

COMMENT

Pressure to Pray? Thinking beyond the Coercion Test for Legislator-Led Prayer

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The First Amendment to the Constitution commands that “Congress shall make no law respecting an establishment of religion.” This provision is now generally interpreted to forbid a slew of policies and practices at the federal, state, and local levels that endorse or enshrine religion. One flash point in the Establishment Clause doctrine is prayer and government. Whereas one line of cases suggests that prayer offered at government-sponsored events is unconstitutional if it is coercive, another instructs that prayer offered in the legislative context is generally acceptable, at least if delivered by a third party.

This Comment addresses a burgeoning circuit split regarding the intersection of these cases. Lower courts have struggled to come to an adequate answer to the question of whether prayer offered in an intimate, constituent-facing legislative context by councilmembers themselves is constitutional. This Comment analyzes the various prayer cases as two overlapping constitutional prophylactic rules designed to prevent intrusive and time-intensive fact-finding into hard-to-ascertain facts. There is also a parallel line of cases that militates against the constitutionality of legislative prayer—the government is supposed to refrain from practices that have the potential to be politically divisive. Because prayers delivered by legislators themselves are more potentially divisive than those offered by third parties, and because the Court prefers strong prophylactic rules designed to prevent judicial speculation into factors like the divisiveness of specific prayer content, legislator-led prayer should be per se forbidden.

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INTRODUCTION

When the House of Representatives' chaplain Reverend Patrick Conroy was dismissed in April 2018, theories as to why he was fired abounded.¹ Some thought that he was fired because he was Catholic and because his religion was disfavored.² Others thought he was asked to resign for impliedly criticizing a regressive tax cut bill earlier in the congressional term.³

Little, if any, of the mainstream commentary countenanced an argument that the practice of hiring a congressional pastor violated the Constitution.⁴ Though the Constitution bars any "establishment" of religion,⁵ the practice of having a pastor in the House dates back to the First Congress and has been widely accepted throughout American history.⁶

But this acceptance has not necessarily extended to other circumstances in which prayers are offered with the imprimatur of government. Most recently, a split has developed among the circuit courts as to the constitutionality of prayer at local

¹ See Susan Davis and Tom Gjelten, *Ryan's Dismissal of House Chaplain Sparks Outrage and Suspicion* (NPR, Apr 27, 2018), online at <http://www.npr.org/2018/04/27/606428892/ryans-dismissal-of-house-chaplain-sparks-outrage-and-suspicion> (visited Sept 21, 2018) (Perma archive unavailable).

² See Sheryl Gay Stolberg and Elizabeth Dias, *Ryan Reinstates House Chaplain after Priest Decided to Fight Dismissal*, NY Times A14 (May 3, 2018).

³ See Elizabeth Dias, *House Chaplain Was Asked to Resign. He Still Doesn't Know Why*. (NY Times, Apr, 26, 2018), online at <http://www.nytimes.com/2018/04/26/us/politics/patrick-conroy-paul-ryan-house-chaplain.html> (visited Sept 21, 2018) (Perma archive unavailable).

⁴ See, for example, Wendy Cadge and Laura R. Olson, *How Does Congress' Chaplain Not Violate Separation of Church and State?* (Newsweek, May 2, 2018), archived at <http://perma.cc/V9EM-2AQA> (explaining that, while chaplaincies have been controversial at times, the law on congressional chaplains is well settled).

⁵ US Const Amend I.

⁶ See *Town of Greece v Galloway*, 572 US 565, 574–77 (2014).

government meetings led exclusively by the leaders of local government themselves.⁷

On March 12, 2013, Nancy Lund sued Rowan County, North Carolina for violating the Establishment Clause of the First Amendment.⁸ Peter Bormuth filed a similar suit on August 30, 2013 against Jackson County, Michigan.⁹ Both suits presented similar facts and legal theories. The respective plaintiffs attended county board of commissioners meetings at which the commissioners themselves began the proceedings with prayer. These prayers were frequently sectarian in nature, and the only religion represented was Christianity.¹⁰ Both plaintiffs sought relief via 42 USC § 1983, arguing that the practice of beginning the meeting with prayer established the religion of Christianity and violated the First Amendment.¹¹

The state of Establishment Clause doctrine is uncertain, especially as applied to legislative prayer.¹² Though the Constitution forbids Congress from making any “law respecting an establishment of religion,” the Court has not clarified how far this prohibition extends beyond literal congressional lawmaking, which has led to a doctrinal thicket of overlapping and at times contradictory tests.¹³ The clause extends to state and local government through the Fourteenth Amendment and applies to actions carried out by the state or state employees (not just lawmaking).¹⁴

⁷ Compare *Lund v Rowan County*, 863 F3d 268, 275 (4th Cir 2017) (en banc) (holding that the legislature’s prayer practice violated the Establishment Clause), with *Bormuth v County of Jackson*, 870 F3d 494, 498 (6th Cir 2017) (en banc) (holding that a similar practice did not violate the Establishment Clause).

⁸ Complaint against Rowan County, *Lund v Rowan County*, No 1:13-CV-00207, *1–2 (MD NC filed Mar 12, 2013) (Lund Complaint).

⁹ Complaint against County of Jackson, *Bormuth v County of Jackson*, No 2:13-CV-13726, *1–2 (ED Mich filed Aug 30, 2013) (Bormuth Complaint).

¹⁰ Lund Complaint at *2 (cited in note 8); Bormuth Complaint at *2 (cited in note 9).

¹¹ Lund Complaint at *2 (cited in note 8); Bormuth Complaint at *3 (cited in note 9).

¹² See Richard H. Fallon Jr, *Tiers for the Establishment Clause*, 166 U Pa L Rev 59, 62 n 9 (2017) (noting that the leading legislative prayer case defies traditional Establishment Clause approaches).

¹³ See *id* at 60 (“Establishment Clause doctrine is notoriously confused and disarrayed.”); Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 U Pa J Const L 725, 725 (2006) (“It is by now axiomatic that the Supreme Court’s Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory.”). See also *Rowan County v Lund*, 138 S Ct 2564, 2564 (2018) (Thomas dissenting) (“This Court’s Establishment Clause jurisprudence is in disarray.”).

¹⁴ For Fourteenth Amendment incorporation, see *Everson v Board of Education of the Township of Ewing*, 330 US 1, 8 (1947). For extension beyond legislation, see,

But in the two leading Supreme Court cases, legislative prayer has been held to be constitutionally permissible. In *Marsh v Chambers*,¹⁵ the Court upheld the Nebraska state legislature's 100-year-old practice of hiring a pastor to deliver prayers over a lengthy dissent by Justice William Brennan.¹⁶ More recently, the Supreme Court decided *Town of Greece v Galloway*,¹⁷ which dealt with similar circumstances: a town invited local clergy to deliver prayers at the beginning of the town council meeting, and all of the invitees were Christian.¹⁸ The Court held that this practice did not violate the Establishment Clause, though no reasoning garnered a majority of the Court.¹⁹

Town of Greece did little to settle the legal terrain in the pending claims in Lund's and Bormuth's respective lawsuits. Following the *Town of Greece* decision, both cases went en banc in their respective circuits, generating a total of nine opinions sharply split on what legal test should be applied and on the outcome.²⁰ The two cases led to a circuit split as to whether sectarian prayer offered by a councilmember (as opposed to a third party) is subject to a different legal standard than that outlined in *Town of Greece*.²¹ Although both cases, *Lund v Rowan County*²² from the Fourth Circuit and *Bormuth v County of*

for example, *Lee v Weisman*, 505 US 577, 597–99 (1992) (holding that prayer by a rabbi at a public school graduation violated the Establishment Clause).

¹⁵ 463 US 783 (1983).

¹⁶ *Id.* at 795 (Brennan dissenting).

¹⁷ 572 US 565 (2014).

¹⁸ *Id.* at 611–12 (Breyer dissenting) (noting that, between 1999 and 2007, the prayers were exclusively Christian, and that thereafter, four non-Christian prayers were given but only after the plaintiffs in the case complained).

¹⁹ See *id.* at 567. See also *id.* at 603–10 (Thomas concurring) (offering competing rationales for allowing the prayers in question).

²⁰ See generally *Lund*, 863 F3d 268; *Bormuth*, 870 F3d 494.

²¹ Aside from the two cases constituting this split, others have recently addressed the issue. See *Williamson v Brevard County*, 2017 WL 4404444, *14–19 (MD Fla) (discussing concerns with how the county selects prayer givers); *Hudson v Pittsylvania County*, 107 F Supp 3d 524, 541 (WD Va 2015) (upholding an injunction prohibiting councilmembers from delivering sectarian prayers at their meetings). Moreover, a majority of counties in the Fourth Circuit have allowed legislative-led prayer “on at least some occasions.” Brief of Amici Curiae State of West Virginia and 12 Other States Supporting Defendant-Appellant, *Lund v Rowan County*, No 15-1591, *15 (4th Cir filed Aug 3, 2015). Information regarding legislative prayer is less consistently available for the Sixth Circuit, but it appears as though it is widespread. For those counties from which information could be gathered, almost 40 percent had legislator-led prayer. Brief of Amici Curiae State of Michigan and Twenty-One Other States in Support of Jackson County and Affirmance, *Bormuth v County of Jackson*, No 15-1869, *10–12 (6th Cir filed May 1, 2017).

²² 863 F3d 268 (4th Cir 2017) (en banc).

*Jackson*²³ from the Sixth Circuit, were appealed to the Supreme Court, certiorari was denied in both cases (over an impassioned dissent by Justice Clarence Thomas in the former).²⁴ It does not appear as though the lower courts will have further guidance in the near future.

This Comment seeks to untangle the Supreme Court's jurisprudence regarding legislative prayer by focusing on sectarian prayer offered by lawmakers in intimate settings (such as municipal or county council meetings). Part I describes the Establishment Clause and the legal standards applied by the Court in various settings, focusing on prayer in particular. This Comment considers the doctrinal wrinkles surrounding government and prayer through the lens of constitutional prophylactic rules. Part II further homes in on the circuit split regarding prayer led by lawmakers in intimate settings. Finally, Part III offers a solution to this split, concluding that the Constitution forbids legislative prayer in intimate forums in which the identity of the prayer givers are directly determined by elections or other direct political processes.

I. THE ESTABLISHMENT CLAUSE AND ITS ATTENDANT TESTS

The First Amendment to the US Constitution commands that "Congress shall make no law respecting an establishment of religion."²⁵ The Establishment Clause is binding on the states

²³ 870 F3d 494 (6th Cir 2017) (en banc).

²⁴ See generally *Lund*, 138 S Ct 2564; *Bormuth v Jackson County*, 138 S Ct 2708 (2018).

²⁵ US Const Amend I. The First Amendment also contains a provision ensuring that Congress may not pass a law "prohibiting the free exercise" of religion; the so-called Free Exercise Clause is a doctrinally distinct provision, which is outside of the scope of this Comment. Some, however, have astutely noted that there is one area of overlap between these two clauses that is especially germane to legislative prayer: the extent of the coercion test that I describe below. Briefly, a government practice that coerces some form of religious observance can be framed as either an establishment of religion or an infringement on others' free exercise rights. Thus, some have even argued that the coercion test should be considered part of the Court's Free Exercise Clause jurisprudence as opposed to its Establishment Clause jurisprudence. While this line of reasoning raises intriguing questions about the internal consistency of recent First Amendment decisions and the meaning of a freestanding Establishment Clause that is in some applications concomitant with Free Exercise jurisprudence, these issues are outside the scope of this Comment. Regardless of whether or not coercion is the "right" Establishment Clause test in some cases, it is what the Court has used. For a discussion of the view that the coercion test is subsumed within the Free Exercise Clause, see, for example, *Lee v Weisman*, 505 US 577, 604–09 (1992) (Blackmun concurring).

through the Fourteenth Amendment.²⁶ Thus, the clause applies to state and local authorities.

Likewise, the Establishment Clause applies to policies and practices, not just to legislation. Specifically, the Court has ruled that prayer offered at government functions or with the imprimatur of the government may run afoul of the Constitution—even if there is not a law establishing religion in and of itself.²⁷

The Supreme Court has applied sundry tests to potential establishments of religion.²⁸ Here, the most salient tests are the *Lemon* test²⁹ and the coercion test.³⁰ These tests somewhat overlap, and though neither has been explicitly overruled or elevated to primacy, the controlling opinion in *Town of Greece* relied primarily on the coercion test.³¹ In the legislative prayer context, the Court also uses a third, somewhat amorphous, test: historical pedigree.³² There are several other tests, or permutations thereof, that do not get consistently applied in the legislative prayer context, including the endorsement³³ and neutrality³⁴ tests. The former is frequently seen as a variation of one of the prongs of the *Lemon* test.³⁵ The latter is a value that suffuses each of the Court's Establishment Clause decisions³⁶ but can sometimes be considered its own test, particularly when considering government practices and procedures that affect religious

²⁶ *Everson v Board of Education of the Township of Ewing*, 330 US 1, 8 (1947) (incorporating the Establishment Clause).

²⁷ See *Weisman*, 505 US at 597–99 (holding that prayer offered at a public high school graduation violated the Establishment Clause).

²⁸ See Gey, 8 U Pa J Const L at 728 (cited in note 13). Professor Steven Gey counts ten separate tests.

²⁹ See *Lemon v Kurtzman*, 403 US 602, 612–13 (1971).

³⁰ See *Weisman*, 505 US at 587.

³¹ *Town of Greece*, 572 US at 589–90 (Kennedy) (plurality).

³² See, for example, *Marsh*, 463 US at 793.

³³ See *Lynch v Donnelly*, 465 US 668, 691–94 (1984) (O'Connor concurring).

³⁴ See *Zelman v Simmons-Harris*, 536 US 639, 649–53 (2002).

³⁵ See, for example, *Lynch*, 465 US at 691–92 (O'Connor concurring). See also *Doe v Elmbrook School District*, 687 F3d 840, 849–50 (7th Cir 2012) (en banc) (“In accord with further Supreme Court precedent approving of the endorsement approach, . . . we have viewed the endorsement test as a legitimate part of *Lemon*'s second prong.”); Allison Hugi, Comment, *A Borderline Case: The Establishment Clause Implications of Religious Questioning by Government Officials*, 85 U Chi L Rev 193, 206 (2018) (discussing the endorsement test).

³⁶ See, for example, *McCreary County v American Civil Liberties Union of Kentucky*, 545 US 844, 860 (2005) (“The touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”).

institutions or practices.³⁷ In other words, these other tests are useful in understanding the patchwork of the Court's Establishment Clause jurisprudence but are not as comprehensive as the *Lemon* test and bear less directly on prayer at government functions.

A. The *Lemon* Test

The *Lemon* test, announced in *Lemon v Kurtzman*,³⁸ is a three-part test to determine the constitutionality of a contested law or practice.³⁹ In order for a government activity to pass constitutional muster, per *Lemon*, (1) it "must have a secular legislative purpose,"⁴⁰ (2) "its principal or primary effect must be one that neither advances nor inhibits religion,"⁴¹ and (3) it "must not foster an excessive government entanglement with religion."⁴²

If the practice meets those three prongs, it is not a violation of the Establishment Clause per *Lemon*. In *Lemon*, the Court ruled on the constitutionality of, among other things, a Pennsylvania state statute. The statute "provide[d] financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects"; in reaching nonpublic schools, the statute funded secular as well as religious institutions.⁴³ The law required rigorous accounting as to what money was being spent on which costs. For the first *Lemon* prong, the Court reasoned that the legislation had a secular purpose, as the legislation purported to improve all nonpublic education.⁴⁴ The Court declined to apply the second prong, as the statute failed the third prong.⁴⁵

The Court interpreted the third prong in two ways: First, the state may not oversee and meddle in religious affairs.⁴⁶

³⁷ See, for example, *Zelman*, 536 US at 649–52 (noting that previous cases "thus make clear that where a government aid program is neutral with respect to religion, . . . the program is not readily subject to challenge under the Establishment Clause."). But see Hugi, Comment, 85 U Chi L Rev at 206 (cited in note 35) (arguing that neutrality is no more than a value and is therefore not a test).

³⁸ 403 US 602 (1971).

³⁹ Id at 612–13.

⁴⁰ Id at 612.

⁴¹ Id.

⁴² *Lemon*, 403 US at 613 (quotation marks omitted).

⁴³ Id at 606–07.

⁴⁴ Id at 613.

⁴⁵ Id at 613–14.

⁴⁶ *Lemon*, 403 US at 614–15.

Second, a law may lead to entanglement if it has “divisive political potential.”⁴⁷ The Pennsylvania statute failed this prong because the “restrictions and surveillance necessary” to comply with the law fostered entanglements by forcing state actors to police the accounting practices of religious schools.⁴⁸

The divisive political potential aspect of the entanglement prong can also apply in instances in which religion is intermingled with majoritarian decision-making, such as voting. For example, in *Santa Fe Independent School District v Doe*,⁴⁹ the Court considered a public school district’s proposed policy of allowing students to vote on who would give invocations at high school football games.⁵⁰ Although this aspect of the policy was officially neutral toward religion, it nonetheless contravened the Establishment Clause because it invited rancorous sectarianism.⁵¹

The immediacy of the decision-making is often relevant in deciding how divisive a government expression of religion is. This thread in the divisiveness prong is illustrated by *Van Orden v Perry*⁵² and *McCreary County v American Civil Liberties Union of Kentucky*.⁵³ Decided the same day, both cases involved a display of the Decalogue (also called the Ten Commandments) on state property. Justice Stephen Breyer provided the critical fifth vote in each case, voting to forbid Kentucky’s display in *McCreary County* while opting to not mess with Texas’s in *Van Orden*.⁵⁴ He highlighted a couple distinguishing factors. First, the Texas display did not advance a particular religion and was part of a broader installation, whereas the Kentucky display was more explicitly Christian and more focused on the Decalogue.⁵⁵ Second,

⁴⁷ Id at 622.

⁴⁸ Id at 620–21.

⁴⁹ 530 US 290 (2000).

⁵⁰ Id at 304–07. See notes 88–95 and accompanying text.

⁵¹ *Santa Fe*, 530 US at 309–10. Other cases have diminished the importance of the third *Lemon* prong. See, for example, *Agostini v Felton*, 521 US 203, 221–22 (1997) (recasting the “entanglement” prong as part of the “secular purpose” prong).

⁵² 545 US 677 (2005).

⁵³ 545 US 844 (2005).

⁵⁴ See *Van Orden*, 545 US at 698 (Breyer concurring) (distinguishing the two displays).

⁵⁵ See id at 701–03 (Breyer concurring) (explaining that the Texas Decalogue display was donated by a largely secular organization as part of a park with thirty-eight monuments and markers intended to illustrate Texas’s history and ideals, and that the text surrounding the Decalogue was secular). In contrast, in *McCreary County*, the Decalogue was part of a single display by itself, which was later augmented to include other components that furthered its religious nature, such as “an excerpt from President Lincoln’s ‘Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,’ reading that ‘[t]he Bible is the best gift God has ever given to man.’” *McCreary County*, 545 US at 851–54.

the Texas display had been around for decades, whereas the decision-makers in Kentucky had only recently debated the monument's content during a politically fraught approval process.⁵⁶

Professor Richard Fallon explains Justice Breyer's vote in the case as standing for the proposition that long-standing government practices supporting religion are tolerable but that new attempts to bring in similar practices violate the Constitution.⁵⁷ In other words, the Court prefers to let sleeping dogs lie, while newer or frequent changes to policy or content are viewed more skeptically. Changes in the relationship between church and state bring interdenominational and religious strife to the fore. Encouraging politicians and voters to frequently revisit the political and constitutional compromises made yesteryear would promote backlash from all quarters, paradoxically fomenting the type of the divisiveness the *Lemon* test forbids.⁵⁸

While the full *Lemon* test is erratically used in the Supreme Court and doctrinal evolution began to erode it almost as soon as it was announced,⁵⁹ the themes embedded within it suffuse the Court's Establishment Clause jurisprudence. For example, as this Part explains, the Court may turn to endorsement without applying the full *Lemon* test. Likewise, the Court balks at judicial oversight of religious observance, lest it unnecessarily "entangle" the government in others' religious observance.⁶⁰ Thus, applying *Lemon* to a case like legislative prayer may superficially seem simple but raises questions about when the courts should become involved in policing long-standing practices.

B. Prophylactic Rules and Coercion

The current case law distinguishes between two types of coercion: direct and indirect.⁶¹ Under current Supreme Court precedent, "The Establishment Clause . . . does not depend upon

⁵⁶ See *Van Orden*, 545 US at 702–03; *McCreary County*, 545 US at 851–57.

⁵⁷ Richard H. Fallon Jr, *A Salute to Justice Breyer's Concurring Opinion in Van Orden v. Perry*, 128 Harv L Rev 429, 431 (2014).

⁵⁸ See *id.* at 431–32.

⁵⁹ See Gey, 8 U Pa J Const L at 731–32 (cited in note 13). See also *Santa Fe*, 530 US at 319–20 (Rehnquist dissenting) (describing *Lemon's* "checkered career in the decisional law" of the Supreme Court).

⁶⁰ See *Town of Greece*, 572 US at 586 ("The quest to promote a diversity of religious views would require the town to make wholly inappropriate judgments about the number of religions [it] should sponsor[.] . . . a form of government entanglement with religion that is far more troublesome than the current approach.") (quotation marks and citations omitted).

⁶¹ See, for example, *Engel v Vitale*, 370 US 421, 430–31 (1962).

any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”⁶² In other words, the threshold for passing the coercion test is the lower bar of indirect coercion, and even state laws that do not directly coerce religious behavior may violate the First Amendment.⁶³

The coercion test is frequently used to determine whether prayers sponsored by the government or provided in government fora violate the Establishment Clause. Unlike the *Lemon* test, there are no formal criteria; instead the Court looks to the extent of supervision and social pressures to participate. In two cases, the Court has held that even nonsectarian prayer can violate the Establishment Clause because it coerces participation.⁶⁴ Both cases involved minors; however, the Court did not indicate that the coercion test should be applied exclusively in situations involving minors. This Comment considers the presence of minors along with other aspects of the Court’s review of these practices,⁶⁵ but age alone fails to provide a satisfactory answer to the Court’s reasoning and holdings in these cases. Rather, this Comment suggests a complementary framework: prophylactic rules.

The coercive prayer and legislative prayer cases both evince the characteristics of constitutional prophylactic rules. As argued by Professor David Strauss, prophylactic rules are ubiquitous in constitutional jurisprudence; these rules are designed to be deliberately overinclusive to protect core constitutional values.⁶⁶ Strauss’s seminal article focuses on the prophylactic rule in *Miranda v Arizona*,⁶⁷ which requires police officers to inform criminal suspects of their rights to remain silent and consult counsel during custodial interrogations.⁶⁸ While this

⁶² Id at 430.

⁶³ But see *Town of Greece*, 572 US at 609–10 (Thomas concurring) (arguing that most of the Court’s Establishment Clause jurisprudence is misbegotten and that legal coercion is a more appropriate test in most circumstances). See also note 126 for a discussion of the direct coercion test’s relevance as a controlling opinion. And see note 25 for a discussion of the potential overlap between the coercion test and the Free Exercise Clause of the First Amendment.

⁶⁴ See *Weisman*, 505 US at 599; *Santa Fe*, 530 US at 317.

⁶⁵ See notes 99, 230, and accompanying text.

⁶⁶ See generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U Chi L Rev 190 (1988).

⁶⁷ 384 US 436 (1966).

⁶⁸ Id at 444.

warning requirement cannot be found in the Fifth Amendment, the Court nonetheless requires it because it helps guide lower courts' decision-making and avoids laborious factfinding about whether the other aspects of the interrogation violated due process.⁶⁹ To use Strauss's language, prophylactic rules like *Miranda* are broader than the "real" constitutional provision they are designed to enforce.⁷⁰ *Miranda* itself bars otherwise legitimately obtained confessions from being used in court.

Another area of constitutional law with ubiquitous prophylactic rules is freedom of speech. The Court is extremely skeptical of content-based restrictions, applying a "nearly conclusive presumption against [their] constitutionality."⁷¹ This is not because the First Amendment itself distinguishes between content-based and content-neutral speech restrictions.⁷² Rather, the freedom of speech is a core constitutional value, and it is exceptionally difficult to discern what actually motivates legislatures when they make restrictions on speech content.⁷³ Again, the "real" constitutional provision is that Congress should not write laws barring certain kinds of politically disfavored speech⁷⁴—but because courts cannot always determine what the intention and effect are, the Court has established a strong prophylactic rule disfavoring all content-based restrictions. The analogy between prophylactic rules protecting the freedom of speech and those prohibiting the establishment of religion is apt. Both constitutional provisions are located within the First Amendment and are designed (to a certain extent) to prevent a majoritarian body from prescribing what thoughts and expressions are orthodox.⁷⁵ These values are both core to American democracy and easily subverted by pretextual legislation—and are thus deserving of strong prophylactic protection.

⁶⁹ See Strauss, 55 U Chi L Rev at 205 (cited in note 66).

⁷⁰ Id at 201–02.

⁷¹ Id at 198.

⁷² See US Const Amend I ("Congress shall make no law . . . abridging the freedom of speech.").

⁷³ See Strauss, 55 U Chi L Rev at 200 (cited in note 66).

⁷⁴ See *West Virginia State Board of Education v Barnette*, 319 US 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in *politics*, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.") (emphasis added).

⁷⁵ See id.

Across various constitutional contexts, prophylactic rules have many of the same hallmarks.⁷⁶ They consider the institutional propensities and strengths of the various branches.⁷⁷ Most importantly, when the constitutional provision in question would require extensive judicial factfinding, or even judicial omniscience, the Court will establish a rule to avoid having to divine actors' true motivations or subtle actions.⁷⁸ These questions are also weighed against the importance of the constitutional value at stake.⁷⁹ Likewise, the Court sometimes establishes a "prophylactic rule [that] operates in reverse"; such rules "uphold legislation that the 'real' Constitution would invalidate."⁸⁰ Similarly, prophylactic rules in reverse consider the propensities of institutional actors.⁸¹ As this Section and Part II.B discuss, although the government prayer cases discuss factual inquiries, the holdings and legal rules bear the hallmarks of prophylactic rules.

In *Lee v Weisman*,⁸² the Court held that nonsectarian religious prayers offered at a nonrequired school function still violate the Establishment Clause because they are coercive.⁸³ A rabbi offered an opening prayer at a middle school graduation. The prayer's content was broadly religious but not sectarian—calling upon "God" and "Lord" but not discussing particularly Jewish dogma or creed.⁸⁴ The Court found government coercion in the fact that this occurred at a school graduation: there are already "heightened concerns" about coerced prayer in the public school context; students had no obvious way to avoid participating or appearing to participate; and the school district's "supervision and control" of the event placed public and peer pressure on students to stand or maintain silence during the prayer.⁸⁵ The Court did not rest its holding exclusively on the plaintiff's

⁷⁶ See Strauss, 55 U Chi L Rev at 195–200, 204–05 (cited in note 66) (discussing prophylactic rules in the context of custodial interrogations, pamphleteering, where and about what people may protest, the First Amendment generally, and race-based classifications).

⁷⁷ See id at 208.

⁷⁸ See id at 202 (discussing how the Court's treatment of the ordinance at issue in *Police Department of the City of Chicago v Mosley*, 408 US 92 (1972), illustrates an attempt to protect the government from discriminating against a particular point of view).

⁷⁹ See id at 207–09.

⁸⁰ Strauss, 55 U Chi L Rev at 206–07 (cited in note 66), citing *Oregon v Mitchell*, 400 US 112 (1970) (providing an example of a prophylactic rule operating in reverse).

⁸¹ Strauss, 55 U Chi L Rev at 204–05.

⁸² 505 US 577 (1992).

⁸³ Id at 586–87.

⁸⁴ See id at 581–82.

⁸⁵ Id at 592–93.

age or the school-based setting, noting that any government coercion of religious practice would violate the Establishment Clause.⁸⁶ That is, the Court preferred to consider the totality of the circumstances in determining whether students were coerced rather than resting its holding on the well-established principle that *classroom* prayer is outright forbidden.⁸⁷

The Court also recently applied the coercion test to find a violation of the Establishment Clause in *Santa Fe*.⁸⁸ In this case, a student challenged the school district's practice of allowing students serving on the student council to deliver prayers prior to each home football game.⁸⁹ Applying the coercion principles outlined in *Weisman*, the Court held that the prayer practice was similar to that disallowed in *Weisman*.⁹⁰

The Court also dismissed several potentially distinguishing factors. First, though the school did not pick the speakers directly (as in *Weisman*), the election of speakers through majoritarian means "encourage[d] divisiveness along religious lines in a public school setting" and therefore also ran afoul of the Constitution.⁹¹ Second, the Court dismissed the argument that student attendance at football games was less mandatory than attendance at a high school graduation,⁹² reasoning that attendance at school-sanctioned extracurricular activities is a normal part of student life⁹³ but further held that the prayers would still have been coercive even if attendance were "purely voluntary."⁹⁴ Although the school district had a fallback option that did not mention prayer at all, the Court also struck that provision down because the rest of the policy was close enough to prayer.⁹⁵

⁸⁶ See *Weisman*, 505 US at 592.

⁸⁷ See *id.* at 596. See also generally William P. Marshall, *The Constitutionality of School Prayer: Or Why Engel v. Vitale May Have Had It Right All Along*, 46 *Cap U L Rev* 339 (2018) (arguing that *Weisman* and *Santa Fe* should never have introduced coercion and instead should have rested on an antidivisiveness rationale).

⁸⁸ *Santa Fe*, 530 US at 310–12.

⁸⁹ See *id.* at 297–98. The policy was written as if the school board was anticipating litigation and had several fallback options. For example, it allowed for sectarian prayer, but should that policy be enjoined, the district's policy would revert to allowing only non-sectarian prayer. Should that be enjoined, the policy would shift to allowing various "messages," "statements," and "invocations." *Id.*

⁹⁰ See *id.* at 305.

⁹¹ *Id.* at 311.

⁹² *Santa Fe*, 530 US at 311–12.

⁹³ *Id.*

⁹⁴ *Id.* at 312.

⁹⁵ *Id.* at 313–16 (invalidating an alternative policy that did not mention prayer but nonetheless called for students to "solemnize" football games beforehand).

These cases analyzed the legal issue through the lens of coercion, but they did not conduct any factual inquiries into whether coercion actually occurred. In *Santa Fe*, the policies were hypothetical—the policy had yet to be implemented, and no prayers or meditations were offered.⁹⁶ And in *Weisman*, the Court did not engage in an extended analysis of how the choreography of the graduation and prayer content gave rise to a coercive environment.⁹⁷ Indeed, in *Weisman*, the prayer was nonsectarian and only faintly religious, and there was no evidence that the plaintiff was uncomfortable, let alone coerced.⁹⁸

The Court's spare treatment of the *actual* facts of these cases supports the theory that the Court prefers to deploy prophylactic rules in this area of law. The Court is ill-suited to analyze the coercive potential in government-sponsored prayers because doing so requires a rich record and intensive factfinding into the subjective mental states of those in attendance. An analysis of coercion in fact would have to consider in isolation and in combination the motivations of the prayer-giving government entity, its actions, and the subjective mental state of audience members. Thus, Justice Antonin Scalia was absolutely correct when he wrote in dissent in *Weisman* that “the Court has gone beyond the realm where judges know what they are doing” by dabbling in “psychology practiced by amateurs.”⁹⁹ But that is exactly the point. Because courts lack the institutional capacity to determine each actor's motivations and sensitivities, the Court appropriately laid out a strong prophylactic rule forbidding religious prayers when children may be explicitly or implicitly cajoled into bending their religious practices to meet those of school administrators.

The problem compounds in cases like *Santa Fe*, in which prayers are to be repeated with regularity; presumably a reviewing court would have to inquire into the subjective mental states of the prayer givers and attendees at each football game. Thus, in each of these cases, the Court did not attempt to discern whether anyone was actually coerced to do anything. *Santa Fe* is especially instructive: the Court blocked the entire practice prophylactically even though the policy had a fallback option

⁹⁶ *Santa Fe*, 530 US at 314 (rejecting the idea that the prayer policy “cannot be invalidated on the basis of some ‘possibility or even likelihood’ of an unconstitutional application”).

⁹⁷ Compare *Weisman*, 505 US at 593 (offering a high-level assertion that this was coercive based on assumed facts), with *Town of Greece*, 572 US at 588–90 (offering a very detailed discussion of what kinds of factors, taken together, could inform a coercion analysis).

⁹⁸ See *Weisman*, 505 US at 581–83.

⁹⁹ *Id.* at 636 (Scalia dissenting).

that did not even fully authorize prayer.¹⁰⁰ As in the equal protection realm, majoritarian decision-making looms large over the Establishment Clause, further explaining these prophylactic rules; the Court is concerned that a majority group will use seemingly neutral policies to discriminate against an out-group.¹⁰¹

In sum, the strong prophylactic rules laid out in *Weisman* and *Santa Fe* seem to cut wider than examining whether a government agent actually indirectly coerced somebody to participate in a religious activity. But these two cases do not make clear what facts trigger this preclusive rule or whether the principles of coercion should also apply to legislative prayer. It is also worth noting that, apart from *Weisman* and *Santa Fe*, the Court has a robust line of cases that forbid religious expression and instruction in public schools.¹⁰² These earlier cases do not discuss indirect coercion as a rationale or test (and in some cases explicitly set aside coercion), suggesting that the prophylactic rules surrounding public prayer differ from the Court's categorical ban on prayer in a public schoolhouse.¹⁰³

II. LEGISLATIVE PRAYER AND LEGISLATOR-LED PRAYER

In the two leading cases regarding legislative prayer, *Town of Greece* and *Marsh*, the Supreme Court held the practices constitutional. The Court did not consistently apply any of the above tests in these cases. In *Marsh*, the Court appeared to accept the practice as presumptively constitutional, based on the First Congress hiring a pastor as it finalized the language of what would become the Bill of Rights.¹⁰⁴ In *Town of Greece*, the controlling opinion applied a form of the "indirect coercion" test

¹⁰⁰ *Santa Fe*, 530 US at 308–09.

¹⁰¹ See Strauss, 55 U Chi L Rev at 204–05 (cited in note 66).

¹⁰² See, for example, *Engel*, 370 US at 424; *School District of Abington Township v Schempp*, 374 US 203, 223 (1963); *Epperson v Arkansas*, 393 US 97, 103 (1968); *Wallace v Jaffree*, 472 US 38, 56 (1985). See also *Engel*, 370 US at 438–42 (Douglas concurring) (explaining that coercion is not necessary to invalidate prayer in school).

¹⁰³ See note 100 and accompanying text. See also *Jaffree*, 472 US at 72 (O'Connor concurring) (explaining that earlier religion and school decisions "expressly turned only on the fact that the government was sponsoring a manifestly religious exercise" notwithstanding any implicit coercion that may have been present). See also Marshall, 46 Cap U L Rev at 341 (cited in note 87) (contrasting the rationales of earlier school prayer cases with those of *Weisman* and *Santa Fe*).

¹⁰⁴ *Marsh*, 463 US at 787–88.

but failed to garner a majority of the Court.¹⁰⁵ Each of these cases considers prayers delivered by third parties. As such, no Court case directly controls the factual circumstance that underlies this Comment, namely legislators themselves leading prayer.

A. *Marsh v Chambers*: A Carveout for Historical Practices

Though the Court has never held that the *Lemon* test is inapplicable to legislative prayer,¹⁰⁶ it has strongly implied that its applicability is at least limited when the practice has a long historical pedigree. In *Marsh*, the Nebraska state legislature paid a pastor to deliver prayers at its legislative sessions.¹⁰⁷ This practice was a century old,¹⁰⁸ and the same Presbyterian pastor had been retained for the two decades preceding suit.¹⁰⁹ The prayers were offered in the official legislative chamber before the official start of the workday, and the legislators (let alone any observers) did not need to be present.¹¹⁰

The Court's decision ignored the *Lemon* test except to note that the lower court applied that test.¹¹¹ Rather, the majority opinion in *Marsh* located the constitutionality of legislative prayer in the First Congress, which also hired a pastor to deliver prayers almost immediately after ratifying the First Amendment.¹¹² The Court did acknowledge that there were contemporaneous objections to legislative prayer during the process of constitutional ratification and that two of the authors of the Federalist Papers opposed the practice at various points in their respective careers.¹¹³ But *Marsh* downplayed these undercurrents and held

¹⁰⁵ This Comment treats Justice Anthony Kennedy's opinion, which applied the indirect coercion test, as the controlling plurality opinion under *Marks v United States*, 430 US 188 (1977). See note 126 and accompanying text.

¹⁰⁶ See generally *Town of Greece*, 572 US 565; *Marsh*, 463 US 783.

¹⁰⁷ See *Marsh*, 463 US at 784–85.

¹⁰⁸ See *id.* at 790.

¹⁰⁹ See *id.* at 785.

¹¹⁰ See *Chambers v Marsh*, 504 F Supp 585, 590 & n 12 (D Neb 1980).

¹¹¹ See *Marsh*, 463 US at 786. See also *id.* at 796 (Brennan dissenting).

¹¹² See *id.* at 787–88.

¹¹³ For contemporaneous objections, see *id.* at 791 n 12 (“It also could be noted that objections to prayer were raised, apparently successfully, in Pennsylvania while ratification of the Constitution was debated.”). For noncontemporaneous objections raised by former President James Madison and then-delegate John Jay, see *id.* at 791 & n 12; *id.* at 807–08 (Brennan dissenting) (quoting Madison as writing, “Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom? In strictness, the answer on both points must be in the negative”).

that the practices of the First Congress are determinative.¹¹⁴ In other words, the First Congress’s “actions reveal their intent”: if hiring a minister to deliver prayers contravened the Establishment Clause, they would not have done it.¹¹⁵

A forceful dissent by Justice Brennan argued that this history is not compelling and instead applied the *Lemon* test, finding that legislative prayer fails on all three prongs. First, the purpose of retaining a pastor is religious, and not secular, in nature.¹¹⁶ Second, the primary effect is to advance religion.¹¹⁷ Finally, legislative prayer fails both aspects of the final prong: the legislature might have to police the pastor’s prayers to ensure that they do not cross lines of acceptability, and the selection of pastors from the several denominations and religions has “divisive political potential.”¹¹⁸

B. *Town of Greece v Galloway*

The most recent case—and source of the current circuit split—regarding legislative prayer is *Town of Greece*. Greece, a hamlet in upstate New York, instituted a prayer session at the beginning of its town board meetings.¹¹⁹ The town followed an “informal” method of identifying potential prayer-giving volunteers by calling up local religious institutions, finding someone available to pray at that month’s meeting, and then compiling a list of individuals available to be called on in the future.¹²⁰ Until litigation began, every volunteer prayer giver was Christian, and many of the prayers were overtly sectarian.¹²¹ Later, a rabbi, a Wiccan priestess, and a chairman of the local Baha’i temple gave prayers at the town board meetings.¹²²

The plaintiffs in the case sought to limit the holding of *Marsh* and distinguished Greece’s practices in several ways. First, they argued that *Marsh* authorized only nonsectarian prayer, whereas Greece’s volunteers gave openly sectarian prayers.¹²³ Second, the

¹¹⁴ See *Marsh*, 463 US at 792.

¹¹⁵ *Id* at 790.

¹¹⁶ See *id* at 797 (Brennan dissenting).

¹¹⁷ See *id* at 798 (Brennan dissenting).

¹¹⁸ *Marsh*, 463 US at 798–800 (Brennan dissenting).

¹¹⁹ See *Town of Greece*, 572 US at 570.

¹²⁰ See *id* at 571.

¹²¹ See *id*.

¹²² See *id* at 572.

¹²³ See *Town of Greece*, 572 US at 579, discussing *County of Allegheny v American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 US 573 (1989).

plaintiffs argued that the fact that only Christian leaders were invited to give prayers ran afoul of the endorsement prong of the *Lemon* test and the principle of government neutrality toward religion.¹²⁴ Finally, the prayers in *Marsh* occurred in a remote legislative chamber, whereas Greece held only town board meetings, at which constituents openly petitioned their local representatives. Because citizens attended these intimate meetings to personally petition the board, a prayer at the beginning, the plaintiffs argued, was coercive.¹²⁵

The Court rejected all three of these arguments in a five-to-four vote and held that Greece's prayer practice passed constitutional muster. But the Court was nonetheless fractured: the case generated five opinions, and a majority failed to coalesce around a shared rationale on one key legal issue. Justice Kennedy wrote the opinion of the Court on the first two questions, holding that openly sectarian legislative prayer is constitutionally acceptable and that, despite the imbalance in religious groups invited to lead prayers, the selection process for prayer givers was neutral and thus constitutional. While a majority of the Court found that the practice was not coercive, they fractured on the rationale.¹²⁶

Justice Elena Kagan wrote the primary dissent, joined by the remaining justices, which argued that the prayers should have been nonsectarian and that Greece should have solicited prayers from more diverse clergy.¹²⁷ The dissent also argued that the location of a local government meeting is more coercive than the legislative session at issue in *Marsh*.¹²⁸ Justice Breyer dissented separately to explain all of the practical ways that Greece

¹²⁴ See *Town of Greece*, 572 US at 585.

¹²⁵ See *id.* at 585–86.

¹²⁶ This Comment treats Justice Kennedy's opinion as controlling. See, for example, *Lund*, 863 F3d at 277 (en banc) (treating Justice Kennedy's plurality opinion as controlling without further discussion); *Lund*, 837 F3d at 416–17 (panel opinion) (same). See also *Bormuth*, 870 F3d at 515 n 10 (implying that a majority of the en banc Sixth Circuit agrees that Justice Kennedy's opinion controls). There are, however, some who believe that, under *Marks*, Justice Thomas's concurrence should control on this final legal question. See, for example, *Bormuth*, 870 F3d at 515 n 10. It is outside the scope of this Comment to fully grapple with this question, but there are very strong arguments that, as a matter of logic and *Marks* itself, Justice Kennedy's opinion is the one that binds lower courts. See, for example, *Bormuth*, 870 F3d at 519–21 (Rogers concurring). Moreover, applying Justice Thomas's proposed test would upend binding Supreme Court precedent, whereas Justice Kennedy's acknowledgment of indirect coercion would not. See *Bormuth*, 870 F3d at 540 n 9 (Moore dissenting).

¹²⁷ See *Town of Greece*, 572 US at 631–32 (Kagan dissenting).

¹²⁸ See *id.* at 626–27 (Kagan dissenting).

could have made its prayer practice more inclusive and, by his lights, constitutional.¹²⁹

A majority of the Court quickly rejected the plaintiffs' first two arguments. In response to the first, regarding sectarian prayer, it noted that, in the actual *Marsh* case, many of the prayers were overtly Christian.¹³⁰ Moreover, requiring that the prayer be nonsectarian would require the town and judiciary to actively police the content of the prayer.¹³¹ But the Court explicitly withheld judgment on a hypothetical future case in which "the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."¹³²

Second, a majority of the Court held that the method of identifying prayer givers did not violate governmental neutrality. The Court explained that the method was neutral and reasonable: "So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing."¹³³ In his concurrence, Justice Samuel Alito elaborated that the method of identifying prayer givers was appropriate in two respects: first, the policy was not born of "religious animus," and second, the town offered opportunities to non-Christians to lead prayers once the lack of diversity was brought to their attention.¹³⁴ In essence, the procedure for selecting prayer givers was facially neutral, which is all that the Constitution requires.¹³⁵ A majority of the court also found that Greece's prayer practice, though implemented only in the 1990s, was justifiable due to its

¹²⁹ See *id.* at 612–14 (Breyer dissenting).

¹³⁰ See *id.* at 580–81 (Kennedy) (plurality).

¹³¹ See *Town of Greece*, 572 US at 580–81; *id.* at 595 (Alito concurring). While the majority and concurring opinions do not cite the *Lemon* test, they do seem concerned with potential religious entanglements. See *Lemon*, 403 US at 620–21 (prohibiting monitoring practices that "entangle" the state with religious practice). Justice Kagan countered that, in *Marsh*, the prayer giver stopped giving sectarian prayers when asked, and "the Court would have reached a different decision" in that case if the prayers had been given to "advance any one . . . faith." *Town of Greece*, 572 US at 627 (Kagan dissenting).

¹³² *Town of Greece*, 572 US at 583.

¹³³ *Id.* at 567.

¹³⁴ *Id.* at 593–94 (Alito concurring).

¹³⁵ Writing in dissent, Justice Kagan argued that, regardless of the methods used to identify prayer givers, "prayer repeatedly invoking a single religion's beliefs . . . crossed a constitutional line." *Id.* at 618 (Kagan dissenting). Also, note the contrast between Justice Alito's reasoning and *Santa Fe*, which condemned a facially neutral method of selecting a prayer giver because of concerns over majoritarianism. See *Santa Fe*, 530 US at 311, 316–17. See also Part III.B below (distinguishing *Town of Greece* and *Santa Fe* because, in the former, the facially neutral process does not directly rely on majoritarian decision-making).

similarity to other accepted policies.¹³⁶ The Court echoed *Marsh's* reasoning that practices adopted by the First Congress, such as sectarian prayer, are presumptively constitutional.¹³⁷ A majority of the Court also found that there is a historical precedent for prayer in small-town board meetings.¹³⁸ Thus, the practice's historical pedigree shielded it from the exacting constitutional scrutiny embodied in traditional Establishment Clause tests such as *Lemon*.¹³⁹

The majority hints, however, that historical pedigree may be qualified by other Establishment Clause tests: "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."¹⁴⁰ In other words, the Court acknowledges that historicity is not the be-all and end-all of legislative prayer and that other Establishment Clause tests may be appropriate. Indeed, the controlling plurality opinion went on to analyze Greece's prayer practice in light of the coercion test, suggesting that, while historicity is important to the Court's analysis, it is not necessarily sufficient to find instances of legislative prayer constitutional.¹⁴¹

This final issue facing the Court—whether the practice of sectarian prayer (offered by a third party) at a local government meeting was coercive to citizens in attendance—proved more controversial, with no opinion commanding a majority of the Court. The controlling opinion, written by Justice Kennedy,¹⁴² employed a broad indirect coercion analysis of the town's prayer practice.¹⁴³ Justice Thomas agreed, on other grounds, that the prayers were constitutional, thus supplying a majority.¹⁴⁴

¹³⁶ But see Fallon, 128 Harv L Rev at 431 (cited in note 57).

¹³⁷ *Town of Greece*, 572 US at 575–79.

¹³⁸ *Id.* at 576.

¹³⁹ See Lisa Shaw Roy, *The Unexplored Implications of Town of Greece v. Galloway*, 80 Albany L Rev 877, 879–80 (2016) (collecting scholarly reactions and discussing the history argument).

¹⁴⁰ *Town of Greece*, 572 US at 577.

¹⁴¹ *Id.* at 584–92.

¹⁴² See note 126 and accompanying text for a brief discussion of why this Comment treats this opinion as controlling.

¹⁴³ See *Town of Greece*, 572 US at 584–92.

¹⁴⁴ *Id.* at 608–10 (Thomas concurring) (arguing that the only valid form of a coercion test is examining whether anybody was directly and legally coerced by the government). Justice Kagan dissented, contending that the intimate environs of a local government meeting were dissimilar from a legislative session in a capitol building and more likely to lead to indirect coercion to participate. *Id.* at 625–31 (Kagan dissenting).

Justice Kennedy, in the plurality opinion, explained that, because the prayers were not directed at the non-councilmembers, they cannot be coercive. Quoting the district court in *Marsh*, Justice Kennedy explained that legislative prayer as an “internal act” is permissible under the Establishment Clause.¹⁴⁵ In this context, “internal” means primarily for an audience of other legislators.¹⁴⁶ Since the prayers in Greece were also “internal” in the sense that they were primarily to “accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers,” they thus fell into the set of practices recognized and allowed in *Marsh*.¹⁴⁷ Justice Kennedy’s opinion distinguished this case from *Weisman* and *Santa Fe* by noting that any offended person in attendance could simply leave for the prayer and return to the board meeting once the prayer concluded.¹⁴⁸ Whereas the students in *Weisman* and *Santa Fe* were arguably required to attend and their behavior may have been monitored, here the meeting’s attendees were adults who were not required to participate in or even attend a prayer that offended their religious sensibilities.¹⁴⁹ This plurality opinion, however, explicitly withheld judgment on several factual wrinkles not presented, noting that, despite the holding in *Town of Greece*, “[t]he inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.”¹⁵⁰ Most importantly, the Court did not address a situation in which “town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced

¹⁴⁵ Id at 587 (Kennedy) (plurality), quoting *Chambers*, 504 F Supp at 588.

¹⁴⁶ See *Town of Greece*, 572 US at 588.

¹⁴⁷ Id.

¹⁴⁸ See id at 590 (“Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest.”). See also id at 594 (Alito concurring):

The prayer preceded only the portion of the town board meeting that I view as essentially legislative. While it is true that the matters considered by the board during this initial part of the meeting might involve very specific questions, such as the installation of a traffic light or stop sign at a particular intersection, that does not transform the nature of this part of the meeting.

¹⁴⁹ See id at 590–91. The various opinions, including the dissents, also do not address the possibility that religious minorities may feel coerced to participate, not because they feel uncomfortable individually but because they worry about how the incident may lead to a backlash against all members of that minority group.

¹⁵⁰ *Town of Greece*, 572 US at 587.

by a person's acquiescence in the prayer opportunity."¹⁵¹ Similarly, the plurality implied that prayer that "chastised dissenters [or] attempted lengthy disquisition on religious dogma" would be impermissible.¹⁵² As the Fourth Circuit later noted in *Lund*, "[T]he decision takes for granted the use of outside clergy."¹⁵³

The holding of *Town of Greece*, that inoffensive sectarian prayers offered by third parties are constitutional, supports the view that the Court's prayer and coercion jurisprudence is dominated by prophylactic rules. In *Marsh*, the Court established that legislative prayer is generally constitutional so long as it hews relatively closely to what was practiced at the Founding. The holding in *Town of Greece* can therefore be understood as a prophylactic rule in reverse—allowing a practice that may violate the "real" Constitution in order to prevent judges from having to parse the theological significance and coercive potential of every meditation offered by a third party.¹⁵⁴ Thus, the plaintiffs' desired solution of examining prayer content and allowing only nonsectarian prayers is actually at odds with the spirit of *Weisman* and *Santa Fe*. Although the Court said in dicta that the coercion inquiry for legislative prayer is fact-sensitive, the controlling opinion nonetheless also establishes a strong presumption that, when a third party is giving prayers, the prayers are constitutional.¹⁵⁵

The holding in *Town of Greece* therefore aligns with the other government prayer decisions. As in *Santa Fe* and *Weisman*, the controlling opinion in *Town of Greece* does not meaningfully address whether someone actually felt coerced to participate; the discussion was conclusory and theoretical.¹⁵⁶ The Court rests its conclusion on the observation that adults are generally hearty enough that they can withstand peer pressure and a subtly offensive environment engendered by the legislators' presence.¹⁵⁷ Thus,

¹⁵¹ *Id.* at 588.

¹⁵² *Id.* at 589–90.

¹⁵³ *Lund*, 863 F3d at 278.

¹⁵⁴ See Strauss, 55 U Chi L Rev at 206–07 (cited in note 66) (explaining how *Oregon v Mitchell*, 400 US 112 (1970), provides an example of a prophylactic rule operating in reverse).

¹⁵⁵ See *Town of Greece*, 572 US at 589–90.

¹⁵⁶ See *id.* at 590–91 (dismissing the plaintiffs' objections to the practice because they could not point to specific instances of coercion—despite the fact that the Court found coercion present on even sparser records in *Weisman* and *Santa Fe*).

¹⁵⁷ *Id.* at 589 ("Offense . . . does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time

someone might actually feel coerced but be unable to overcome the presumption so long as the legislators or third-party prayer givers do not engage in a pattern of overt coercion. But if the Court is to protect the holding in *Marsh* and prevent extended and potentially error-prone judicial review, minor constitutional violations, such as an adult feeling pressure to participate in a prayer, may be tolerated.¹⁵⁸ Whereas in *Santa Fe* and *Weisman*, the Court arguably held practices that did not violate the “real” Constitution unconstitutional, here the Court did the opposite, allowing a practice that may actually be indirectly coercive.

C. Circuit Split regarding Sectarian Prayer Delivered by Local Government Representatives

The *Town of Greece* decision in many ways created more questions than it answered. In particular, the plurality opinion’s insistence that the inquiry is “fact sensitive” and that its holding should not be read to extend to other factual circumstances left lower courts wondering which circumstances are permissible and which are not.¹⁵⁹ *Town of Greece* also failed to answer what constitutional tests courts should employ. Beyond mentioning that these situations exist, *Town of Greece* provided lower courts with few tools for responding to new fact patterns.¹⁶⁰

The circuit split between the Fourth and Sixth Circuits regarding prayer led by local government representatives themselves highlights this lacuna. In *Lund*, the Fourth Circuit held that one county’s practice of legislator-led prayer violated the Establishment Clause,¹⁶¹ but in *Bormuth*, the Sixth Circuit found a generally similar practice to be constitutional.¹⁶² These two cases resulted in a flurry of opinions; the majorities in each circuit understood the holding of *Town of Greece* differently, and the two circuits came to opposite conclusions despite confronting similar factual circumstances.¹⁶³ On the one hand, the Fourth

a person experiences a sense of affront from the expression of contrary religious views in a legislative forum.”).

¹⁵⁸ See Strauss, 55 U Chi L Rev at 205–07 (cited in note 66).

¹⁵⁹ *Town of Greece*, 572 US at 587.

¹⁶⁰ See note 132 and accompanying text.

¹⁶¹ See *Lund*, 863 F3d at 290.

¹⁶² See *Bormuth*, 870 F3d at 498.

¹⁶³ But see *id* at 512–13, 518 (distinguishing the factual circumstances in the two cases as a possible explanation for the distinct results). Though the content of the prayers on the record necessarily differs, that is insufficient grounds for distinguishing the cases. As Parts II.C.1–2 discuss in greater detail, the two courts read *Town of Greece*

Circuit considered several factors mentioned by the *Town of Greece* opinion to fashion a new totality of the circumstances standard that generally disfavors sectarian prayers led by councilmembers, regardless of whether or not participants actually felt coerced. On the other hand, the Sixth Circuit held that the legal test from *Town of Greece* fully controls instances of prayer led by councilmembers. Moreover, in order to show that a practice is unconstitutionally coercive, plaintiffs must demonstrate that the councilmembers engaged in retaliatory behavior.

1. Fourth Circuit: totality of the circumstances test through the lens of the prayer giver's identity.

In *Lund*, the Rowan County, North Carolina Board delivered invocations before their meetings for years and did not allow others to deliver an invocation.¹⁶⁴ The prayers in question were “pointedly sectarian” in that they exclusively referenced the Christian faith, and some of the prayers “veered from time to time into overt proselytization.”¹⁶⁵ Some of the prayers included requests for attendees to join in, and the setting was akin to that of *Town of Greece* rather than *Marsh* in that it was a meeting of local government, not the state legislature in the state capitol.¹⁶⁶

The Fourth Circuit's en banc opinion considered instances of legislator-led prayer to be broadly governed by the holding and tests in *Town of Greece*. It noted that, per *Town of Greece*, a court determining the constitutionality of a prayer practice “must conduct a ‘fact-sensitive’ review of ‘the setting in which the prayer arises and the audience to whom it is directed’” rather than applying another Establishment Clause test such as *Lemon*.¹⁶⁷ Moreover, it applied dicta from *Town of Greece*, which explained that a few stray prayers that denigrate religious minorities or nonbelievers do “not despoil a practice that on the whole reflects and embraces our tradition. Absent a pattern of

very differently and applied different legal tests. Moreover, there is reason to think that the practices and religious content of the two counties' prayers were not so dissimilar. See *Bormuth*, 870 F3d at 525–26 (Moore dissenting). Finally, as discussed below, this Comment argues that neither circuit's approach is especially workable or consistent with the Supreme Court's Establishment Clause jurisprudence.

¹⁶⁴ See *Lund*, 863 F3d at 272.

¹⁶⁵ *Id.* Though the board members were all Protestant Christians, they were not all of the same denomination. *Id.* at 282.

¹⁶⁶ *Id.* at 272.

¹⁶⁷ *Id.* at 281, quoting *Town of Greece*, 572 US at 587.

prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.”¹⁶⁸

The court converted these instructions to a totality of the circumstances test centered on the practice of the county board. Specifically, it examined four aspects of the prayers in turn and together: (1) “commissioners as the sole prayer-givers,” (2) “invocations that drew exclusively on Christianity and sometimes served to advance that faith,” (3) “invitations to attendees to participate,” and (4) “the local government setting.”¹⁶⁹

With respect to items (2)–(4), the Fourth Circuit found it particularly important that the prayer givers were exclusively board members.¹⁷⁰ It is worth noting that these latter three factors were also present in *Town of Greece*: until the litigation began, the prayers in Greece were exclusively Christian, the prayer givers often invited those in attendance to participate, and the town meetings were intimate local government meetings.¹⁷¹ The *Lund* court then held that “it is the combination of these elements—not any particular feature alone—that” violated the Establishment Clause.¹⁷²

The *Lund* court first distinguished *Town of Greece*, in which there was a facially neutral and open prayer-giving policy. Ultimately, a Wiccan priestess (among others) requested to give a prayer and was afforded the opportunity to do so.¹⁷³ In *Lund*, in contrast, the board members refused to give any third parties the opportunity to give prayers at the beginning of the meeting.¹⁷⁴ This, the court held, thus contravenes the *Town of Greece* justification for the prayer practice—that it was open to majority and minority religions alike (and was thus neutral).¹⁷⁵

Here, the court also discussed the applicability of the third *Lemon* prong: that the prayer practice should not foster “political

¹⁶⁸ *Town of Greece*, 572 US at 585. See also *Lund*, 863 F3d at 283, quoting *Town of Greece*, 572 US at 585.

¹⁶⁹ *Lund*, 863 F3d at 281.

¹⁷⁰ *Id.*

¹⁷¹ See *Town of Greece*, 572 US at 578–79.

¹⁷² *Lund*, 863 F3d at 281.

¹⁷³ See *Town of Greece*, 572 US at 572.

¹⁷⁴ See *Lund*, 863 F3d at 282.

¹⁷⁵ See *Town of Greece*, 572 US at 585–86 (“So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.”).

division.”¹⁷⁶ Without discussing *Santa Fe*, *Lund* noted that the prayer practice became a controversial topic at the 2016 board elections, and one person who “‘expressed opposition to the Board’s prayer practice’ was booed and jeered by the audience” of other community members.¹⁷⁷ Though the threads of these arguments are not altogether lucid in the en banc opinion, the thrust appears to be that having sectarian prayer given exclusively by the councilmembers violates both the neutrality principle from *Town of Greece* and the political divisiveness principle from *Lemon*.¹⁷⁸

The *Lund* opinion then examined three factors from *Town of Greece* in light of the fact that the legislators themselves were leading the prayers. First, in *Town of Greece*, the controlling opinion instructed, “[A]dult citizens . . . can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith” and thus allowed sectarian prayer delivered by third parties that is not belligerent.¹⁷⁹ In viewing the prayer content through the lens of the prayer givers’ status as government representatives, the *Lund* court looked at similar prayer content and found the prayers problematic. Specifically, the prayers at issue in *Lund* were also almost exclusively Christian and were occasionally confrontational to non-Christians.¹⁸⁰ The *Lund* court first suggested that the prayers at issue were more confrontational than those in *Town of Greece*¹⁸¹ then noted that, when recited by *agents of the government*, the sectarian nature of the prayers becomes a potential establishment of religion.¹⁸²

Next, the *Lund* court focused on the distinction from *Town of Greece* that noted that invitations to participate in prayers from the legislators themselves are expressly not protected by the *Town of Greece* opinion.¹⁸³ The *Lund* court first looked at

¹⁷⁶ See *Lund*, 863 F3d at 282.

¹⁷⁷ *Id.*

¹⁷⁸ The opinion also does not explain why the prayer practice in *Town of Greece* did not fail the *Lemon* test given that it too sowed political discord. See *Town of Greece*, 572 US at 614–15 (Breyer dissenting); *id.* at 636 (Kagan dissenting).

¹⁷⁹ *Id.* at 584 (Kennedy) (plurality).

¹⁸⁰ See *Lund*, 863 F3d at 284–86 (quoting prayers, for example: “[W]e do believe that there is only one way to salvation, and that is Jesus Christ”; “We can’t be defeated, we can’t be destroyed, and we won’t be denied, because of our salvation through the Lord Jesus Christ”).

¹⁸¹ See *id.* But see *id.* at 314 (Agee dissenting) (noting that many of the prayers in *Town of Greece* are similar to those criticized in the majority opinion).

¹⁸² See *id.* at 286.

¹⁸³ See *id.* at 286–87.

whom the calls were directed toward—the other councilmembers or the citizens in attendance.¹⁸⁴ Looking at the record, it found that the calls were often directed to those in attendance, meaning that government agents exhorted not just themselves but others to participate in sectarian prayer.¹⁸⁵ The *Lund* majority also remarked offhandedly that this issue on its own may be dispositive in favor of those challenging the prayer practice.¹⁸⁶

Finally, whereas the prayers in both *Town of Greece* and *Lund* took place in local government meetings, the *Lund* court distinguished the practices at two levels. First, it noted that, when prayer givers are the councilmembers themselves, leaving the meeting for the duration of the prayer does more to marginalize the dissident.¹⁸⁷ It is not clear from the opinion, however, what exactly the mechanism of marginalization is and whether it would have been present in *Town of Greece* as well. Second, *Lund* distinguishes the facts of *Town of Greece*, noting that in the latter there was a clearer separation between prayer and lawmaking, making it easier for objectors to leave without the council immediately making decisions about various petitioners as soon as the prayers concluded.¹⁸⁸ The *Lund* majority opinion then concluded that legislative prayer, as practiced in Rowan County, violated the Establishment Clause.¹⁸⁹

2. Sixth Circuit: elevating history and downplaying the prayer giver's position.

In contrast, the Sixth Circuit found that a practice similar to that discussed above was constitutional.¹⁹⁰ As in *Lund*, Jackson County commissioners delivered prayers on a rotating basis, prayers were exclusively Christian, and the commissioners often instructed citizens in attendance to participate.¹⁹¹ In *Bormuth*, some of the councilmembers were openly antagonistic

¹⁸⁴ See *Lund*, 863 F3d at 287.

¹⁸⁵ See *id.*

¹⁸⁶ *Id.* at 277, quoting *Town of Greece*, 572 US at 588 (“[T]he analysis would be different if *town board members* directed the public to participate in the prayers.”) (emphasis added).

¹⁸⁷ See *Lund*, 863 F3d at 288.

¹⁸⁸ See *id.* See also *Town of Greece*, 572 US at 593–94 (Alito concurring).

¹⁸⁹ *Lund*, 863 F3d at 290–91.

¹⁹⁰ See *Bormuth*, 870 F3d at 498.

¹⁹¹ See *id.* at 498–99.

to a person who complained about the practice, though there may have been alternative justifications for their disfavor.¹⁹²

The Sixth Circuit applied a different legal standard than the Fourth Circuit to arrive at its alternate conclusion: it placed great weight on the historical pedigree of legislative prayer generally¹⁹³ and then considered whether the situations described in *Town of Greece* differed in other ways beyond the identity of the prayer giver.¹⁹⁴

Specifically, the Sixth Circuit applied the coercion test with regard to three facts in the record: the councilmembers requested audience participation, the councilmembers turned their backs on Mr. Bormuth during the hearings, and the council declined to appoint Mr. Bormuth to various citizens' boards.¹⁹⁵ As in *Lund*, the *Bormuth* majority used *Town of Greece* as its starting point but read the decision to broadly license all forms of legislative prayer. The primary frame of its analysis was not the distinction between councilmembers and local pastors (as in *Lund*) but rather the historical pedigree of legislative prayer generally.¹⁹⁶

First, the *Bormuth* court disregarded *Town of Greece's* dicta regarding the differences between requests to participate coming from clergy and councilmembers: "We do not think there is a constitutional difference here, for government-sanctioned prayers by official chaplains or invited community members still fall within the ambit of the Establishment Clause."¹⁹⁷ It explained *Town of Greece's* distinction by hypothesizing that *Town of Greece* contemplated individualized commands for objectors to participate.¹⁹⁸

Second, the *Bormuth* court observed that, though some councilmembers criticized Mr. Bormuth and turned their backs on him, they may not have done so because of his criticism of

¹⁹² See *id.* at 517–18.

¹⁹³ See *id.* at 504.

¹⁹⁴ See *Bormuth*, 870 F.3d at 512.

¹⁹⁵ See *id.* at 517.

¹⁹⁶ See *id.* at 510 (criticizing the opinion in *Lund* because it did not account for historical instances of legislator-led prayer).

¹⁹⁷ *Id.* at 517.

¹⁹⁸ The majority approvingly cited a district court opinion that found an Establishment Clause violation when councilmembers ordered the forcible ejection of people who respectfully refused to participate in a premeeting prayer. See *id.*, citing *Fields v Speaker of the Pennsylvania House of Representatives*, 251 F. Supp. 3d 772, 776, 788 (MD Pa. 2017). The opinion does not, however, describe how forcible ejection differs from Justice Thomas's higher direct coercion bar. See note 63. *Bormuth* also did not discuss *Weisman* and *Santa Fe* despite the fact that they are part of the Court's coercion jurisprudence.

their prayers. Rather, Mr. Bormuth was confrontational with the councilmembers, both about the prayer practice and other issues in front of the council.¹⁹⁹ Regardless, the *Bormuth* court reasoned, a few statements and actions do not make a pattern so as to run afoul of *Town of Greece*.²⁰⁰

Finally, the *Bormuth* court placed the burden of proving coercion on Mr. Bormuth. Thus, *Town of Greece* explained that legislative prayer's historical pedigree will generally insulate it from thinly supported allegations of indirect coercion. Although the *Bormuth* court acknowledged that the councilmembers disliked Mr. Bormuth's complaints about the prayers, it concluded, "Bormuth failed to put forth any evidence tying his objection to the invocations to the Board's decision to not appoint him to the [requested committee], and [it] therefore g[a]ve no weight to this allegation."²⁰¹

* * *

The Sixth Circuit's opinion recast *Town of Greece* as a broad opinion with applicability across myriad contexts. While determinations about legislative prayer remain fact-sensitive processes, there is a strong presumption of constitutionality so long as the practice is *generally* tied to the historical roots of legislative prayer.²⁰² This approach ignores the dicta in the *Town of Greece* plurality opinion itself that specifically limited the holding of the case. Finally, in order to prevail on a coercion claim, a plaintiff must show that the legislators took specific retaliatory action, unlike in *Weisman* or *Santa Fe*, in which indirect coercion could be presumed from the circumstances.

In contrast, *Lund* established a fact-intensive totality of the circumstances test that relies heavily on the dicta in *Town of Greece*.²⁰³ The court emphasized the inherent divisiveness in having prayers offered by elected representatives and the fact that elevating a single religion in the public sphere amounts to

¹⁹⁹ *Bormuth*, 870 F3d at 517–18.

²⁰⁰ *Id* at 518.

²⁰¹ *Id* at 519.

²⁰² The opinion also suggested that discriminatory procedures for selecting prayer givers would violate the Constitution as well. See *id* at 514 (citing *Lund* and suggesting that the constitutional minimum for neutrality is nondiscrimination).

²⁰³ See *Lund*, 863 F3d at 281. It is worth noting that *Bormuth* also attempted to distinguish *Lund* on the facts, describing the prayers in *Lund* as more sectarian and confrontational. *Bormuth*, 870 F3d at 512–13, 518. Regardless, the two opinions use very different reasoning and announce quite dissimilar tests.

endorsement.²⁰⁴ This dynamic changes the historically sanctioned practice described in *Town of Greece* into something that invites greater inquiry.²⁰⁵ As such, *Lund* hints at the possibility that having government prayer givers brings the practice of legislative prayer closer to the ambit of traditional Establishment Clause jurisprudence.²⁰⁶

III. RETHINKING COERCION AND FACT-SPECIFIC INQUIRIES

This Part argues that both circuits' approaches to this issue are unworkable or at odds with Supreme Court precedent. The Sixth Circuit established a fairly simple bright-line rule to determine whether a practice is coercive: there must be a pattern of singling out or openly punishing dissidents. The problem with this approach is that it ignores much of the plurality opinion in *Town of Greece* and sweeps aside other parts of the Court's Establishment Clause jurisprudence. Specifically, it does not grapple with the ways in which sectarian prayer led by councilmembers may be categorically more divisive or coercive than those led by a local religious leader or other disinterested third party—facts that *Town of Greece* seems to contemplate.²⁰⁷

The Fourth Circuit's test suffers from a more fundamental fault: it is almost impossible to apply.²⁰⁸ The Fourth Circuit calls for weighing and reweighing almost every factor discussed and disposed with in *Town of Greece*. At the very least, *Town of Greece* established a presumption of constitutionality in the mine-run case in which the legislators themselves did not get involved. *Lund's* analysis, however, is not pellucid and seems to apply to only the set of facts presented in the case. Requiring en banc review for any prayer or combination of prayers would defeat a central theme that animated the *Town of Greece* majority:

²⁰⁴ For divisiveness, see *Lund*, 863 F3d at 275, quoting *Lemon*, 403 US at 622. For endorsement and neutrality, see *Lund*, 863 F3d at 280, quoting *Larson v Valente*, 456 US 228, 244 (1982) (“[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

²⁰⁵ See *Lund*, 863 F3d at 280.

²⁰⁶ Part III.B discusses this possibility further.

²⁰⁷ See *Town of Greece*, 572 US at 588–89.

²⁰⁸ See *Paris Adult Theatre I v Slaton*, 413 US 49, 83–94 (1973) (Brennan dissenting) (explaining that, when the majority of the Court fails to announce a simple legal rule in such fact-sensitive circumstances, it can lead to confusion, chilling of constitutional behavior, and unnecessary appeals).

that governments and courts should, by and large, steer away from policing the specifics of legislative prayer.²⁰⁹

This Part suggests a solution to this split that alleviates many of these problems. First, this Part extends the insight that the Court seeks to prevent fact-specific reviews by fully fleshing out the structure of constitutional prophylactic rules in legislative prayer.²¹⁰ Thinking about the Court's prayer cases as overlapping prophylactic rules then leads to the obvious question of where the borderline cases of legislator-led prayer fit in. The Sixth Circuit held that they should be treated identically to *Town of Greece* and that there should be a strong presumption of their constitutionality.²¹¹ But the opinion in *Bormuth* did not consider whether another prophylactic rule would be appropriate.

The correct prophylactic rule should be that legislative prayer led predominantly by councilmembers in these intimate environs is unconstitutional. *Town of Greece* accepted that prayers led by councilmembers themselves are distinguishable from the practice deemed constitutional in that case.²¹² And in *Santa Fe*, the Court recognized that mingling majoritarian decision-making with prayer creates a divisive political potential, thus violating the *Lemon* test.²¹³ Moreover, this is a practical solution that balances two conflicting strains in Establishment Clause jurisprudence. While legislative prayer offered by third parties was declared presumptively constitutional in *Town of Greece*, the Court is also skeptical of practices that enmesh majoritarian decision-making with religious establishments.²¹⁴

A. Limitations of the Extant Circuit Opinions

As discussed above, the Court's government prayer cases bear the hallmarks of constitutional prophylactic rules.²¹⁵ The Court is, on the one hand, willing to apply very strong medicine to prevent even ecumenical or nonsectarian prayers from being uttered with the government's imprimatur in the presence of teenagers. But on the other hand, it employs a reverse prophylactic

²⁰⁹ *Town of Greece*, 572 US at 579–82.

²¹⁰ See generally Strauss, 55 U Chi L Rev at 190 (cited in note 66).

²¹¹ See *Bormuth*, 870 F3d at 509–14, 519.

²¹² See *Lund*, 863 F3d at 278.

²¹³ *Santa Fe*, 530 US at 310–11.

²¹⁴ See notes 74–75 and accompanying text (discussing other areas of First Amendment law in which the Court is skeptical of majoritarian decision-making).

²¹⁵ See Part I.B.

rule with regard to third-party delivered prayers at constituent-facing government functions. In this context, the Court is willing to countenance far more sectarian prayers so long as the prayers are not outrageous and the custom is arguably similar to that practiced by the First Congress.

Neither of the circuits that have reviewed the constitutionality of legislator-led prayer has grappled with the tension between these strains in the Court's prayer jurisprudence, or the fact that they appear to be strong prophylactic rules operating in tension. Their analyses are therefore unsatisfactory because the opinions do not recognize that this area of the law is structured to prevent extended factual reviews and may turn on seemingly minute details.

The Fourth Circuit's approach in *Lund* therefore violates the tenor of the Court's prayer jurisprudence. It requires trial courts to laboriously consider the evidence before them about the denominational breakdown of the prayers as a whole, how exhortative each prayer was, and whether councilmembers invited citizen attendees to participate.²¹⁶ In its application, the court had to determine whether "the invocations crossed the line from 'reflect[ing] upon shared ideals and common ends,' . . . to 'promot[ing] a preferred system of belief.'"²¹⁷ This is a subjective inquiry that relies on extensive judicial factfinding, not just into the words of the prayers but also into how those words were delivered and received by those in attendance.²¹⁸

The totality of the circumstances test announced in *Lund* will prove unworkable.²¹⁹ While it cites dicta in *Town of Greece* to elucidate what factors reviewing courts are supposed to use to analyze the constitutionality of prayers,²²⁰ it takes that dicta too much at face value. Here, weighing those factors without any presumption one way or the other because the prayer givers are

²¹⁶ See *Lund*, 863 F3d at 281.

²¹⁷ Id at 284, quoting *Town of Greece*, 572 US at 581, 583.

²¹⁸ See *Town of Greece*, 572 US at 589–90 (discussing how to discern between "internal" and "external" prayers). See also *Lund*, 863 F3d at 282–86 (discussing how the content of the prayer would likely be received by those in the audience).

²¹⁹ See generally, for example, Recent Case, *Fourth Circuit Holds That County Commissioners' Practice of Offering Sectarian Prayers at Public Meetings Is Unconstitutional*, 131 Harv L Rev 626 (2017) (criticizing the en banc opinion for announcing a difficult to apply test that is insufficiently grounded in Establishment Clause doctrine). But see generally John Gavin, Comment, *Praying for Clarity: Lund, Bormuth, and the Split over Legislator-Led Prayer*, 59 BC L Rev E Supp 104 (2018) (suggesting that *Town of Greece* called for a fully fleshed-out factual analysis for all challenges to legislative prayer).

²²⁰ See *Lund*, 863 F3d at 278.

legislative actors requires courts to make difficult judgment calls based on hard-to-discern facts. Moreover, the Court's guidance about what types of prayers are acceptable is inconsistent and thus cannot provide meaningful instruction to lower courts if they seek to weigh multiple factors.²²¹ For example, at what point do children's presence turn an acceptable legislative prayer into something unacceptable?²²² Similarly, *Town of Greece* instructs that isolated incidents of proselytization are tolerable, but where should lower courts draw the line—while also factoring in the agenda of the meeting, identity of the prayer giver, wording of the invitations to participate, and any other myriad factual details mentioned in passing in various cases?²²³

Although the Sixth Circuit recognizes that *Town of Greece* created a presumption of constitutionality with third-party legislative prayer, it fails to situate the opinion in the broader Establishment Clause context. *Weisman* and *Santa Fe* show that in generally similar circumstances, some factual tweaks, such as the presence of children for school-related reasons, can lead to a broad preclusive rule against prayers' constitutionality.²²⁴ At the very least, this hair-trigger quality requires courts to be attentive to potentially distinguishing details. Moreover, *Town of Greece* invites lower courts to limit the case to its facts by specifically describing the holding as narrow with regard to the prayer practice in that town.²²⁵ The Court also invited lower courts to reconsider the applicability of the *Town of Greece* opinion in dissimilar situations (but did not tell them how to weigh any of the mentioned factors).²²⁶

There are also practical reasons to suspect that the Court does not intend for *Town of Greece* to be read broadly. In the

²²¹ See notes 150–56 and accompanying text (describing the caveats in the plurality opinion in *Town of Greece*).

²²² Compare *Town of Greece*, 572 US at 597–98 (Alito concurring), 623–28 (Kagan dissenting), with *Weisman*, 505 US at 592–93. See also *Bormuth*, 870 F3d at 501–02 (sanctioning prayer practice that encouraged children to lead the pledge of allegiance immediately following the prayer).

²²³ See *Town of Greece*, 572 US at 584–89 (discussing what factors would influence a coercion analysis). See also, for example, *Weisman*, 505 US at 586, 590, 594 (discussing, respectively, the extent to which an event is mandatory, the degree of government involvement in propagating the prayer and monitoring attendees, and how other attendees might react to respectful protest).

²²⁴ See Part I.B for discussions of both cases.

²²⁵ See *Town of Greece*, 572 US at 583–85 (noting that prayers that were less solemn and respectful may violate the Constitution); *id.* at 584 (discussing the prayer giver selection process).

²²⁶ *Id.* at 588–91.

term following *Town of Greece*, it denied certiorari, over a dissent from Justice Scalia, in a case that could have extended *Town of Greece*'s presumption against coercion to another public high school graduation ceremony that took place in a church but had no prayer content.²²⁷ Similarly, the Court recently denied certiorari in *Lund* over an ardent dissent by Justice Thomas.²²⁸ Though too much should not be made of the denials of certiorari, both instances taken together show, at the very least, that the Sixth Circuit's capacious reading of *Town of Greece* is not *obviously* correct—had the Court intended to simply extend *Town of Greece* to these types of cases, it could have issued a per curiam opinion to that effect.

One obvious counterargument against attempts to distinguish *Town of Greece* from legislator-led prayer is that it creates an arbitrary and unnecessary discontinuity in the law. For example, in a concurrence to the *Bormuth* en banc opinion, Judge Jeffrey Sutton argued that it would be silly to say that, if a hired third party had given identical prayers, the practice would pass constitutional muster.²²⁹ Such a minor difference seems arbitrary and therefore is not enough to distinguish the case of legislator-led prayer from that offered by a third party.²³⁰ This argument, however, ignores the fact that the Court's holdings on the Establishment Clause, and government prayer in particular, are already rife with remarkably similar-seeming inconsistencies. For example, one barely religious prayer delivered by a rabbi was coercive in *Weisman*, but a decade's worth of exclusively Christian prayers at government functions at which children were also present and at which legislators made adjudications affecting meeting participants was not coercive in *Town of Greece*. This is the result of two overlapping prophylactic rules, which lead to the same kind of inconsistencies Judge Sutton argues would be out of place in constitutional law.

²²⁷ See generally *Elmbrook School District v Doe*, 572 US 2283 (2014) (Scalia dissenting from denial of certiorari) (arguing that *Town of Greece* changed the Establishment Clause landscape and that lower court decisions issued before it should be revisited).

²²⁸ See *Rowan County v Lund*, 138 S Ct 2564, 2564 (2018) (Thomas dissenting from denial of certiorari). Unlike Justice Scalia's dissent in *Elmbrook*, Justice Thomas's dissent in *Lund* highlights the fact that starkly different laws apply in two different circuits and argues that it was the Court's role to "have stepped in to resolve this conflict." *Id.* at 2567.

²²⁹ See *Bormuth*, 870 F3d at 523 (Sutton concurring). See also *Lund*, 138 S Ct at 2566 (Thomas dissenting from denial of certiorari).

²³⁰ See *Bormuth*, 870 F3d at 523 (Sutton concurring).

This Comment's approach is to recognize that these inconsistencies are actually foundational to the Court's prayer jurisprudence and to place legislator-led prayer within this broader context. Moreover, the facts of *Bormuth* illustrate the limitations of Judge Sutton's approach. The councilmembers became offended when the plaintiff criticized their prayers and may have retaliated against him.²³¹ The possibility of offense and retaliation are greatly heightened when the elected officials have a personal stake in the prayers—that is, when they are themselves delivering prayers.²³² Finally, as illustrated by Professor Strauss's freedom of speech example, legislators may use pretexts to hide their unconstitutional animus.²³³

It would accord more with the government-prayer jurisprudence to take the decision-making about prayer content and meeting context out of the hands of judges and apply a bright-line rule against legislator-led prayer.²³⁴ But this then leads to the obvious question of whether the *Town of Greece* presumption of constitutionality should apply in cases in which the legislators themselves are the exclusive prayer givers. The Sixth Circuit assumed it did in *Bormuth*, but the controlling opinion in *Town of Greece* reserved judgment on the question.²³⁵ As the next Section discusses, a concurrent line of precedent about intermingling religion and political processes leading to divisiveness indicates that the practice of legislator-led prayer in intimate local-government settings is a per se violation of the Establishment Clause.

B. Legislator-Led Prayer Entangles Religion in Political Processes and Is Politically Divisive, Thereby Violating the Establishment Clause

Marsh and *Town of Greece* establish an exception to the Court's general Establishment Clause principles because of the historical pedigree of the practice. Thus, the Court pointedly

²³¹ See id at 517–19.

²³² See Part III.B. Even if the legislator leading the prayer was somehow agnostic about his or her religious beliefs or otherwise not committed to the content of the prayer, that is far outside the scope of appropriate judicial review. See note 78 and accompanying text.

²³³ See Part I.B.

²³⁴ See note 66 and accompanying text (introducing prophylactic rules); notes 98–101 and accompanying text (applying the concept to government prayer).

²³⁵ See *Town of Greece*, 572 US at 589–90.

ignored the *Lemon* test in its analysis in *Marsh*.²³⁶ But the practices of the county councils in Jackson and Rowan counties differ considerably from the practices approved of by the First Congress. Most importantly, the First Congress approved of only prayers given by third parties.²³⁷ Moreover, the resolution authorizing congressional pastors required hiring two ministers from different denominations and alternating between the two houses of Congress.²³⁸ While *Town of Greece* held that the First Congress's prayer practice provides an element of constitutionality to similar practices held in different contexts, there is no reason to think that it should extend to different prayer practices held in different contexts.²³⁹ Indeed, as this Section explains, the practice of having elected officials regularly deliver prayers to their constituents raises a whole raft of Establishment Clause problems beyond those contemplated in *Town of Greece*. Given the Court's preference for prophylactic rules in this arena²⁴⁰ and the availability of perfectly constitutional alternatives, such as prayers led by third parties, per se unconstitutionality is the appropriate approach to the practices at issue in *Lund* and *Bormuth*.

The practice of legislator-led prayer in intimate gatherings with constituents entangles religion with political processes in two ways. First, it establishes an identity between democratic votes and prayer *content*. That is, when constituents vote, they vote specifically for the one person (or set of people) who may lead prayers at government functions. Because majoritarian votes fail to safeguard minority viewpoints, "fundamental rights may not be submitted to vote."²⁴¹ Second, even if no coercion is present during town meetings, legislator-led prayer necessarily injects religion into every decision made by citizen-participants and every political decision made by councilmembers. In other words, it has "divisive political *potential*."²⁴²

²³⁶ See *Marsh*, 463 US at 796–801 (Brennan dissenting).

²³⁷ See *Lund*, 863 F3d at 294 (Motz concurring).

²³⁸ See *id.* at 295 (Motz concurring).

²³⁹ See *id.* at 294 (Motz concurring). But see *Bormuth*, 870 F3d at 523 (Sutton concurring). For a thorough discussion of this point, see notes 229–36 and accompanying text.

²⁴⁰ See notes 98–101, 154, and accompanying text.

²⁴¹ *Santa Fe*, 530 US at 304–05, quoting *West Virginia Board of Education v. Barnette*, 319 US 624, 638 (1943).

²⁴² *Lemon*, 403 US at 622 (emphasis added).

Prayer practices that establish an identity between people's votes and prayer content are per se unconstitutional under *Santa Fe*. In *Santa Fe*, the Court flatly rejected a proposed policy to allow students to officially lead prayers prior to football games at a public high school.²⁴³ One of the fallback options the school district (anticipating litigation) wrote into the policy was for students to vote on who could deliver reflective, not necessarily religious, speeches.²⁴⁴

The Court ruled that this policy still violated the Establishment Clause by inviting divisive political potential, a component of the entanglement prong of *Lemon*.²⁴⁵ As part of this analysis, the Court noted that the exclusivity in who can give the prayers is constitutionally problematic—the policy is not neutral because (unlike in the later *Town of Greece* case) only the one person selected through majoritarian means may deliver the invocation.²⁴⁶ This necessarily will exclude people from minority or disfavored religions.²⁴⁷ Importantly, the Court did not hold or discuss that children *in particular* are more susceptible to division than adults. Rather, it faulted the school district for encouraging the majoritarian voting mechanism in such a fraught arena, regardless of the age of the voters.²⁴⁸ Therefore, this case is still instructive notwithstanding the distinction between *Weisman* and *Town of Greece* that adults are more readily able to deflect coercive influences.

There are other threads in the case law that confirm this reading of *Santa Fe*. For example, *McCreary County* and *Van Orden* distinguish between long-standing, established practices and those that are currently being implemented, particularly if the content is potentially explosive or sectarian.²⁴⁹ Professor Fallon wrote that this is the key distinction between the two: when the content is fixed and nondenominational enough, then religious symbolism is acceptable, but when the religious content is newly up for debate, then this raises the possibility that politics and religion will become entangled anew.²⁵⁰

²⁴³ *Santa Fe*, 530 US at 305–10.

²⁴⁴ *Id.* at 308–09.

²⁴⁵ *Id.* at 311.

²⁴⁶ See *id.* at 303, 309.

²⁴⁷ See *Santa Fe*, 530 US at 304–05.

²⁴⁸ See *id.* at 311.

²⁴⁹ See *Van Orden*, 545 US at 702–03 (Breyer concurring).

²⁵⁰ Fallon, 128 Harv L Rev at 431 (cited in note 57).

The distinction between long-standing and novel practices is analogous to the distinction between third-party and legislator-led prayer; in each pair, the latter is more divisive than the former. The content of the prayers was not meaningfully up for political debate in the *Town of Greece* case.²⁵¹ After the opinion, the only political debate left for constituents and lawmakers in Greece is whether to maintain the prayer practice as is or abolish it. Likewise, in *Van Orden*, the long-standing religious display could have been voted on, but changing the content to advocate more or less strongly for different religions would have been forbidden under Fallon's reading of the case.²⁵² Having legislators lead the prayers themselves means that the *content* of each prayer is up for debate and disputation every few years with each new election. *Lund* and *Bormuth* are therefore closer to *McCreary County*, a case in which a new attempt to augment a Decalogue display was foreclosed because of its potential divisiveness.²⁵³ Because the contents of the prayers in *Lund* and *Bormuth* necessarily need to be debated in a political way every few years, they are constantly running afoul of the rule in *McCreary County*—and therefore are always running afoul of the Constitution.

Moreover, a fact-sensitive review in both cases was more warranted than with legislative prayer—the religious content in the Decalogue cases was literally written in stone, whereas here it is constantly shifting, both from election to election and from prayer to prayer. Establishing a prophylactic rule with prayer cases thus also preserves judicial resources and prevents an incoherent doctrine, borne of several fractured opinions, from springing up. As evidenced by the Court's enjoining a facially nonreligious fallback option in *Santa Fe*, it sometimes makes more sense to prevent repeated post hoc litigation testing the limits of the doctrine.

One potential counterargument is that this approach fails to account for the constitutionality of congressional chaplains and the Court's decision in *Marsh*. These are distinguishable for two

²⁵¹ See *Town of Greece*, 572 US at 581–83. The legislator-led prayer cases are therefore also distinguishable from the Court's favorite expression of religion pronounced at government functions—the phrase, “God save the United States and this honorable Court,” said at the beginning of the Court's sessions. See *id.* at 1825. Because the content of that phrase is not contingent on regular elections, it would be safe from the prophylactic rule that this Comment suggests.

²⁵² See Fallon, 128 Harv L Rev at 431 (cited in note 57).

²⁵³ See *Van Orden*, 545 US at 703 (Breyer concurring).

reasons. First, with congressional chaplains, there is no identity between one's elected representative and the content of prayers; indeed, there are several steps between voters in Washington state and prayer content, delivered by a third-party officiant, in Washington, DC. This disconnect is underscored by the recent controversy regarding the House chaplain—citizens voted for representatives who, for their own pastoral care, hired a chaplain who criticized those representatives. Second, unlike in *Marsh*, attendees at a local government meeting are in closer proximity—both in terms of space and the legislators' decision-making authority—to their legislators than, for example, citizens are to the House of Representatives. Thus, a case like *Bormuth* raises immediate constitutional issues because the council discussed religious matters with Mr. Bormuth and then came out against him on a nonreligious matter. By contrast, a House member leading a prayer thousands of miles away from her district in a venue where she does not interact with constituents does not. The setting of a local county, city, or ward board meeting provides a unique set of facts in which constituents meet face-to-face with their representatives under the auspices of an official government function at which the representatives make decisions as a government entity.²⁵⁴ It should not be difficult for lower courts to identify these hallmarks of local government meetings and distinguish them from, say, campaign events or remote legislative sessions.

The practice of religious legislator-led prayer is also more likely to impermissibly inject religion into politics than is third-party prayer. Several justices in *Town of Greece* emphasized that the town's methods of selecting prayer givers were facially neutral.²⁵⁵ Thus, sometimes a Christian leads the prayer, and sometimes a Wiccan leads the prayer.²⁵⁶ In this abstracted neutrality argument, the Court can entertain the presumption that the councilmembers have no personal stake in the specific content of any given prayer. The councilmembers may disapprove of the third-party delivered prayer as much as the citizen attendees. That presumption cannot stand when the councilmembers themselves give the prayers. Even a respectful gesture such

²⁵⁴ See, for example, *Town of Greece*, 572 US at 594 (Alito concurring) (acknowledging that aspects of local government meetings are adjudicatory). Perhaps another similar circumstance would be a trial before an elected judge.

²⁵⁵ See *id.* at 585–86 (Kennedy) (plurality); *id.* at 593–94 (Alito concurring).

²⁵⁶ See *id.* at 572 (Kennedy) (plurality).

as refusal to stand, or quietly stepping out, could be interpreted as a personal attack on the councilmember delivering the prayer and that councilmember's religious beliefs. And that councilmember, unlike a third-party invitee, has tangible decision-making power over the people in attendance for the prayer.

This is a quintessential case that calls for the application of a prophylactic rule. The facts of *Bormuth* underscore this point. The plaintiff complained about the prayer practice and content and then applied for various positions in the county that required the board's approval; the councilmembers colorfully criticized his religious objections, and he subsequently did not get approval.²⁵⁷ The Sixth Circuit noted that there was nothing in the record suggesting that the board's decision was animated by animus or was intended to coerce people into praying along with them.²⁵⁸ But that argument cuts as strongly *against* the court's holding. As Strauss noted, because finding evidence of animus is so difficult, the Court has made the use of deliberately overinclusive prophylactic rules "ubiquitous."²⁵⁹ Even if it is not part of the "real" Establishment Clause to forbid legislator-led prayer, judges have effectively no way to police the line between political decisions made on the basis of sound policy and those intended to punish religious minorities. A judge would have to be omniscient. Legislator-led prayer presents a particularly difficult case for judges—not only do judges have to determine which prayers "cross[] [a] line";²⁶⁰ they would have to determine to what extent councilmembers consider constituents' attentiveness during prayers when making government decisions. Likewise, as in the equal protection context, the Court is typically skeptical of a majoritarian institution making decisions that bear on someone's constitutionally protected minority status.²⁶¹ While, per *Town of Greece*, prayers made before a lawmaking session may not coerce participation, they cast elected officials'

²⁵⁷ See *Bormuth*, 870 F3d at 525–26 (Moore dissenting).

²⁵⁸ See *id.* at 519.

²⁵⁹ See generally Strauss, 55 U Chi L Rev 190 (cited in note 66).

²⁶⁰ See *Town of Greece*, 572 US at 596 (Alito concurring).

²⁶¹ See Strauss, 55 U Chi L Rev at 204 n 45 (cited in note 66), citing *Palmore v Sidoti*, 466 US 429, 432–33 (1984), and *McLaughlin v Florida*, 379 US 184, 196 (1964) (supporting the proposition that government classifications, especially those based on race, will be upheld only if they support a compelling state interest).

decisions in a potentially unflattering light and could chill full-throated democratic engagement.²⁶²

One limitation to adopting a conclusive prophylactic rule prohibiting councilmember-led prayer is that it does not fully answer all of the borderline cases that would be sure to arise if this approach is adopted. For example, occasionally members of Congress deliver prayers in the chamber—is that alright? When is a legislative session intimate enough that it raises entanglement concerns? What if a councilmember makes an offhand remark like, “Praise the Lord,” in response to good news from an attendee of the meeting?

Policing the line between slipups and politically entangled practices is, mercifully, less difficult than the test announced in *Town of Greece*. In fact, it is quite a bit easier. Determining whether a prayer was off-the-cuff or part of a broader council practice seems like it would require less digging than investigating whether the prayer was, in the totality of circumstances, coercive.

The application of a prophylactic rule would also protect municipalities and legislators who wish to implement prayer practices. This is an easy-to-understand rule that preserves the core historical practice of third-party prayer. City councils in the Fourth Circuit have little guidance as to what impermissibly crosses the constitutional line, and protracted litigation is all but destined to ensue from district courts’ misapprehension of the newly announced test.²⁶³ And the Sixth Circuit’s *Bormuth* holding, even taken at its most expansive, does not shield municipalities from *litigation*.²⁶⁴ Thus, applying a strong prophylactic rule is an improvement over either of the circuits’ approaches. Unlike the Fourth Circuit’s approach, this rule will be easy to apply and lead to more consistent outcomes, and unlike the Sixth Circuit’s approach, this Comment’s preferred rule adequately safeguards constitutional rights.

²⁶² See *Town of Greece*, 572 US at 621 (Kagan dissenting) (arguing that legislative prayer practices can “alter[] the very nature” of an individual’s “relationship with her government,” disrupting our process of civic engagement).

²⁶³ See generally Recent Case, 131 Harv L Rev 626 (2017) (cited in note 219).

²⁶⁴ 42 USC § 1983, the vehicle through which most of these claims are brought into court, is typically read to preclude fee shifting if the defendant prevails, unless the claim is frivolous. See, for example, *James v City of Boise*, 136 S Ct 685, 686 (2016) (per curiam). Given that *Town of Greece* explicitly calls the legal question “fact sensitive,” it may be difficult for winning municipalities to recoup fees because other factual situations may be nonfrivolously distinguishable.

CONCLUSION

Despite the sundry tests and rules the Court has set out in other Establishment Clause contexts, its jurisprudence regarding legislative prayer is remarkably barren. The *Town of Greece* decision did little to clear up outstanding confusion. With its numerous caveats and lack of a majority opinion, *Town of Greece* only slightly extends a small exception in the Court's public prayer jurisprudence, finding that, when some factors are met, legislative prayer is presumptively constitutional—even when the prayer is sectarian and occurs in an intimate forum where citizens will interact with their representatives.²⁶⁵

Due to the lack of clarity in *Town of Greece*, many questions pending its resolution went unanswered, particularly how courts should analyze prayer given at local government meetings by councilmembers themselves. Though *Town of Greece* explicitly reserves judgment on this question, it does imply that legislative prayer is not an “exception” to the Establishment Clause and is thus subject to tests similar to the usual Establishment Clause tests like any other state practice that may affect religion.²⁶⁶ Therefore, the answers to the nascent circuit split between the Fourth and Sixth Circuits can be found in the Court's other Establishment Clause precedents. Unlike the Fourth and Sixth Circuits, however, this Comment looked beyond the narrow coercion test to consider in-depth how legislator-led prayer may warp political processes—and vice versa.

Councilmember-led prayer is distinguishable from *Town of Greece* just as *Town of Greece* can be distinguished from *Weisman* and *Santa Fe*. In *Weisman* and *Santa Fe*, the presence of minors and possibility of surveillance (even at an after-school or non-mandatory graduation event) made prayer in public schools per se unconstitutional. In contrast, the legislative context in *Town of Greece* turned what would otherwise be a clear-cut case of establishment into a presumptively permitted practice.

In *Lund* and *Bormuth*, the identity of the person delivering the prayers changes the entire nature of the prayer practice. Instead of a facially neutral selection process, the prayer giver is decided by direct election. Moreover, it identifies any person's reaction to the prayer with a direct statement about the councilmember's faith. This makes the decision to leave during the

²⁶⁵ See *Town of Greece*, 572 US at 581–91.

²⁶⁶ See id at 574–76.

prayer much more fraught than in *Town of Greece* and renders subsequent council decisions involving the peaceful refuser suspect. Though *Lund*, *Bormuth*, and this Comment's proposed solution seemingly turn the minutia of a county board meeting into a constitutional case, this is exactly the analysis the Court invited in tailoring its *Town of Greece* opinion to reach only prayers delivered by third parties.

Finally, the stakes are high: "There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them."²⁶⁷ Legislator-led prayers entangle government and religion and lead to divisiveness on religious grounds in a way that facially neutral third-party prayer giver policies do not. Even if the policy itself does not necessarily run afoul of the Constitution, it invites legislators to impermissibly use religious criteria when considering their constituents' individual claims. A strong prophylactic rule is therefore necessary to prevent reviewing courts from unnecessarily policing prayer content or failing to remedy civil rights violations when they in fact occur.

²⁶⁷ *Elk Grove Unified School District v Newdow*, 542 US 1, 36–37 (2004) (O'Connor concurring).