newdow Calls for A New Day in Establishment Clause Jurisprudence: Justice Thomas’s “Actual Legal Coercion” Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541, 591 (2006) (concluding that “Justice Thomas’s actual legal coercion test provides a preferable alternative to Establishment Clause analysis. O’Connor’s ceremonial deism approach adds an additional test to an already perplexing area of constitutional law.”); Ralph W. Johnson III, *Lee v. Weisman: Easy Cases Make Bad Law Too—the Direct Coercion Test Is the Appropriate Establishment Clause Standard*, 2 GEO. MASON INDEP. L. REV. 123, 194 (1993) (“The “direct coercion” test appropriately focuses attention on the governmental

1. The Original Meaning of the Establishment of Religion and its Interplay with Coercion

a. Establishment of Religion

Many Supreme Court Justices and scholars portray an establishment of religion “to mean the promotion of any kind of religion or religious activity.”²¹⁹ Yet, that interpretation does not stand well against historical precedent.²²⁰ The historical record reflects that establishment “denotes any special connection with the state . . . possessed by one religious society to the exclusion of others; in a word, establishment is of the nature of a monopoly.”²²¹ Former Supreme Court nominee and U.S. Senator, George E. Badger, succinctly described the original understanding of an “establishment of religion” in his Senate Judiciary Committee report regarding the Senate’s Chaplaincy Program. He wrote:

The clause speaks of “an establishment of religion.” What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother-country . . . endowment at the public expense . . . or disadvantages or penalties upon those who should reject its doctrines or belong to other communions—such law would be a “law respecting an establishment of religion . . .”²²²

Constitutional scholar and former Circuit Judge, Michael McConnell, explained that the hallmark elements of establishment included: 1) governmental control over the doctrines, structure, and personnel of the state church;²²³ 2) mandatory attendance at religious worship services in the state church;²²⁴ 3) public financial support;²²⁵ 4) prohibition of religious worship in other dominations;²²⁶ 5) use of the state church for civil functions;²²⁷ and 6) limitation of political participation to members of the state church.²²⁸ Thus, a review of the Framers’ original understanding of “an establishment of religion” indicates they concerned themselves with the possibility of government controlling religion, “which is arguably the most salient aspect of the historical establishment,”²²⁹

indoctrination and compulsion, which is, in fact, the true standard of an establishment of religion.”).

219. William F. Cox, Jr., *The Original Meaning of the Establishment Clause and its Application to Education*, REGENT U. L. REV. 111, 128 (2001); see, e.g., *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring) (“[The] Court’s precedent permits even the slightest public recognition of religion to constitute an establishment of religion.”).

220. See Cox, *supra* note 219, at 128-34; See, e.g. Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 51 (2005) (“[W]hen people referred to an ‘establishment of religion,’ they generally referred either to a single state church or to some other mechanism whereby one denomination or group of denominations was favored over others.”).

221. Cox, *supra* note 219, at 130 (quoting 9 THE ENCYCLOPEDIA BRITANNICA A DICTIONARY OF ARTS, SCIENCES, LITERATURE, AND GENERAL INFORMATION 787 (11th ed. 1910)); see also *id.* (“Similarly, use of the word ‘establishment’ during the Founding Era referred to ‘the “establishing” by law’ a church, religion, or form of worship and ‘the conferring on a particular religious body the position of a state church.’”).

222. AMERICA’S GOD AND COUNTRY ENCYCLOPEDIA OF QUOTATIONS 168 (William J. Federer ed., 1996).

223. McConnell Establishment, *supra* note 32, at 2131-44.

224. *Id.* at 2144-46.

225. *Id.* at 2146-59.

226. *Id.* at 2159-69.

227. *Id.* at 2169-76.

228. McConnell Establishment, *supra* note 32, at 2176-81.

229. *Id.* at 2207.

rather than removing religion from the public sphere.²³⁰

b. Coercion and Establishment

At the time of the Framing, the Founders strived to combat the State’s compulsion and coercive decrees regarding religion. Professor Michael McConnell notes, “the problems that the Founders had encountered were that the government had sought to compel adherence to one religion or, in some colonies, one of several religions, and that the government had sought to restrain adherence to the others.”²³¹ Justice Scalia re-affirmed these facts in his *Lee* dissent, stating, “The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.”²³²

Throughout the Court’s lengthy jurisprudential roller coaster with the Establishment Clause, many Justices looked to Founder James Madison’s *Memorial and Remonstrance Against Religious Assessment* for clarity on the original understanding of the Religion Clauses.²³³ Professor McConnell points out that Madison’s work reflects the fact that compulsion/coercion go hand-in-hand with establishment:²³⁴

What does the *Memorial and Remonstrance* have to say about compulsion and establishment? It states: (1) that the proposed bill for the support of teachers of the Christian religion would be a “dangerous abuse” if “armed with the sanctions of a law”; (2) that religion “can be directed only by reason and conviction, not by force or violence”; (3) that government should not be able to “force a citizen to contribute” even so much as three pence to the support of a church; (4) that such a government would be able to “force him to conform to any other establishment in all cases whatsoever”; (5) that “compulsive support” of religion is “unnecessary and unwarrantable”; and (6) that “attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general.” Again, legal compulsion to support or participate in religious activities would seem to be the essence of an establishment.²³⁵

He further notes that it is “difficult to see” how there could be a state establishment without some element of coercion.²³⁶

In sum, the historical record reflects the Framers’ original understanding of an

230. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring) (“I would prefer . . . adopting an Establishment Clause jurisprudence that is in accord with our Nation’s past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State’s favoring religion generally.”).

231. McConnell Coercion, *supra* note 215, at 939.

232. *Lee*, 505 U.S. at 640 (Scalia, J., dissenting).

233. See JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in JAMES MADISON: WRITINGS 29 (Jack N. Rakove ed., 1999); *Everson*, 330 U.S. 1 at 37 (“[The Memorial and Remonstrance] is Madison’s complete, though not his only, interpretation of religious liberty. It is a broadside attack upon all forms of ‘establishment’ of religion, both general and particular, nondiscriminatory or selective.”) (Rutledge, J., dissenting); see, e.g., John T. Valauri, *Justice Rutledge’s Appendix*, 47 CAL. W. L. REV. 91, 91-92 (2010) (“Justice Rutledge appended Madison’s Memorial and Remonstrance Against Religious Assessments to his *Everson* dissent, making the *Remonstrance* the central historical document in the subsequent debate on the meaning of the Establishment Clause.”).

234. McConnell Coercion, *supra* note 215, at 938.

235. *Id.* (internal citations omitted).

236. *Id.*

establishment of religion to “necessarily [involve] actual legal coercion.”²³⁷ Through actual legal coercion, “the government only violates the Constitution when it uses legal means to directly coerce religious beliefs.”²³⁸ An establishment of religion “entails coercion,”²³⁹ and failure by the Court to summarily parallel the two infringes upon religious freedom.

2. Clarity for Legislator-Led Prayer

The courts in *Bormuth* and *Lund* caused a jurisprudential ‘split’ regarding sectarian, legislator-led prayer.²⁴⁰ As previously argued, these conflicting rulings stem from the ambiguities left by *Town of Greece*. If the Court adopts Justice Thomas’s actual legal coercion model for evaluating legislator-led prayer, it will 1) put to rest the subtle difficulties of the psycho-coercion test by replacing it with a historically accurate evaluation; and 2) give guidance to the lower courts when evaluating legislator-led prayer cases.

a. Actual Legal Coercion Brings Uniformity to the Courts

The Fourth and Sixth Circuits raised several issues arising from legislator-led prayer cases. The court in *Bormuth* found no issue analogizing legislator-led prayer to legislative prayer,²⁴¹ while the Fourth Circuit in *Lund* expounded that the elected representatives giving such prayers “threaten[ed] to blur the line between church and state to a degree unimaginable in *Town of Greece*.”²⁴² With this, the lower courts are in disarray on key issues arising in legislator-led prayer inquiries. By using the actual legal coercion model, the courts can affirm a “long-standing tradition”²⁴³ in America, and bar practices the original meaning of the Establishment Clause intended to prevent.

First, Judge Sutton’s concurrence in *Bormuth* posed the important question “[How would] a pattern of legislator-led prayer with respect to one faith coerce citizens to follow that faith in a way that chaplain-led prayer of a single faith does not?”²⁴⁴ He also wrote

237. *Newdow*, 124 S.Ct. 2301 at 2331 (Thomas, J., concurring); see also *Green v. Haskell Cty. Bd. of Comm’rs*, 574 F.3d 1235, 1236 n. 3 (10th Cir. 2009) (“Though not yet adopted by a majority opinion from the Supreme Court, a test focusing on actual legal coercion, rather than endorsement, appears the most faithful to the original meaning of the Establishment Clause.”); Johnson, *supra* note 218 at 179 (“[Adopting a legal coercion] standard would mark a return to the original purposes of the Establishment Clause.”); William A. Glaser, *Worshipping Separation: Worship in Limited Public Forums and the Establishment Clause*, 38 PEPP. L. REV. 1053, 1064 (2011) (“[T]he coercion test forms an important element of modern Establishment Clause jurisprudence.”).

238. Campbell, *supra* note 218, at 569.

239. *Books v. Elkhart County*, 401 F.3d 857, 869 (Easterbrook, F, dissenting) (7th Cir. 2005).

240. See David L. Hudson, Jr., *Circuit Split on Constitutionality of Legislator-led Prayer May Lead to SCOTUS Review*, Am. Bar Ass’n J. (Feb. 2018) http://www.abajournal.com/magazine/article/circuit_split_on_legislator_led_prayer/.

241. *Bormuth*, 870 F.3d at 512 (“In our view and consistent with our Nation’s historical tradition, prayers by agents (like in *Marsh* and *Town of Greece N.Y.*) are not constitutionally different from prayers offered by principals.”); see *id.* (citing *Am. Humanist Association v. McCarty*, 851 F.3d 521, 529 (5th Cir. 2017) (“It would be nonsensical to permit legislative prayers but bar the legislative officers for whom they are being primarily recited from participating in the prayers in any way.”)).

242. *Lund*, 863 F.3d at 281.

243. *Bormuth*, 870 F.3d at 509.

244. *Id.* at 523 (Sutton, J., concurring); see also *id.* at 521. Judge Sutton included a list of the common prayerful

that the religious message would seem to “grow[], rather than diminish[],” when the government employs a chaplain to lead in prayers.²⁴⁵ Like Judge Sutton, and the rest of the majority in *Bormuth*, Judge Agee and Judge Niemeyer shared these views in *Lund*.²⁴⁶ These judges find the identity of the prayer giver constitutionally irrelevant.²⁴⁷

But the majority in *Lund* and the dissenting judges in *Bormuth* disagreed. Judge Wilkinson, writing for the *Lund* majority, wrote that the Rowan County Board “stepped over the line”²⁴⁸ by allowing solely the board members to conduct the prayer sessions and, in turn, “press[ed] religious observances upon their citizens.”²⁴⁹ Likewise, author of the lead dissent in *Bormuth*, Judge Moore, opined that “coercion is compounded by the setting in which it is exerted . . . [and] there is increased pressure on Jackson County residents to follow the Board of Commissioners’ instructions at these meetings, as the residents would not want to offend the local government officials they are petitioning.”²⁵⁰

Like legislative prayer, legislator-led prayer requires a “fact-sensitive” inquiry.²⁵¹ However, rather than using Justice Kennedy’s approach, which looks to “social pressures,”²⁵² “subtle coercive pressures,”²⁵³ and speculates impact, the Court should adopt a simpler rule that “faithfully reflects the understanding of the Founding Fathers.”²⁵⁴ The actual legal coercion test is a simple, “liberty-focused inquiry.”²⁵⁵ It holds true to the original meaning of the Establishment Clause, which is that an establishment of religion “interferes with religious liberty.”²⁵⁶ When using this test to evaluate legislator-led prayers, judges will weigh liberty against compulsion and constraint.²⁵⁷

Instead of looking to how the “‘reasonable observer’ feels ‘subtle pressure,’ or perceives governmental ‘endors[ement],’”²⁵⁸ actual legal coercion looks to the direct

elements. (“Let us pray.” Or “Let me pray.” “Please join me in prayer.” Or “Please join me, if you wish, in prayer.” “Please stand reverently as we pray.” Or “Please stand reverently, if you wish, as we pray.” “Council member Smith will now offer a prayer.” Or “Our chaplain will now offer a prayer.” “We pray these things in Jesus’s name.” Or “We pray these things in God’s name.” “We pray these things in God’s name” while making the sign of the cross. Or “We pray these things in God’s name” without making the sign of the cross. In telling Congress and eventually the States that they “shall make no law respecting an establishment of religion,” *the First Amendment does not preference any of these options.* (emphasis added)).

245. *Id.* at 523; *see also id.* (“Just as we would not mistake a legislator’s reference to his or her faith during a floor debate as an establishment of religion, we should not make that mistake when they invoke their personal faith as part of an invocation.”).

246. *Lund*, 863 F.3d at 299 (Niemeyer, J., dissenting) (“The 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, in all aspects of plaintiffs’ complaints, virtually indistinguishable from the practice upheld [in *Town of Greece*.]”); *Id.* at 301 (Agee, J., dissenting) (“The only new feature in this case is the identity of the prayer giver. But—for the reasons explained below—that single characteristic does not remove the Board’s practice from the protected scope of *Marsh* and *Town of Greece*.”).

247. *See Bormuth*, 870 F.3d at 509 (“[N]either *Marsh* nor *Town of Greece* restricts *who* may give prayers.”).

248. *Lund*, 863 F.3d at 286.

249. *Id.* (internal citations omitted).

250. *Bormuth*, 870 F.3d at 541 (Moore, J., dissenting).

251. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (plurality opinion).

252. *Id.* at 1820.

253. *Id.*

254. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

255. Johnson, *supra* note 218, at 192.

256. McConnell Coercion, *supra* note 215, at 941.

257. Johnson, *supra* note 218 at 192.

258. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1838 (2014). (Thomas, J., concurring) (internal citations

actions of the government. As applied to the context of *Bormuth* and *Lund*, the test allows both county boards to continue their prayer practice. As Judge Easterbrook noted, speech is not inherently coercive because “the listener may do as he likes.”²⁵⁹ Thus, the “subtle coercive pressures”²⁶⁰ the prayer practices *may* have caused do not equate to the actual legal coercion by government establishment that the Framers sought to prevent. When a government leader stands before his constituents and colleagues, asking them to “Please Rise” or invoking the name of “Jesus Christ,” they are not preferring one religion over another nor coercing their audience to partake in a state establishment by the force of law or threat of penalty.²⁶¹

b. Actual Legal Coercion: A Simple Alternative to the Psycho-Coercion Test

The Court should discard Justice Kennedy’s “psycho-coercion” test. His plurality opinion in *Town of Greece* was contradictory, and his coercion test was inapposite to his historical analysis. Kennedy discussed an the “tradition” of our nation and offers an evaluation steeped in history,²⁶² but he ultimately supplanted this analysis with his own ‘psycho-coercion’ test,²⁶³ which is a far cry from the historical meaning and record of the Establishment Clause.²⁶⁴ “[T]he primary concern for those who framed the Establishment Clause was the potential imposition of a single religion by the Federal government via coercive force.”²⁶⁵ By employing an actual legal coercion test, the Court can apply a test that is “relatively easi[er] to apply,” unlike Justice Kennedy’s test,²⁶⁶ and provide one, simple test for the lower courts that “focuses attention on governmental indoctrination and compulsion.”²⁶⁷

VII. CONCLUSION

For nearly seventy years, the Justices of the Supreme Court battled to define the Establishment Clause’s confines on government. Whether it be through a plethora of tests or two roads diverging in historical clarity, the Court finds itself at an impasse. Over the years, many Justices addressed the Establishment Clause with little recourse to, or regard for, our nation’s historical record.²⁶⁸ As written by Justice Douglas, “We are a religious

omitted).

259. *Am. Jewish Cong. v. Chicago*, 827 F.2d at 132 (Easterbrook, J., dissenting).

260. *Town of Greece*, 134 S. Ct. at 1820.

261. *But See Hudson v. Pittsylvania Cty.*, 107 F. Supp. 3d 524, 530 (W.D. Va. 2015) This is the only legislator-led prayer case on record showing the government coercing its audience. Rather than letting dissenters to town board prayers sit in disagreement, the board members instructed them to either rise and participate or leave the meeting.

262. *Town of Greece*, 134 S. Ct., at 1819–22.

263. *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

264. *See id.* at 642 (Scalia, J., dissenting) (“I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud.”); *see also supra* Part II.A and accompanying text.

265. Johnson, *supra* note 218, at 183.

266. Glaser, *supra* note 237, at 1064.

267. Johnson, *supra* note 218, at 194.

268. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833) (“The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should

2018]

LET US PRAY

79

people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses.”²⁶⁹ For more than sixty years, a metaphor not present in the U.S. Constitution, and likely never uttered during the Constitutional debates, dictates our Establishment Clause jurisprudence.²⁷⁰

Legislator-led prayer invokes a tradition intricately embedded in the fabric of this nation. The federal circuits divide on issues regarding these prayers, thus, causing conflicting precedent across the nation. If the Court does not address the resulting ambiguities left regarding legislator-led prayer from its *Town of Greece* opinion, “similar cases will continue to have [more] incongruous outcomes throughout the country.”²⁷¹ Through the two-part analysis offered in this paper, the Court can address legislator-led prayer through a historically accurate inquiry. This test would “provide certainty for the thousands of state and local governments that have long allowed lawmaker-led prayer in their proceedings—and thereby continue a tradition that ‘has become part of the fabric of our society.’”²⁷²

give to an hierarchy the exclusive patronage of the national government.”); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) (“[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.”).

269. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (Douglas, J.)

270. *But see* *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921) (“[A] page of history is worth a volume of logic[.]”).

271. Brief of American Center for Legal Justice as Amici Curiae Supporting Petitioner, at 7, *Rowan Cty., N.C. v. Lund*, 138 S. Ct. 2564 (2018) (No. 17-565) *cert denied*.

272. Brief of West Virginia and 20 Other States et al., as Amici Curiae Supporting Petitioner, at 29–30, *Rowan Cty., N.C. v. Lund*, 138 S. Ct. 2564 (2018) (No. 17-565), *cert denied*.