

LEGISLATOR-LED LEGISLATIVE PRAYER AND THE SEARCH FOR RELIGIOUS NEUTRALITY

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I. INTRODUCTION

Prayers can be powerful: a source of strength, peace, and hope. Although they can be used to unite communities, prayers undoubtedly have private elements. People often recite them in silence, eyes closed, calling out to some higher force. Even when prayers are delivered in a group setting, they affect people privately. Those listening to the individual leading the group in prayer experience the leader's words differently: some listeners affirm the words voiced and some quietly add their own requests.

Leading a group in prayer in a public setting blurs the line between public and private. Such blurring implicates a constitutional tension between the Establishment Clause and the Free Exercise Clause. This tension is magnified when the constitutionality of prayer is questioned in the context of democratic participation.

This Note questions the constitutionality of prayer led by elected officials in open legislative sessions. Part II provides a brief history of the drafting and passing of the Establishment Clause. Part III explains that current Supreme Court precedent holds legislative prayer to be constitutional, but the relevant cases—*Marsh v. Chambers*¹ and *Town of Greece, NY v. Galloway*²—do not address the constitutionality of legislator-led prayer.

Part IV confronts the circuit split on the constitutionality of legislator-led legislative prayer. On the one hand, in *Bormuth v.*

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1. 463 U.S. 783 (1983).
2. 572 U.S. 565 (2014).

County of Jackson,³ the United States Court of Appeals for the Sixth Circuit held legislator-led legislative prayer to be constitutional. On the other hand, in *Lund v. Rowan County, N.C.*,⁴ the United States Court of Appeals for the Fourth Circuit came to the opposite conclusion, despite the case having strikingly similar facts. Part V confronts this tension. First, I challenge the validity of the precedent on legislative prayer. Then, accepting the current precedents as valid, I argue legislator-led prayer in public legislative sessions is unconstitutional. This analysis evaluates the interplay of the original intent of the Establishment Clause, the changes in the social structure of the United States since the eighteenth century, and the unique role of the legislator, separate from that of a guest minister or ordinary citizen.

Ultimately, I attempt to inject empathy into legal analysis by pointing to the tangible effects of legislator-led prayer: alienation from the community and increased violence against religious minorities. I hope to highlight these harms as sufficient in themselves to implicate the Establishment Clause and to bolster the argument for holding this practice to be unconstitutional.

II. THE PURPOSE OF THE ESTABLISHMENT CLAUSE AND ITS RELATIONSHIP TO LEGISLATIVE PRAYER

A. *The Creation and Ratification of the Establishment Clause*

The First Amendment of the United States Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”⁵

While engineering the ideological foundation of the United States, through the drafting and passing of the Constitution and the Bill of Rights, the Founders grappled with significant issues concerning the new country’s collective identity, including the existence of an established religion in the new country. To be clear, the Founders identified themselves as Christians.⁶ Still, the creation of the United

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

4. 863 F.3d 268 (4th Cir. 2017).

5. U.S. CONST. amend. I.

6. Mark David Hall, *Did America Have a Christian Founding?*, THE HERITAGE

States was substantially related to a need to secure religious freedom, which could only flourish in the absence of established state-religion.⁷ Thus, the importance of such a constitutional protection was at the forefront of the minds of not only the Framers, but also the states that ratified the Constitution. Although nine of the thirteen colonies had established churches immediately before the revolution, and approximately half of the new states maintained some kind of official religious establishment when the First Amendment was ratified,⁸ disestablishment gradually spread through the colonies starting in the early nineteenth century.⁹ The last state-sponsored church was disestablished in 1832.¹⁰

Both James Madison, the primary author of the First Amendment, and the members of the First Congress shared a broad consensus regarding the role of religion in the new country:

They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. All of them also thought religion was useful, perhaps even necessary, for teaching morality. They all thought a free republic needed citizens who had a moral education. They all thought the primary responsibility for this education lay with the states. And they all agreed that Article I gave Congress no direct power to deal with the subject. The disagreement was over what Congress should be allowed to do pursuant to some other delegated power.¹¹

Similarly, states were worried that the creation of established churches threatened citizens liberty of conscience. For instance, at the Pennsylvania ratifying convention, John Smilie voiced an objection to the Constitution without an Establishment Clause, stating that if “the

FOUNDATION (2011), <https://www.heritage.org/political-process/report/did-america-have-christian-founding> (stating that “[o]ne possibility is simply that the Founders identified themselves as Christians. Clearly, they did. In 1776, every European American, with the exception of about 2,500 Jews, identified himself or herself as a Christian.”).

7. See *Bormuth v. County of Jackson*, 870 F.3d 494, 513 (6th Cir. 2017) (noting that “[t]he Reformation of the Sixteenth Century spawned an explosion of Christian faiths. Many of those practicing these new Christian faiths sought religious freedom in America and found refuge from the tyranny inflicted by sectarian governments. To guarantee religious liberty to all persons, including those practicing the emerging Christian religions, the First Amendment was provided.”).

8. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishments of Religion*, 44 WM. & MARY L. REV. 2105, 2107 (2003).

9. See *id.* at 2126.

10. Hall, *supra* note 6.

11. Michael J. Malbin, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 17 (1978).

rights of conscience [were] not secured . . . Congress may establish any religion.”¹² A petition at this convention echoed this concern in its proposed amendment, mandating “[t]hat the rights of conscience should be secured to all men, that no man should be molested for his religion, and that none should be compelled contrary to their principles and inclination to hear or support the clergy of any one religion.”¹³ Additionally, the *Philadelphia Independent Gazetteer*, a local newspaper at the time, printed a similar formulation:

That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own conscience and understanding: And that no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against his own free will and consent . . .¹⁴

Virginia’s elites shared these apprehensions. Patrick Henry cautioned Virginia residents that “a religious establishment was in contemplation under the new government.”¹⁵ A letter from a local militiaman from Virginia to James Madison warned of local Baptists who were “much alarm’d fearing reeligious [sic] liberty is not Sufficiently secur’d” in a constitution barring an established church.¹⁶ The letter continued,

What is dearest of all – Religious Liberty, is not Sufficiently Secured . . . if a Majority of Congress with the president favored one system more then another, they may oblige all others to pay to the Support of their System as Much as they please and if Oppression does not ensue, it will be owing to the Mildness of Administration & not to any Constitutional defense.¹⁷

12. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 398 (2002) (citing *Proceedings and Debates of the Pennsylvania Convention*, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 326, 592 (Merrill Jensen ed., 1976) [hereinafter “DOCUMENTARY HISTORY”]).

13. *Id.* (citing *Petition Against Confirmation of the Ratification of the Constitution*, Jan. 1788, reprinted in DOCUMENTARY HISTORY *supra* note 12 at 710–11 (Merrill Jensen ed., 1976)).

14. *Id.* at 399 (citing Timothy Meanwell, PHILA. INDEP. GAZETTEER, Oct. 29, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 12, at 511 (John P. Kaminski & Gaspare J. Saladino eds., 1983)).

15. *Id.* (citing Letter from John Blair Smith to James Madison (June 12, 1788), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 12, at 607–08 (John P. Kaminski & Gaspare J. Saladino eds., 1983)).

16. *Id.* (citing Letter from Joseph Spencer to James Madison (Feb. 28, 1788), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 12, at 252 (John P. Kaminski & Gaspare J. Saladino eds., 1986)) [hereinafter Letter from Spencer to Madison].

17. *Id.* at 400 (citing Letter from Spencer to Madison, *supra* note 16).

In the first session of Congress representatives from Virginia,¹⁸ North Carolina¹⁹, Rhode Island²⁰ and New York²¹ proposed almost identical amendments to the Constitution, calling for free exercise of religion with no established religion. New Hampshire went so far to propose that “Congress shall make no laws touching religion, or to infringe the rights of conscience.”²²

In a brief House discussion of the proposed First Amendment, concerning the portion of the Amendment that read, “no religion shall be established by law, nor shall the equal rights of conscience be infringed,”²³ Madison stated that “he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, *nor compel men to worship God in any manner contrary to their conscience.*”²⁴

Overall, it was broadly agreed that both liberty of conscience through the prevention of an established religion was a basic and inalienable right.²⁵

B. The Relationship Between the Establishment Clause and Legislative Prayer

Considering the Framers’ emphasis on preserving a secular state, the United States Supreme Court’s upholding legislative prayer offered by guest ministers seems to be an exception to the presumption against state-established religion. The Supreme Court has regularly upheld a secular state. For instance, the Supreme Court

18. *Id.* at 401 (citing 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 659 (Jonathan Elliot ed., 1901)) (George Mason proposed the following amendment to Virginia’s Declaration of Rights, which was adopted by the ratifying convention in its entirety: “That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.” *Id.*).

19. *Id.* (citing 4 DOCUMENTARY HISTORY, *supra* note 12 at 244 (John P. Kaminski & Gaspare J. Saladino eds., 1990)).

20. *Id.* (citing 4 DOCUMENTARY HISTORY, *supra* note 12 at 334 (John P. Kaminski & Gaspare J. Saladino eds., 1990)).

21. *Id.* at 328 (specifying “[t]hat the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others”).

22. *Id.* at 326.

23. 1 ANNALS OF CONG. 757 (Joseph Gales ed., 1789).

24. *Id.* at 758 (emphasis added).

25. Feldman, *supra* note 12, at 405.

has found unconstitutional under the Establishment Clause a state requirement that a candidate for public office declare a belief in God to be eligible for the position,²⁶ a state-composed non-denominational prayer to begin the school day,²⁷ and a state law reimbursing religious schools with state funds to purchase textbooks and to pay teachers' salaries.²⁸ Justice Kennedy, during the oral arguments for *Town of Greece*, called legislative prayer a "historical aberration."²⁹ One scholar has even described it as "born of an unprincipled practice that seemed relatively harmless when the national population was overwhelmingly Protestant."³⁰

The Continental Congress began the tradition of opening its sessions with prayer in 1774 and the First Congress, in 1789, implemented a policy to select a chaplain for opening services.³¹ Madison himself, however, resisted the practice of legislative prayer by a paid minister. He "labeled legislative prayer an unconstitutional irregularity that he hoped would not distort our future understanding of the Establishment Clause."³² Madison called the establishment of congressional chaplaincies "a palpable violation of equal rights, as well as of Constitutional principles," and he hoped their "daily devotions" would not come to be seen as a "legitimate precedent."³³ He understood that paying chaplains and ministers out of public funds was a constitutional anomaly, and suggested that members of Congress pay for services from their own pockets.³⁴

The legislative prayer exception is the result of judicial analysis focused on the historical practice of paid chaplains offering prayer at the opening of legislative sessions, in an attempt to effectuate the

26. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

27. *Engel v. Vitale*, 370 U.S. 421 (1962).

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

29. Transcript of Oral Argument at 8, *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (No. 12-696) [hereinafter *Galloway Oral Argument*].

30. Ian Bartrum, *The Curious Case of Legislative Prayer: Town of Greece v. Galloway*, 108 NW. U. L. REV. 218, 219 (2014).

31. *Marsh v. Chambers*, 463 U.S. 783, 787 (1983).

32. James Madison, Detached Memoranda, JAMES MADISON: WRITINGS 745, 762-63 (Jack N. Rakove ed., 1999).

33. *Id.* at 763.

34. Noah Feldman, DIVIDED BY GOD 247 (2005). *But cf.* Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 20 (2005) (stating that when Madison became president, he recommended at least four days of national prayer and thanksgiving and supervised federal funding given to congressional and military chaplains and missionaries charged with converting the Indians to Christianity.).

original intent of the Framers in implementing the First Amendment.³⁵

III. THE SUPREME COURT'S ESTABLISHED PRECEDENT RELATING TO LEGISLATIVE PRAYER

In *Marsh v. Chambers* and *Town of Greece v. Galloway*, the Supreme Court held that prayers led by guest ministers or members of the public at the beginning of public legislative sessions are constitutional. These cases, however, do not address the unique harms and interests triggered by elected officials leading public sessions with prayer. Thus, while relevant to the present analysis, the constitutionality of prayer in these cases does not mean that legislator-led public prayer must also be constitutional.

A. *The Supreme Court first confronted the constitutionality of legislative prayer in Marsh*

The Executive Board of the Legislative Council of the Nebraska Legislature was responsible for choosing a chaplain biennially.³⁶ Robert E. Palmer, a Presbyterian minister, served as a chaplain offering prayer at the beginning of each Nebraska Legislature session since 1965.³⁷ For his services, Palmer got paid \$319.75 per month while the legislature was in session.³⁸ Besides Palmer, the Legislature also often hired other guest chaplains to officiate prayers.³⁹

Ernest Chambers, a member of the Nebraska Legislature,⁴⁰ brought suit claiming that the Nebraska Legislature's chaplaincy practice violated the Establishment Clause of the First Amendment.⁴¹ The District Court denied a motion to dismiss on the ground of legislative immunity and held that the Establishment Clause was not violated by the prayers, but by paying the chaplain with public funds.⁴² The Court of Appeals for the Eighth Circuit, however, combined these questions and prohibited Nebraska from engaging in any aspect

35. See *Marsh*, 463 U.S. at 791 (1983) (holding that legislator-led prayer did not violate the Constitution since the practice was deeply rooted in the country's history and tradition); *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) (holding that sectarian prayer was not by itself constitutional based on the prevalence of such prayer throughout the country's history).

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

37. *Id.*

38. *Id.*

39. *Id.* at 793.

40. *Id.* at 785.

41. *Id.*

42. *Id.* at 785.

of an established chaplaincy practice.⁴³ The Supreme Court then granted certiorari.

The Court held the use of chaplains to open legislative meetings with prayer is deeply embedded in the country's history and traditions.⁴⁴ The Continental Congress opened its sessions with a prayer offered by a paid chaplain.⁴⁵ While prayers were not offered by a chaplain during the Constitutional Convention, the First Congress adopted a policy of selecting a chaplain to open each session with prayer.⁴⁶ In 1789, the Senate elected its first chaplain, and the House soon followed suit.⁴⁷ The Court concluded, "the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress."⁴⁸

But the Court did acknowledge that although Nebraska's practice did not threaten the Establishment Clause, it was possible for other instances of legislative prayer to do so.⁴⁹ The Court offered two limiting principles: a prayer would be unconstitutional if, (1) a prayer was overly divisive and denominational (the "nonsectarian standard")⁵⁰ or, (2) if prayer-givers were chosen solely on the basis of their religious affiliation (the "impermissible motive").⁵¹ Even when delineating these limits, though, the Court assumed a guest prayer-giver, and did not overlook the prayer-giver's identity in its determination.

43. *Id.* at 786.

44. *Id.*

45. *Id.* at 787.

46. *Id.* at 787–88.

47. *Id.* at 788.

48. *Id.*

49. *Id.* at 795 ("It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.")

50. *See id.* at 792–95.

51. *See id.* at 793–94 ("The Court of Appeals was concerned that Palmer's long tenure has the effect of giving preference to his religious views. We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him. . . . Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.")

Marsh, then, held that legislative prayer did not violate the Constitution, despite being religious. In doing so, *Marsh* forged an exception to the principle that the government must be neutral towards religion and, accordingly, not endorse one religion over another.⁵²

The Court understood this exception to be narrow: a singular “special instance [where it] found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious.”⁵³ Lower courts, too, affirmed this narrow interpretation of *Marsh* and the acceptance of legislative prayer, calling *Marsh* “one-of-a-kind.”⁵⁴

Yet the scope of the limits on legislative prayer remained uncertain. To the plaintiff’s complaints of prayers being sectarian, the *Marsh* court responded, “[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief,”⁵⁵ and that the chaplain had tried his best to “remove all references to Christ.”⁵⁶ These two phrases have conjured different standards of permissible legislative prayer: supporters of legislative prayer often cite the former and interpret *Marsh* to be a broader standard, and only to be struck down when it “proselytize[s] or advance[s] any one, or disparage[s] any other, faith or belief.”⁵⁷ Opponents of the practice advocate for a stricter nonsectarian requirement in the vein of “remov[ing] all references to Christ This division highlights the difficulty in defining and applying the quasi-nonsectarian requirement in the legislative prayer context, as prayers inherently must be sectarian. “Religious liberty for all cannot really be served in any legislative prayer scheme.”⁵⁸

52. *Id.* at 791.

53. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 859 n.10 (2005) (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 40 (2004) (O’Connor, J., concurring) (“[O]nly in the most extraordinary circumstances could actual worship or prayer be defended [as constitutional]. We have upheld only one such prayer against Establishment Clause challenge, and it was supported by an extremely long and unambiguous history.”).

54. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999); *see also Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 211 (5th Cir. 2006); *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003); *Newman v. City of East Point*, 181 F. Supp. 2d 1374, 1378 (N.D. Ga. 2002).

55. *Marsh*, 463 U.S. at 794–95.

56. *Id.* at n.14.

57. *Id.* at 794.

58. Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1023 (2010).

This uncertainty begs the question: now that there has been a departure from the neutrality principle, how far can the departure go?

B. The Supreme Court then addressed the scope of legislative prayer in Town of Greece

In 1999, John Auberger, then newly-elected town supervisor of Greece, New York, implemented a new prayer practice: after the Pledge of Allegiance, Auberger “would invite a local clergyman to the front of the room to deliver an invocation.”⁵⁹ After the invocation, he would thank the minister for being the “chaplain of the month” and present him with a commemorative plaque.⁶⁰ The stated purpose for this practice was to “place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures.”⁶¹ The town never excluded or denied an opportunity to a would-be prayer giver, keeping open the prayer-giving opportunity to any layperson of any persuasion, including an atheist.⁶² The town “neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content.”⁶³

After the plaintiffs vocalized their concerns of the pervasive Christian themes in the prayers, the town invited a Jewish layman, the chairman of the local Baha’i temple, and a Wiccan priestess to deliver prayers.⁶⁴ The plaintiffs, Galloway and Stephens, brought suit in the United States District Court for the Western District of New York, alleging that the prayer practice violated the Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers.⁶⁵ They sought an injunction that would limit the town to “inclusive and ecumenical” prayers that referred solely to a “generic God” and would not associate the government with any one faith.⁶⁶ The District Court on summary judgment upheld the prayer practice as consistent with the First Amendment.⁶⁷ But the United

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

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 572.

65. *Id.*

66. *Id.* at 572–73.

67. *Id.* at 573

States Court of Appeals for the Second Circuit reversed,⁶⁸ and the Supreme Court then granted certiorari.

The Court held that sectarian prayer was not, by itself, unconstitutional.⁶⁹ The pertinent question was whether the prayer practice in *Town of Greece* fit within the history and tradition long followed by Congress and the state legislatures.⁷⁰ The Court further held that the Establishment Clause did not require “nonsectarian or ecumenical prayer as a single, fixed standard.”⁷¹ Instead, the “relevant constraint” on faith-specific prayer “derive[d] from its place at the opening of legislative sessions, where it [was] meant to lend gravity to the occasion and reflect values long part of the Nation’s heritage.”⁷² Just as in *Marsh*, sectarian prayers offered in *Town of Greece* by guest ministers, including a Jewish layman and Wiccan priestess, fell within the country’s historical and traditional outline.⁷³ Finally, the Court concluded that the town’s prayer practice did not coerce attendee participation.⁷⁴ Although no single test commanded a majority, Justice Kennedy’s opinion for the plurality stated that “[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person’s acquiescence in the prayer opportunity.”⁷⁵ Justice Thomas, on the other hand, stated that coercion was limited to “coercive state establishments” “by force of law or threat of penalty,”⁷⁶ including practices like “mandatory church attendance, levying taxes to generate church revenue, barring ministers who dissented, and limiting political participation to members of the established church.”⁷⁷

IV. THE CIRCUIT SPLIT ON THE CONSTITUTIONALITY OF LEGISLATOR-LED PRAYER

The Sixth Circuit and the Fourth Circuit addressed the constitutionality of legislators’ opening public sessions with prayer in

68. *Id.*

69. *Id.* at 577.

70. *Id.* at 578.

71. *Id.*

72. *Id.* at 583.

73. *Id.*

74. *Id.* at 589.

75. *Id.* at 588.

76. *Id.* at 608.

77. *Id.*

*Bormuth v. County of Jackson*⁷⁸ and *Lund v. Rowan County, North Carolina*,⁷⁹ respectively. Yet these courts came to opposite conclusions. The *Bormuth* court held the practice to comport with the Establishment Clause under *Marsh* and *Town of Greece*. The *Lund* court disagreed.

A. *The Sixth Circuit Confronted the Constitutionality of Legislator-Led Prayer in Bormuth*

i. Peter Bormuth Felt Alienated By Legislator-Led Prayer in Jackson County and Challenged the Constitutionality of the Practice

Peter Bormuth’s objections to the Jackson County Board of Commissioners’ practice of opening public meetings with exclusively Christian prayers were met with a disgusted face and a turned back.⁸⁰ Bormuth, a self-professed Pagan and Animist, frequently attended the public meetings of the Jackson County Board of Commissioners (the “Board”) in Jackson County, Michigan.⁸¹ The Board was comprised of nine elected individuals.⁸² At the beginning of every meeting, following a call to order, one of the commissioners asked Bormuth and the other attendees to “rise and assume a reverent position,” or to “please stand up” or to “please bow [their] heads and . . . pray.”⁸³ Following this request, one of the Commissioners would offer a prayer, followed by the Pledge of Allegiance, and county business.⁸⁴ The Commissioners offered prayers on a rotating basis and neither the other Commissioners nor the Board as a whole reviewed or approved in advance the content of the prayers.⁸⁵ One such prayer that Bormuth offered was as follows:

Bow your heads with me please. Heavenly father we thank you for this day and for this time that we have come together. Lord we ask that you would be with us while we conduct the business of Jackson County. Lord help us to make good decisions that will be best for generations to come. We ask that you would bless our troops that protect us near and far, be with them and their families. Now Lord we wanna [sic] give you all the thanks and all the praise

78. 870 F.3d 494, 525 (6th Cir. 2017).

79. 863 F.3d 268, 272 (4th Cir. 2017).

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

81. *Id.* at 498.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

for all that you do. Lord I wanna [sic] remember bereaved families tonight too, that you would be with them and take them through difficult times. We ask these things in your son Jesus's name. Amen.⁸⁶

Bormuth “felt like he was being forced to participate in a religion to which he did not subscribe in order to bring a matter of concern to his local government.”⁸⁷ In another meeting in August 2013, Bormuth was met with another prayer:

Please rise. Please bow our heads. Our heavenly father we thank you for allowing us to gather here in your presence tonight. We ask that you watch over us and keep your guiding hand on our shoulder as we deliberate tonight. Please protect and watch over the men and women serving this great nation, whether at home or abroad, as well as our police officers and firefighters. In this we pray, in Jesus name, Amen.⁸⁸

Bormuth did not rise for this prayer but remaining seated made him feel isolated and worried that the Board would hold it against him.⁸⁹ Another prayer called to “[b]less the Christians worldwide who seem to be targets of killers and extremists.”⁹⁰ When Bormuth voiced his concerns that the prayers may violate the Establishment Clause, “one of the Commissioners ‘made faces expressing his disgust’ and then turned his chair around, refusing to look at Bormuth while he spoke.”⁹¹ Ten days later, Bormuth filed suit against the County, alleging that the prayers violated the Establishment Clause.⁹² While this suit was pending, the Board nominated residents to the County’s new Solid Waste Planning Committee, but did not nominate Bormuth, intensifying Bormuth’s fears of being adversely treated for speaking up.⁹³ In an article published shortly after, two commissioners confirmed their disapproval of Bormuth and the suit, stating, “Bormuth is attacking us and, from my perspective, my Lord and savior Jesus Christ,” and, “[a]ll this political correctness, after a while I get sick of it.”⁹⁴

86. *Id.*

87. *Id.* at 527.

88. *Id.*

89. *Id.*

90. *Id.* at 512.

91. *Id.* at 527.

92. *Id.* at 499.

93. *Id.* at 527.

94. *Id.*

Bormuth then filed an amended complaint, adding the Commissioners' decision not to nominate him to the Solid Waste Planning Committee, and seeking declaratory and injunctive relief, and nominal damages.⁹⁵ Both parties filed motions for summary judgment.⁹⁶

The district court granted the County's motion for summary judgment and denied Bormuth's summary-judgment motion.⁹⁷ The district court concluded that "although the prayers were "exclusively Christian," they were composed of only "benign religious references," making Bormuth's reaction to them "hypersensitive."⁹⁸ Further, it was held to be immaterial that all Commissioners were Christian, as it only reflected "the community's own overwhelmingly Christian demographic."⁹⁹ On the issue of coercion, the court noted that "Bormuth's subjective sense of affront resulting from exposure to sectarian prayer is insufficient to sustain an Establishment Clause violation."¹⁰⁰

Bormuth appealed.¹⁰¹ On appeal, a panel of the Court of Appeals for the Sixth Circuit ruled in Bormuth's favor on the Establishment Clause issue.¹⁰² Then, the Sixth Circuit, granted rehearing *en banc sua sponte*.¹⁰³

ii. The Sixth Circuit Relied on the History and Tradition of Prayer at Public Meetings to Uphold Jackson County's Practice as Constitutional

On rehearing, the Sixth Circuit understood the purpose of legislative prayers as being to "[invite] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing."¹⁰⁴ It emphasized that the Supreme Court has recognized "[w]e are a religious people whose institutions presuppose a Supreme Being,"¹⁰⁵ making opening public sessions with prayers

95. *Id.*

96. *Id.*

97. *Id.* at 529.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 499.

102. *Id.*

103. *Id.*

104. *Id.* at 511.

105. *Id.* at 503 (citing *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

“deeply embedded in the history and tradition of this country.”¹⁰⁶ The court asked: (a) Did Jackson County’s prayer practice fall outside our historically accepted traditions because the Commissioners themselves, not chaplains or invited community members, led these prayers?¹⁰⁷ And, (b) Was Jackson County’s prayer practice so coercive as to be unconstitutional?¹⁰⁸

Bormuth argued that as only Commissioners offered prayers, *and* each Commissioner was Christian, only Christian prayers were being offered.¹⁰⁹ Thus, these elements together amounted to the Jackson County Board of Commissioners’ endorsing Christianity.¹¹⁰ The court rejected this argument.¹¹¹

The court concluded that neither *Marsh* nor *Town of Greece* was dispositive on the significance of the identity of the prayer giver, and instead intended for the inquiry to be more holistic.¹¹² Relying on amicus briefs by the State of Michigan and Twenty-one Other States, Local and State Legislatures, and the Commonwealth of Kentucky, and Members of Congress, the court pointed to multiple examples of legislator-led prayers.¹¹³ Jackson County offered a 2002 National Conference of State Legislatures study that stated, “. . . legislators gave prayers in thirty-one states,” and “[f]orty-seven chambers allow people other than the designated legislative chaplain or a visiting chaplain to offer the opening prayer. *Legislators*, chamber clerks and secretaries, or other staff may be called upon to perform this opening ceremony.”¹¹⁴ However, while the court repeatedly asserted that this practice has been present in state capitols for over one hundred and fifty years, there is no indication of how pervasive such practices were, i.e. how consistently practiced or accepted these were within each capitol, or for how continuous a period of time they had occurred, i.e. whether they were infrequently practiced or not.

The court rationalized legislator-led prayer practices in light of the purpose of legislative prayer: to invite “lawmakers to reflect upon

106. *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783, 786 (1983)).

107. *Id.* at 509.

108. *Id.* at 508.

109. *Id.* at 509.

110. *Id.*

111. *Id.*

112. *Id.*

113. *See id.* at 509–10 (referencing an instance of a legislator-led prayer during the Illinois Constitutional Convention on January 12, 1870).

114. *Id.* at 511.

shared ideals and common ends before they embark on the fractious business of governing.”¹¹⁵ Emphasizing this interest for the individual legislator to follow their conscience, the court called attention to the *Town of Greece* instruction that “government must permit a prayer giver to address his or her own God or gods as conscience dictates,” and that it was not the role of the judiciary to act “as [a] supervisor[] and censor[] of religious speech.”¹¹⁶ Ultimately, the court found the identity of the prayer-giver as a legislator irrelevant, and the practice consistent with the country’s history and tradition of legislative prayers.¹¹⁷

iii. The Sixth Circuit Held that the Christian Imagery of the Prayers Did Not Violate the Establishment Clause

The court held that the content of the prayers was consistent with constitutionally compliant legislative prayer practices.¹¹⁸ Though the prayers invoked Christian imagery, the court found this imagery to be within the purview of *Town of Greece*, and that the founders “embraced these universal and sectarian references as ‘particular means to universal ends.’”¹¹⁹ As long as the invocations did not “denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion” and any pattern of prayers did not “denigrate, proselytize, or betray an impermissible government purpose,” they fell within the constitutional limits of *Town of Greece*.¹²⁰ Further, a stray remark by a legislator that could be construed to fall out of these limits was held to be insufficient to overcome a long respected and revered practice.¹²¹

Finally, the court held that the individual prayers by Commissioners could not reflect an endorsement of a religion by the Board or by other Commissioners.¹²² Although all the Commissioners were Christian, “faiths of Christianity are diverse, not monolithic.”¹²³ While the denominations of each Commissioner were not in the record, the court highlighted that it was possible for Commissioners of

115. *Id.* (citing *Town of Greece v. Galloway*, 572 U.S. 565, 583 (2014)).

116. *Id.* at 511–12 (alteration in original) (citing *Town of Greece*, 572 U.S. at 581).

117. *Id.* at 512.

118. *Id.*

119. *Id.* (quoting *Town of Greece*, 572 U.S. at 582–584).

120. *Id.* (internal quotation marks omitted) (quoting *Town of Greece*, 572 U.S. at 582, 584).

121. *See id.* (“[T]his stray remark does ‘not despoil a practice that on the whole reflects and embraces our tradition.’” (quoting *Town of Greece*, 572 U.S. at 584.))

122. *Id.* at 513.

123. *Id.*

any faith to be elected.¹²⁴ This dynamic potential of the position precluded endorsement of Christianity.¹²⁵

iv. The Sixth Circuit Rejected the Proposition that the Prayers Offered in Jackson County Had a Coercive Effect on the Constituents

The court held that the Jackson County prayer practices were not unconstitutionally coercive.¹²⁶ Declining to decide which plurality opinion—that of Justice Kennedy or that of Justice Thomas—regarding coercion in *Town of Greece* was controlling, the court held that Bormuth failed both.¹²⁷ Bormuth made three contentions of coercion: (a) the Board’s request that the members rise and be reverent, (b) two Commissioners turning their backs on him during the public comment section, and two others making statements of disapproval, and (c) his denial of a nomination to the committee.¹²⁸

In *Town of Greece*, Justice Kennedy found that the societal pressures an audience might feel while listening to prayers necessitated a fact-sensitive inquiry to be conducted in light of historical practices.¹²⁹ Justice Kennedy presumed that a reasonable person was both aware of and understood the gravity of legislative prayers, and that legislative prayers were not means to “proselytize or force truant constituents into the pews.”¹³⁰

First, the appeals court held that “soliciting adult members of the public to assist in solemnizing the meetings by rising and remaining quiet in a reverent position” was not coercive,¹³¹ especially when preceded by a “please.”¹³² Second, it was not unconstitutional for two Commissioners to turn their backs and express disdain toward Bormuth.¹³³ One of the commissioners responded in such a way in response to Bormuth’s comments on abortion, unrelated to the prayer practice, and so this behavior failed to establish a “pattern and

124. *Id.*

125. *See id.* (“Jackson County’s prayer policy *permits* prayers of any—or no—faith, and the County need not adopt a different policy as part of a ‘quest to promote a diversity of religious views.’”) (quoting *Town of Greece*, 572 U.S. at 586).

126. *Id.* at 519.

127. *Id.* at 515–16.

128. *Id.* at 517.

129. *Id.* at 507 (quoting *Town of Greece*, 572 U.S. at 587 (Kennedy, J.)).

130. *Id.*

131. *Id.* at 517.

132. *Id.*

133. *Id.*

practice” of coercion against non-believers.¹³⁴ Additionally, statements by the Commissioners post-litigation, including “What about my rights? . . . If a guy doesn’t want to hear a public prayer, he can come into the meeting two minutes late,” and “Bormuth is attacking us and, from my perspective, my Lord and savior Jesus Christ,” were held to be in reaction to Bormuth’s disapproval of them as individuals, and not Bormuth’s religious beliefs.¹³⁵ Finally, Bormuth’s failure to be nominated to the Committee position was insufficient in itself to establish coercion because there was no proffer of evidence of a prejudicial reason behind this decision-making.¹³⁶ As a result, the court affirmed the district court’s judgment, holding this Jackson County prayer practice to pass constitutional muster.¹³⁷

B. The Fourth Circuit Confronted the Constitutionality of Legislator-Led Prayer in Lund

The Fourth Circuit met with facts substantially similar to *Bormuth*, but came to the opposite conclusion, holding that legislator-led prayer violated the Establishment Clause.¹³⁸ Like Jackson County, Michigan, Rowan County, North Carolina had an elected Board of Commissioners.¹³⁹ The five-member board met twice monthly.¹⁴⁰ After a call to order, all five Commissioners asked the public to stand up and join them in worship, using phrases such as “Let us pray,” “Let’s pray together,” or “Please pray with me.”¹⁴¹ The prayers ended with “Amen,” and were followed by the Pledge of Allegiance and then county business.¹⁴²

Of all the prayers said in the five-and-a-half years for which video recordings are available, ninety-seven percent of the Board’s prayers included references to ‘Jesus,’ ‘Christ,’ or the ‘Savior.’¹⁴³ No other religion was represented.¹⁴⁴ Examples of prayers included: “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.

134. *Id.* (quoting *Town of Greece*, 572 U.S. at 589).

135. *Id.* at 518.

136. *Id.* at 519.

137. *See id.*

138. *Lund v. Rowan County*, 863 F.3d 268, 295 (4th Cir. 2017) (en banc).

139. *Id.* at 272.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 273.

144. *Id.*

We have also neglected to follow the guidance of your Holy Spirit;” “[A]s we pick up the Cross, we will proclaim His name above all names, as the only way to eternal life;” and “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.”¹⁴⁵

With growing controversy over these prayers, some Commissioners publicly announced that they would continue Christian invocations for the community’s benefit.¹⁴⁶ One Commissioner stated, “I will always pray in the name of Jesus God will lead me through this persecution and I will be His instrument.”¹⁴⁷

The plaintiffs were long-time Rowan County residents and active Board meeting attendees.¹⁴⁸ They asserted that by exclusively associating with and delivering Christian prayers, the Board “sen[t] a message that the County and the Board favor Christians,” causing the plaintiffs to feel “excluded from the community and the local political process.”¹⁴⁹ Further, the plaintiffs professed that they felt pressured to stand for prayers to avoid sticking out, and any resistance would impair their ability to advocate in other matters.¹⁵⁰ After the district court enjoined the prayer practice, the Supreme Court decided *Town of Greece*.¹⁵¹ In light of this, both parties moved for summary judgment.¹⁵² The district court found that the prayer practice was both coercive and “‘deviate[d] from the long-standing history and tradition’ of legislative prayer.”¹⁵³ On appeal, however, the Fourth Circuit reversed the district court’s decision and upheld Rowan County’s prayer practice.¹⁵⁴ The Fourth Circuit then granted rehearing en banc.¹⁵⁵

Unlike the Sixth Circuit, the Fourth Circuit, en banc, concluded that the prayer practice in Rowan County “served to identify the

145. *Id.*

146. *Lund*, 863 F.3d at 273.

147. *Id.*

148. *Id.*

149. *Id.* at 274 (alteration in original).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (alteration in original) (quoting *Lund v. Rowan County*, 103 F.Supp.3d 712, 723 (M.D.N.C. 2015), *rev’d*, 837 F.3d 407 (4th Cir. 2016)).

154. *Id.* at 275 (citing *Lund v. Rowan County*, 837 F.3d 407, 411–31 (4th Cir. 2016)).

155. *Id.*

government with Christianity and risked conveying to citizens of minority faiths a message of exclusion.”¹⁵⁶ It also held that because the Commissioners were the exclusive prayer-givers, “the practice [fell] well outside the more inclusive, minister-oriented practice of legislative prayer described in *Town of Greece*.”¹⁵⁷ “Indeed,” the opinion states, “if elected representatives invite their constituents to participate in prayers invoking a single faith for meeting upon meeting, year after year, it is difficult to imagine constitutional limits to sectarian prayer practice.”¹⁵⁸ To reach this conclusion, the Fourth Circuit had to answer the same questions confronted by the Sixth Circuit. First, whether the County’s prayer practice fell outside our historically accepted traditions because the Commissioners themselves, not chaplains, or invited community-members, led these prayers. Second, whether Rowan County’s prayer practice was so coercive as to be unconstitutional.¹⁵⁹

The court articulated the tradition of legislative prayer to include “the delivery of prayers by ‘a chaplain, separate from the legislative body.’”¹⁶⁰ It stated that the Supreme Court had “consistently discussed legislative prayer practices in terms of invited ministers, clergy, or volunteers providing the prayer,”¹⁶¹ and noted that, “in elaborating on our national tradition of legislative prayer—the history informing its interpretation of the Establishment Clause—the Court ha[d] ‘not once described a situation in which the legislators themselves gave the invocation.’”¹⁶²

Unlike *Town of Greece*, where volunteer guest ministers, not elected government officials, offered the prayers,¹⁶³ the court found that Rowan County’s prayers proffered solely by legislators created a “much greater and more intimate government involvement.”¹⁶⁴ Although *Town of Greece* did not explicitly discuss the constitutional

156. *Id.* at 272.

157. *Id.*

158. *Id.*

159. *Id.* at 272.

160. *Id.* at 274 (quoting *Lund v. Rowan County*, 103 F. Supp. 3d 712, 723 (M.D.N.C. 2015), *rev’d*, 837 F.3d 407 (4th Cir. 2016)).

161. *Id.* at 277 (internal quotation marks omitted) (quoting *Lund v. Rowan County*, 103 F. Supp. 3d 712, 722 (M.D.N.C. 2015), *rev’d*, 837 F.3d 407 (4th Cir. 2016)).

162. *Id.* (quoting *Lund v. Rowan County*, 103 F. Supp. 3d 712, 722 (M.D.N.C. 2015), *rev’d*, 837 F.3d 407 (4th Cir. 2016)).

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

164. *Lund*, 863 F.3d at 278 (quoting *Lund v. Rowan County*, 103 F. Supp. 3d 712, 723 (M.D.N.C. 2015), *rev’d*, 837 F.3d 407 (4th Cir. 2016)).

relevance of the prayer-giver's identity, the court reasoned that the previous decision assumed the legislature would employ outside clergy to give prayers.¹⁶⁵ The court added that *Town of Greece* "emphasized that the town 'neither edit[ed] [n]or approv[ed] prayers' offered by the guest ministers."¹⁶⁶ Instead, the plurality in *Town of Greece* reasoned that "[t]hese requests . . . came not from town leaders but from the guest ministers, who presumably [were] accustomed to directing their congregations in this way."¹⁶⁷ This suggested that the purpose and use of the prayers were to "acknowledge religious leaders and the institutions they represent[ed]."¹⁶⁸

The Fourth Circuit, emphasizing the lack of case law on lawmaker-led prayer, referred to the National Conference of State Legislature Survey, also examined by the *Bormuth* court, which explained it was "tradition for a chaplain [and not a legislator] to be selected to serve the [legislative] body,"¹⁶⁹ and to open meetings with prayer. The survey notes that while twenty-seven state legislative chambers designated an official chaplain, legislators led prayer only occasionally and more routinely invited guest ministers.¹⁷⁰ The Fourth Circuit found that by delivering their own Christianity-based prayers, the Commissioners in Rowan County prevented the invocation of any other faith, and thus put the prayers outside the constitutional protection addressed in *Town of Greece*.¹⁷¹ The Establishment Clause functions to "safeguard[] religious pluralism," the court stated, not to endorse the creation of a "de facto religious litmus test for public office," or a "'closed-universe' of prayer-givers dependent solely on election outcomes," like that created in Rowan County.¹⁷² Therefore, Rowan County's prayer practice created divisions that led to impermissible, subtle coercion, and pressure on non-religious meeting attendees.¹⁷³

165. *Id.*

166. *Id.* (quoting *Town of Greece*, 572 U.S. at 581).

167. *Id.* (quoting *Town of Greece*, 572 U.S. at 589).

168. *Id.* (quoting *Town of Greece*, 572 U.S. at 567).

169. *Id.* at 279 (alteration in original) (quoting NAT'L CONFERENCE OF STATE LEGISLATURES, INSIDE THE LEGISLATIVE PROCESS 5-147 (2002)).

170. *Id.* (quoting Brief of Members of Congress as Amici Curiae at 6-7, *Lund v. Rowan County*, 837 F.3d 407 (4th Cir. 2016) (No. 16-565)).

171. *Id.* at 280.

172. *Id.* at 282 (quoting *Lund v. Rowan County*, 103 F. Supp. 3d 712, 723 (M.D.N.C. 2015), *rev'd*, 837 F.3d 407 (4th Cir. 2016)).

173. *See id.* ("[T]he intimacy of a town board meeting may push attendees to participate in the prayer practice in order to avoid the community's disapproval. This is especially true where,

Justice Kennedy’s analysis in *Town of Greece* required examining the prayer practice from the perspective of a “reasonable observer,” presumed to be “acquainted with [the] tradition” of legislative prayer.¹⁷⁴ However, the court reasoned that neither a reasonable observer nor an “exceptionally well-informed citizen steeped in the Court’s legislative prayer jurisprudence” could expect “to find exclusively sectarian invocations being delivered exclusively by the commissioners because, as noted, the Court has consistently spoken in terms of guest ministers and outside volunteers.”¹⁷⁵

At a point where no religion except Christianity was invoked at public meetings, “attendees must have come to the inescapable conclusion that the Board ‘favor[ed] one faith and one faith only.’”¹⁷⁶ And even though governments were not required to engage in religious balancing, the court contended that, “a tapestry of many faiths lessen[ed] that risk whereas invoking only one exacerbate[d] it.”¹⁷⁷

Further, and most importantly, although courts should not become censors of public prayer, the court explained that the content of the prayers offered by Rowan County risks “denigrat[ing] nonbelievers [and] religious minorities.”¹⁷⁸ For example, these prayers portrayed Christianity as “the one and only way to salvation” and asked the “world [to] believe that [God] sent Jesus to save us from our sins.”¹⁷⁹ Although certain prayers at the heart of the controversy in *Town of Greece* evoked Christian imagery, their content did not rise to this level of exclusion and, more importantly, was not offered by lawmakers.¹⁸⁰ In fact, considering the “intimacy of a town board meeting” and the carrying out of legislative and adjudicative business shortly after the prayers, the court held Rowan County’s prayer practice to present “to say the least, the opportunity for abuse.”¹⁸¹ These factors compelled the plaintiffs to stand up to avoid their

as here, the government has aligned itself with the faith that dominates the electorate.”).

174. *Id.* at 283–84 (alteration in original) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 567 (2014)).

175. *Id.* at 284.

176. *Id.* (quoting *Lund v. Rowan County*, 837 F.3d 407, 434 (4th Cir. 2016) (panel dissent)).

177. *Id.*

178. *Id.* at 285 (alteration in original) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 583 (2014)).

179. *Id.*

180. *Town of Greece v. Galloway*, 572 U.S. 565, 571–72 (2014).

181. *Lund*, 863 F.3d at 288 (internal quotation mark omitted) (quoting *Lund*, 837 F.3d at 436).

community's disapproval.¹⁸² This was found to be especially true considering "one person who spoke out against the Board's prayer practice was booed and jeered by her fellow citizens."¹⁸³ The court stated that defining this discomfort as hypersensitivity was wrong.¹⁸⁴

Finally, the court declined to find any "meaningful distinction between the commissioners and the Board."¹⁸⁵ The court explained that such line-drawing between the beliefs espoused by Commissioners in their official capacity and in their individual capacities was a distinction without a difference.¹⁸⁶ Endorsing this distinction would "create a constitutional safe harbor for all prayers delivered by legislators 'no matter how proselytizing, disparaging of other faiths, or coercive' so long as the legislature itself did not collectively compose the prayers."¹⁸⁷ "When one of Rowan County's commissioners leads his constituents in prayer," the court continued, "he is not just another private citizen," but a "representative of the state."¹⁸⁸ "His power to offer a prayer derives from this status; were he not a member of the Board, he would be barred from doing so."¹⁸⁹ The court concluded that it was "hard to believe that a practice observed so uniformly over so many years was not by any practical yardstick reflective of board policy."¹⁹⁰

V. LEGISLATOR-LED PRAYER IS UNCONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE

A. *Courts Should Reconsider Precedent on Legislative Prayer to Reflect Growing Religious Diversity and Societal Preferences*

The rationale of the Supreme Court precedent deeming guest minister-led or community-member-led legislative prayer constitutional is anchored in an analysis of the history and tradition of legislative prayer.¹⁹¹ This reasoning, however, might have outlasted its

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 289.

186. *Id.* at 307.

187. *Id.* (quoting Supplemental Brief of Appellees at 13–14 n.5, *Lund v. Rowan County*, 837 F.3d 407 (4th Cir. 2016) (No. 15-1591)).

188. *Id.* at 290.

189. *Id.*

190. *Id.* (quoting *Lund*, 837 F.3d at 434 (panel dissent)).

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

relevance, and thus might not bear the same persuasive force if revisited today.

The *Marsh* Court and the *Town of Greece* Court interpreted the widespread use of chaplains by legislatures throughout history as evidence of the Founders' intent not to erode such a practice in the passing of the Establishment Clause.¹⁹² Contemporaneous sources, however, also show a broadly shared intent of the Founders to maintain a secular state.¹⁹³ Although interpreting the meaning of the Constitution through the actions of First Congress to accept the chaplaincy practice as valid under the Establishment Clause is legitimate, it is not the sole method of interpretation. This interpretation, moreover, loses its persuasiveness if it undermines the purpose of the Clause. The Founders included the Establishment Clause in the Bill of Rights “to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say,” or not say, so that personal beliefs are not “subjected to the pressures of government for change each time a new political administration is elected to office.”¹⁹⁴

As the *Lund* court stated, allowing elected officials to open public sessions with prayer in their official capacity must have led to the “inescapable conclusion that the Board ‘favor[ed] one faith and one faith only.’”¹⁹⁵ Both the *Lund* and *Bormuth* prayers shared notable similarities: they evoked Christian sentiment in referring to Jesus, at the exclusion of all other beliefs; they included the pronoun “we,” incorporating the public that was present and listening; and they were both recited by elected officials, not simply guest ministers or members of the public.¹⁹⁶ In this way the government officials endorsed Christianity at the expense of other beliefs and thus violated the Establishment Clause.

Such an endorsement also undermines the original motivations of the First Amendment. As outlined in Part II, *supra*, the fear shared by many states was not merely a fear of an established religion, but a fear

192. *Id.* at 793–95; *Town of Greece v. Galloway*, 572 U.S. 565, 575–76 (2014).

193. DOCUMENTARY HISTORY, *supra* note 12.

194. *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

195. *Lund v. Rowan County*, 863 F.3d 268, 284 (quoting *Lund*, 837 F.3d at 435 (panel dissent)).

196. *Compare* *Bormuth v. County of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017), *with* *Lund*, 863 F.3d at 271–72 (describing the prayer practices in the respective cases).

of an infringement on citizens' liberty of conscience, so that citizens might be compelled to hear or support the edicts of one religion over another. The Establishment Clause, then, does not merely exist to protect the public from the formal establishment of religion, but stands to defend against a deeper, subtler, coercion of religious beliefs. Securing liberty of conscience involves both the positive right to worship, or not to worship, according to the principles of a person's conscience and the negative right to be free from the religious edicts of others, those wearing the cloak of apparent governmental authority. This understanding comports well with the Free Exercise Clause,¹⁹⁷ as both negative and positive liberties support free exercise of religious beliefs, with the Establishment Clause only precluding a government endorsement of any one religion over another.

Such an analysis, looking to effectuate the true intent of the drafters, has significant benefits. It precludes the abuse of judicial discretion, maintaining the balance of power between the judicial branch and legislative branch. By limiting interpretation to the intent of the drafters, the subjective opinions and biases of the presiding judges are minimized so that their role as neutral arbiters of the law can be meaningfully fulfilled. As Justice Scalia stated in a lecture at the University of Virginia, lawyers "are not trained to be moral philosophers," and "[h]istory is a rock-solid science compared to moral philosophy."¹⁹⁸ Yet effectuating such original intent in the manner of the *Marsh* court is obviously not the sole method of constitutional interpretation, especially when it controverts the purpose of the constitutional provision interpreted. Instead, the Framers repeatedly "attempt[ed] to refine the wording of the text, either to eliminate vagueness, or to allay fears that overprecise language would be taken literally and that the aim of a given provision would thus be defeated."¹⁹⁹ Although there was significant debate over the language of the Constitution, there was no indication that the Framers expected future interpreters to effectuate their intent by seeking out extra-textual sources.²⁰⁰

197. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

198. Mary Wood, *Scalia Defends Originalism as Best Methodology for Judging Law*, UVA SCHOOL OF LAW (April 20, 2010), https://www.law.virginia.edu/news/2010_spr/scalia.htm.

199. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903 (1985).

200. *Id.*

Eighteenth-century American society, the period to which the *Marsh* Court looked in determining the intent of the drafters of the Establishment Clause, was drastically different from American society in 2019. The Establishment Clause cannot be meaningfully executed in a vacuum. In the mid-to-late eighteenth century, while the population was growing rapidly, American society consisted of free whites, enslaved people, and a small constituency of free people of color.²⁰¹ In 1776, “every European American, with the exception of about 2,500 Jews, identified himself or herself as a Christian. Moreover, approximately 98 percent of the colonists were Protestants, with the remaining 1.9 percent being Roman Catholics.”²⁰²

The variety of racial and ethnic groups in American society today is significantly more diverse.²⁰³ While at the time of founding religious diversity meant different denominations of Christianity, including Baptist, Methodist, and Episcopalian, the modern United States contains a more varied plurality of belief systems, from Hindus to Sikhs to Muslims to Christians to non-believers.²⁰⁴ Today, according to a survey by Pew Research Center, “77 percent of Americans are acquainted with someone who is nonreligious, 61 percent know someone who is Jewish and 38 percent know someone who is Muslim.”²⁰⁵ According to one expert, religious energy in the colonies was in the “ascension rather than the declension.”²⁰⁶ “Between 1700 and 1740, an estimated 75 to 80 percent of the population attended churches, which were being built at a headlong pace.”²⁰⁷ Given the widespread acceptance and practice of Christianity—albeit different strands of Christianity—the ratification of the Establishment Clause evidences a fear of a government-sanctioned religion. While the scope of this “sanction” is debated, the Supreme Court has held in similar contexts that, “it is no part of the official business of government to compose official prayers for any group of the American people to recite as part of a religious program carried out by the

201. *What Census Calls Us: A Historical Timeline*, PEW RESEARCH CENTER (June 10, 2015)

202. Hall, *supra* note 6.

203. *What Census Calls Us: A Historical Timeline*, PEW RESEARCH CENTER, *supra* note 201.

204. Daniel Cox, *Religious Diversity May Be Making America Less Religious*, FIVETHIRTYEIGHT (Aug. 23, 2016), <https://fivethirtyeight.com/features/religious-diversity-may-be-making-america-less-religious/>.

205. *Id.*

206. *Religion and the Founding of the American Republic*, LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/religion/rel02.html> (last visited Nov. 20, 2018).

207. *Id.*

Government.”²⁰⁸ Although the cases in question do not require the audience to recite the prayers, the principle applies when the audience is asked to stand during the prayers, listen to other beliefs being denounced, or suffer adverse consequences for speaking against them.

While the Establishment Clause surely bars a *de jure* sanctioning of religion by the government, the harms of a *de facto* sanctioning, such as in the legislative prayer cases, lack meaningful distinction from the former. Functionally, they both signify the endorsement by government officials of one religion over others. An elected official leading a public meeting with prayer involves the legislator using their official, public role to voice a private opinion that is perceived as a public opinion affirming a religion, generally Christian, in a public setting, to the exclusion of all other religions or non-religions. Such a religious endorsement of one religion over others might have the ideological and physical effects of disparaging, alienating, or proselytizing religious minorities in the community.²⁰⁹ This is the specific fear the Establishment Clause was meant to avoid.²¹⁰ This fear was echoed in the complaint filed by the plaintiffs in *Lund*, who indicated that the legislator-led prayers made non-Christian groups feel excluded from the community and the local political process.²¹¹ It does not matter if the prayers are heterogenous or nonsectarian, as the recital of *any* prayer by a legislator, for that matter, comes to the exclusion of other prayers and non-prayers, and so inevitably constitutes a governmental affirmation of religion.

The harms of a *de facto* sanctioning, or even acquiescence to legislator-led prayer, seem even more salient in the current political climate. In 2016, law enforcement agencies reported 6,121 incidents of hate crimes motivated by bias toward race, ethnicity, religion, sexual orientation, disability, gender or gender identity.²¹² Among them, 6,063 were single-bias incidents, of which 54.2 % were anti-Jewish and

208. *Engel v. Vitale*, 370 U.S. 421, 425 (1962)

209. See Veronica Louise B. Jereza, *Many Identities, Many Communities: Religious Freedom Amidst Religious Diversity in Southeast Asia*, 14 *THE REVIEW OF FAITH AND RELIGIOUS AFFAIRS* 89, 94 (2016), <https://doi.org/10.1080/15570274.2016.1248472> (“[T]he rise of politicians and political parties that are openly anti-Muslim are grave threats to religious liberty in the West, as Muslims in the United States and in Europe are made to feel unwanted and unsafe.”).

210. Feldman, *supra* note 25.

211. *Lund v. Rowan County*, 863 F.3d 268, 274 (4th Cir. 2017).

212. *2016 Hate Crime Statistics Released*, FBI (Nov. 13, 2017), <https://www.fbi.gov/news/stories/2016-hate-crime-statistics>.

24.8% were anti-Islamic.²¹³ Anti-Muslim hate crimes, specifically, have been on the rise: in 2016, anti-Islamic assaults exceeded the 2001 total.²¹⁴ The total number of anti-Muslim hate crimes rose from 154 in 2014, to 257 in 2015, and then to 307 hate crimes in 2016.²¹⁵ Similarly, there was a rise of anti-Jewish hate crimes from 664 in 2015 to 684 in 2016.²¹⁶ This data is collected by the FBI from 15,000 law enforcement agencies, which voluntarily participate and likely undercount the number of hate crimes per year.²¹⁷ It may seem obvious, but behind each of these numbers and percentages exists a person who bore the brunt of another person's being threatened or affronted by the former's religion, leading the perpetrator to enact violence so as to ensure that the victim knew that her religion subordinated her to a second-class status.

In such an environment, the *de facto* acceptance of a certain religion over another by legislative members in their official capacity could amplify to minority religious groups, who are already at a heightened risk of prejudice and violence, the relative devaluing of their religious beliefs. And, to the majority, it could mean an implicit approval of the attitudes that facilitate religious subordination of minority groups. As Justice Black noted in *Engel v. Vitale*, "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services."²¹⁸ "Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs."²¹⁹

Of the harms of such prayer, Justice Black continued, "history of governmentally established religion, both in England and in this

213. *Incidents and Offenses*, FBI: UCR, <https://ucr.fbi.gov/hate-crime/2016/topic-pages/incidentsandoffenses> (last visited Nov. 20, 2018).

214. Katayoun Kishi, *Assaults Against Muslims in U.S. Surpass 2001 Level*, PEW RESEARCH CENTER (Nov. 15, 2017), <http://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/> ("In a Pew Research Center survey conducted in early 2017, three-quarters of Muslim American adults (75%) say there is 'a lot' of discrimination against Muslims in the U.S., a view shared by nearly seven-in-ten adults in the general public (69%).").

215. *Id.*

216. *Id.*

217. *Id.*

218. *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

219. *Id.*

country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.” To Justice Black, this very same history revealed “that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.”²²⁰

B. Under Current Precedent, Legislator-Led Prayer is Still Unconstitutional Given the Meaningful Differences between Legislators and Others

Even if the *Marsh* and *Town of Greece* holdings are considered the appropriate method of constitutional interpretation, because of the distinct identity of the prayer-giver in the *Lund* and *Bormuth* cases—an elected official—the *Marsh* and *Town of Greece* holdings do not resolve the uncertainties in *Lund* and *Bormuth*. An important point of tension between the *Bormuth* court and the *Lund* court was whether the role of a legislator is meaningfully distinct from that of an average citizen or a guest minister. The *Lund* court correctly identified the unique characteristics of a legislator, as opposed to those of a regular citizen, which makes a legislator-led prayer unconstitutional.

As the *Lund* court pointed out, “[w]hen one of Rowan County’s commissioners leads his constituents in prayer, he is not just another private citizen,” but a “representative of the state.”²²¹ To be a representative of the state is to be responsible for effectuating the best interests of *all* constituents, not the interests of some at the expense of others. As John Locke recognized, this means:

[the] legislature is not only the supreme power of the commonwealth, but is sacred and unalterable in the hands in which the community have placed it; and no other person or organisation, whatever its form and whatever power it has behind it, can make edicts that have the force of law and create obligations as a law does unless they have been permitted to do this by the legislature that the public has chosen and appointed.²²²

By attaining their position through the consent of the public, “legislative power is simply the combined power of every member of the society, which has been handed over to the person or persons

220. *Id.* at 431.

221. *Lund v. Rowan County*, 863 F.3d 268, 290 (4th Cir. 2017).

222. John Locke, *THE SECOND TREATISE OF CIVIL GOVERNMENT* 43, ¶ 134.

constituting the legislature.”²²³ The scope of legislative power is limited by the amount of power those people had “in the state of nature.”²²⁴ The outer limit of this power is “set by the good of the society as a whole.”²²⁵ Legislative power’s “only purpose is preservation, and therefore the legislature can never have a right to destroy, enslave, or deliberately impoverish the subjects.”²²⁶

Legislators have not only tangible, law-making power, but also symbolic power. The court has held that, in public meetings, legislators cannot “act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.”²²⁷ Instead, they are “obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of” all religious beliefs.²²⁸ The Constitution “commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.”²²⁹

These “subtle departures from neutrality,” through legislators’ actions or inactions, may carry an emblematic significance to their constituents. For example, disavowing violence against a certain minority group in the community signals, to both the minority group and others, the community values that the legislators protect and endorse. Although passing legislation takes time, the normative outlook of a legislator, as manifested through words and actions, matters. Assuming that democracy is contingent on the informed participation of its members in the political process, safeguarding such access is fundamental to the role of legislators, who are, after all, the individuals working directly to uphold and maintain the democratic institution.

Legislators leading open sessions with prayer, affirming one religion at the cost of others, and signaling to the community their endorsement of such a religion in their private and official capacity can weaken not only the relationship between minority religious

223. *Id.* at ¶135.

224. *Id.* at ¶171.

225. *Id.*

226. *Id.* at 43–44, ¶ 135.

227. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018).

228. *Id.*

229. *Id.*

groups and the government, but also relationships within the community. Such a harm can be caused only by a person cloaked with government authority, not an ordinary person, for an ordinary person speaks only for herself. Further, heterogeneous prayer cannot be the solution to this problem for two reasons. First, even if a variety of beliefs are represented, in each instance of prayer the risk of denigrating other beliefs remains. Second, any endorsement or rejection of any religion by a legislator acting in his or her official capacity amounts to an unacceptable government endorsement of that religion over others. And, in places where one religion tends to be shared by the majority of a given population, that religion will tend to be represented more frequently in prayers, which precludes the government from upholding its duty of religious neutrality.

Given this unacceptable result, legislators' opening public meetings with prayer violates the Establishment Clause. The Supreme Court, therefore, should settle the circuit split and hold the practice to be unconstitutional.

VI. CONCLUSION

Rejecting the practices of legislative prayer in whole, or at least legislator-led prayer, is imperative for maintaining governmental religious neutrality, for creating a community that invites its members to participate in the political process, and for guarding against the psychological, physical, and systemic harms that accompany the government's elevation of one religion by the government over all others.