THE POWERFUL PROBLEM OF PRAYER AT PUBLIC SCHOOL BOARD MEETINGS

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"I believe in the power of prayer . . . ."—Justice Amy Coney Barrett[1]

"[I]t is no defense to urge that the religious practices [in the public school environment] may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . ."[2]

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1 *Confirmation Hearing on the Nomination of Amy Coney Barrett to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (opening statement of Amy Coney Barrett, Judge).

2 Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963).

INTRODUCTION

At the start of the Birdville Independent School District school board meeting in Haltom City, Texas, a young public school student prays for the proceedings, stating, "All of us students are lucky to be a part of this district, and I ask God to bless you."[3] While the student speaks into the microphone that is used by constituents and set at his level in front of the podium, the school board members post a disclaimer on the screen behind them and in front of the gathered assembly of meeting attendees that states: "The content of the speaker's message is the private expression of the individual student."[4] This student is part of a longstanding tradition of the district's merit-based selection of elementary and middle school students to deliver an invocation prior to the start of school board meetings—an invocation practice that was upheld as constitutional by the Fifth Circuit in *American Humanist Ass'n v. McCarty*.[5]

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3 *See Prayers Can Continue at Texas School Board Meetings*, FOX NEWS (Nov. 29, 2017), https://video.foxnews.com/v/5662362762001/#sp=show-clips [https://perma.cc/VJD9-HPA6] (providing digital footage of the school board meeting prayer and the disclaimer); *see also* BIRDVILLE ISD, https://www.birdvilleschools.net [https://perma.cc/6DE9-KQRV] (providing the school district location).

4 *Prayers Can Continue at Texas School Board Meetings*, *supra* note 3 (providing the text and details of the school board disclaimer).

5 *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 524, 529–30 (5th Cir. 2017) (discussing the history of the student invocation selection process and holding that the school board meeting prayer practice did not violate the Establishment Clause).

Throughout the litigation challenging these student invocations, the school district, as well as fourteen states in a joint amicus brief, argued that the prayers were the students' private speech and thus could not violate the Establishment Clause.[6] However, the court refused to decide whether the students' religious speech was private speech or government speech.[7] Instead, it determined that the student school board meeting invocations did not violate the Establishment Clause under the legislative prayer exception.[8] In its opinion, the Fifth Circuit emphasized that school board prayer cases put courts "between the proverbial rock and a hard place."[9]

The Ninth Circuit also acknowledged the arduous nature of judicial review of school board meeting prayer in *Freedom from Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education*.[10] It stressed the need for particular vigilance in these cases "[b]ecause children and adolescents are just beginning to develop their own belief systems, and because they absorb the lessons of adults as to what beliefs are appropriate or right."[11] Applying this judicial attentiveness, the court determined that a public school board's invocation policy violated the Establishment Clause.[12] After this decision, the Chino Valley school board voted 3–2 to not appeal.[13] One month later, the Orange County Board of Education (OCBE) voted to move to intervene in the lawsuit and to seek appeal of the decision with the United States Supreme Court.[14] The OCBE's desire to intervene was based on receipt of challenges regarding its own school board meeting

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6 *See* Appellants' Brief at 16–19, *Am. Humanist Ass'n*, 851 F.3d 521 (No. 15-11067), 2016 WL 284831, at *16–19; Amicus Brief of the State of Texas et al. at 2–3, *Am. Humanist Ass'n*, 851 F.3d 521 (No. 15-11067), 2016 WL 6574925, at *2–3.

7 *See Am. Humanist Ass'n*, 851 F.3d at 529–30 (finding that the practice did not violate the Establishment Clause without reaching the issue of whether this prayer was private speech).

8 *See id.* at 526 (finding that school board meeting prayer fits within the legislative prayer exception to the Establishment Clause).

9 *Id.* at 528 (quoting Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 371 (6th Cir. 1999)).

10 *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1137 (9th Cir. 2018) (per curiam) (discussing the judicial vigilance that is required in evaluating Establishment Clause challenges involving students and religious activities in schools).

11 *Id.*

12 *See id.* at 1138.

13 *See* Dawn Marks, *Orange County Board to Intervene in Prayer Lawsuit*, CHAMPION NEWSPAPERS (Feb. 23, 2019), https://www.championnewspapers.com/news/article_4b07e5cc-36e3-11e9-8789-839aec234e00.html#:~:text=One%20month%20after%20the%20Chino,own%20issues%20regarding%20religious%20references [https://perma.cc/JU6Z-R7W8] (discussing the Chino Valley school board decision to not pursue an appeal).

14 *See id.*

invocation policy,[15] which authorized prayers that focused on the district's students.[16] However, the Ninth Circuit denied OCBE's motion to intervene.[17]

On October 7, 2020, the OCBE adopted a new school board meeting invocation or inspirational words policy,[18] which would allow attendees to excuse themselves from the meeting for the invocations and which would endeavor to not have students be present for them "[t]o every extent possible."[19] At the start of this meeting, two Christian pastors prayed for much longer than the three minutes allotted for invocations under the new policy.[20] In one of these invocations, one pastor stated,

> Long after you and I are gone, any attempt to stamp out God from society will be met by a revolution driven by the human heart that deep down inside knows there is but one true God, and they will chant over our dead bodies the same phrase, "God exists."[21]

These recent public school board meeting prayer decisions and their divergent outcomes exemplify the difficult and controversial constitutional decision-making that inheres in all school law Establishment Clause cases.[22] The Supreme Court has often reflected on the cautious balancing that is required in interpreting this clause of the

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15 *See id.*

16 *See* ORANGE CNTY. BD. OF EDUC., BOARD POLICY BOOK 100-12 (2020), https://ocde.us/Board/Documents/Board%20Policies/Board%20Policy%20Book.pdf [https://perma.cc/27W9-P43F].

17 *See* Order Denying Motion to Intervene, *Freedom from Religion Found., Inc.*, 896 F.3d 1132 (No. 16-55425).

18 *See* ORANGE CNTY. BD. OF EDUC., BOARD MEETING 10-7-2020 TRANSCRIPTION 61–66 (2020) [hereinafter OCBE MEETING TRANSCRIPTION], https://ocde.us/Board/Documents/2020%20Minutes%20and%20Transcripts/OCBE%20Transcription%2010.07.2020.pdf [https://perma.cc/SUH6-ZVDY].

19 ORANGE CNTY. BD. OF EDUC., AGENDA 10-7-2020 34 (2020), https://ocde.us/Board/Documents/2020%20Agendas/AGENDA%2010.07.2020.pdf [https://perma.cc/4U7D-TXKN].

20 *See id.* at 33 (providing a three-minute limitation for the invocations); *see also* OCBE MEETING TRANSCRIPTION, *supra* note 18, at 13–15 (providing the pastors' opening statements); *id.* at 63 ("Tonight we violated [the OCBE policy that limits invocations to three minutes] like nobody's business.").

21 OCBE MEETING TRANSCRIPTION, *supra* note 18, at 14.

22 *See* Mark W. Cordes, *Schools, Worship, and the First Amendment*, 48 SUFFOLK U. L. REV. 9, 14 (2015) ("Religion in public schools is one of the most controversial areas in constitutional law . . . ."); Eric J. Segall, *Parochial School Aid Revisited: The* Lemon *Test, the Endorsement Test and Religious Liberty*, 28 SAN DIEGO L. REV. 263, 264 (1991) (highlighting the difficulties of school law Establishment Clause cases).

First Amendment in the public school context.[23] While the Court has recognized the central role of religion in American history,[24] it has also established "that governmental intervention in religious matters can itself endanger religious freedom."[25] This recognition has been at the core of the Court's use of Madisonian neutrality as the touchstone for its establishment analysis of public school prayer cases.[26] The net result of this neutrality approach has been the Court's invalidation of such religious practices under the Establishment Clause, which is outlined in Part II of this Article.

Like the school prayer cases, the intertwined questions of the role of religion and conscientious liberty in American public life have also been at the center of the Court's jurisprudence on legislative prayer.[27] The result of these cases has been the controversial creation of an exception to the Establishment Clause based on history alone, rather than legal principle.[28] Here, the Court has carved out a specific legislative prayer exception for religious speech that has been deemed to violate the Establishment Clause in settings like public schools.[29] Part III of this Article outlines this area of the Supreme Court's decision-making.

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23 *See* Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1230 (2012) (identifying the tension between the acknowledgment of the longstanding role of religion in America "and resisting an integration of religion with the mechanisms of government" in the Court's Establishment Clause cases).

24 *See* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 212–13 (1963) (discussing the central role of religion in American history); Engel v. Vitale, 370 U.S. 421, 434 (1962) (same).

25 Van Orden v. Perry, 545 U.S. 677, 683 (2005).

26 *See* Amanda Harmon Cooley, *Framers' Fidelity and Thicket Theory in Educational Establishment Clause Jurisprudence*, 58 SAN DIEGO L. REV. 1, 46–53 (2021) [hereinafter Cooley, *Framers' Fidelity*] (arguing that the Supreme Court has consistently and correctly applied Madisonian neutrality in its public school religious exercises establishment jurisprudence).

27 *See* Scott W. Gaylord, *When the Exception Becomes the Rule:* Marsh *and Sectarian Legislative Prayer Post-*Summum, 79 U. CIN. L. REV. 1017, 1022 (2011) (discussing the considerations of religion and liberty within the Court's legislative prayer Establishment Clause analysis).

28 *See* B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE L.J. 705, 763 (2010) (discussing how legislative prayer "has been mired in controversy from its inception"); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 974 (2010) ("[L]egislative prayer controversies have become a part of American culture."); Andrew L. Seidel, *Bad History, Bad Opinions: How "Law Office History" Is Leading the Courts Astray on School Board Prayer and the First Amendment*, 12 NE. U. L. REV. 248, 251 (2020) (arguing that "[l]egal principle was set aside in favor of history" in *Marsh v. Chambers*).

29 *See* Richard Albert, *The Separation of Higher Powers*, 65 SMU L. REV. 3, 54 (2012) (stating legislative prayer implicates "the very kind of fusion between Church and State that the Establishment Clause is intended to thwart").

School board meeting prayer cases are just as divisive as school prayer and legislative prayer cases.[30] The federal circuit courts have struggled mightily with these cases, resulting in a circuit split regarding the constitutionality of school board meeting prayer.[31] Part IV of this Article examines the current state of these divided cases. At the core of this split is whether these cases are governed by the Court's school prayer jurisprudence or by its narrow legislative prayer exception.[32] Although the Court had a recent opportunity to quell this dissension by resolving the circuit split, it mistakenly failed to do so.[33]

Consequently, Part V of this Article argues that federal courts should end the establishment violations that continue to occur as public school boards craft invocation policies in the vacuum of Supreme Court guidance on the unconstitutionality of this prayer. To do so, these courts should invalidate student-led invocations at school board meetings because they incentivize state loudspeaker prayer by select adherent schoolchildren and they allow end runs around the First Amendment by state entities that seek to classify this prayer as private speech that is not subject to Establishment Clause limitations. Courts should also reject findings that school board meeting prayers are subject to the legislative prayer exception to the Establishment Clause. Instead, they should hold these prayers violate the Establishment Clause because they result in state-sponsored coercion. Such holdings should extend to any state attempts to exclude students from school board meeting invocations, as these attempts do nothing to cure the constitutional

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30 *See* Erwin Chemerinsky, *Why Justice Breyer Was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL RTS. J. 1, 3–4 (2005) (detailing the divisions caused by school prayer); Mark W. Cordes, *Prayer in Public Schools After* Santa Fe Independent School District, 90 KY. L.J. 1, 1 (2002) (highlighting the intense controversy of school prayer litigation); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 32 (1998) (discussing the divisiveness of all Establishment Clause litigation); Paul Horwitz, *The Religious Geography of* Town of Greece v. Galloway, 2014 SUP. CT. REV. 243, 268 (referencing the "legislative prayer controversy"); Myron Schreck, *Balancing the Right to Pray at Graduation and the Responsibility of Disestablishment*, 68 TEMP. L. REV. 1869, 1869 (1995) (discussing the factious nature of school prayer cases).

31 *Compare* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1152 (9th Cir. 2018) (per curiam) (finding that a school board meeting prayer policy violated the Establishment Clause), Doe v. Indian River Sch. Dist., 653 F.3d 256, 290 (3d Cir. 2011) (same), *and* Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 386 (6th Cir. 1999) (same), *with* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017) (finding that a school board student invocation practice did not violate the Establishment Clause).

32 *See McCarty*, 851 F.3d at 526 (designating this classification as the key question in determining whether the prayer constitutes an Establishment Clause violation).

33 *See* Am. Humanist Ass'n v. Birdville Indep. Sch. Dist., 138 S. Ct. 470 (2017) (denying petition for writ of certiorari).

violation and, instead, teach majoritarian lessons that run counter to the purposes of the First Amendment.

Part V concludes by cementing the importance of Supreme Court guidance here for all American public school constituencies given that public school board meeting prayer carries the risk of a degradation of religion and a dilution of the autonomy to form individual conscientious beliefs in contravention of the original intent of the Framers in the adoption of the Establishment Clause. Given the paramount importance of avoiding these risks that arise from the continued adoption and implementation of school board meeting prayer policies and practices, the Supreme Court's failure to review whether this prayer is a violation of the First Amendment is as problematic as the prayer itself. Consequently, federal courts, including the Supreme Court, should tackle the powerfully difficult problem of school board meeting prayer head-on and invalidate these policies as impermissible establishments of religion. The Constitution and *all* American public schoolchildren require no less.

I. THE ESTABLISHMENT CLAUSE AND PUBLIC SCHOOL PRAYER

The Establishment Clause of the First Amendment guarantees that "Congress shall make no law respecting an establishment of religion."[34] This religion clause encompasses all federal and state governmental action, including prayer.[35] Education law has been at the center of the evolution of the Supreme Court's complex First Amendment Establishment Clause jurisprudence.[36] Indeed, the Court's first significant analysis of this clause took place in a 1947 school law case,

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34 U.S. CONST. amend. I.

35 *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009*)* (applying the Establishment Clause to government speech); McCreary Cnty. v. ACLU, 545 U.S. 844, 875 (2005) ("The prohibition on establishment covers . . . prayer in widely varying government settings . . . ."); Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (discussing the application of the Establishment Clause to official governmental conduct); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (first incorporating the Establishment Clause against the states via the Fourteenth Amendment's Due Process Clause); Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 507 (2006) (noting how federal and state government action can violate the Establishment Clause).

36 *See* Epperson v. Arkansas, 393 U.S. 97, 104–05 (1968) (emphasizing the importance of the Court's school law Establishment Clause jurisprudence); Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 72 (2017) (discussing the complexity of all Establishment Clause case law); Preston C. Green, III, Julie F. Mead & Joseph O. Oluwole, *Parents Involved, School Assignment Plans, and the Equal Protection Clause: The Case for Special Constitutional Rules*, 76 BROOK. L. REV. 503, 538 (2011) (highlighting the difficulties of education law Establishment Clause doctrine).

Everson v. Board of Education,[37] in which the Court expressly incorporated it to apply to state and local governmental entities, including public school districts.[38]

Establishment analysis of school religious practices has been a fulcrum of this First Amendment case law.[39] Throughout these cases, the Court has utilized Madisonian neutrality, whereby the government may neither aid nor inhibit religion, as the guiding constitutional principle.[40] The net result of this decision-making has been a prohibition on coercive, majoritarian school prayer that harms conscientious liberty and risks degradation of religion, as this type of religious exercise in the public school environment violates the Establishment Clause.[41]

The Court's first examination and invalidation of religious practices in schools under the Establishment Clause took place in *Illinois ex rel. McCollum v. Board of Education* in 1948.[42] In *McCollum*, religious teachers employed by private religious groups provided thirty minutes of religious education in the public schools each week.[43] Students who did not attend the religion classes were forced to leave their classrooms and instructed to pursue "their secular studies" in the hallway.[44] In analyzing this challenged state action, the Court found that the use "of the tax-established and tax-supported public school system to aid religious groups to spread their faith" was, without question, constitutionally impermissible.[45] In doing so, the Court highlighted the First Amendment's protections of the inviolability of both religion and

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37 *Everson*, 330 U.S. at 8, 15–16.

38 *Id.*; *see also* Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 390 (1989) (identifying *Everson* as "the starting point" for modern Establishment Clause analysis); Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 530 n.173 (2011) (noting how the Court first incorporated the Establishment Clause to state and local governments in *Everson*).

39 *See* Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987) (noting the particular vigilance the Court has taken in Establishment Clause cases involving religious activities in public schools); Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 125 (2000) ("Schools have provided the battleground for some of the most notable Establishment Clause disputes, which is not surprising, given the special concern for protecting children from religious establishments.").

40 *See Everson*, 330 U.S. at 18 (finding that the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); Cooley, *Framers' Fidelity*, *supra* note 26 (arguing that the Supreme Court has consistently applied Madisonian neutrality in its public school religious exercises jurisprudence).

41 *See infra* text accompanying notes 42–153.

42 Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

43 *Id.* at 205.

44 *Id.* at 209.

45 *Id.* at 210.

government.[46] The Court concluded its analysis by finding that the provision of "tax-supported public school buildings . . . for the dissemination of religious doctrines" and of "pupils for [these] religious classes through use of the state's compulsory public school machinery" was a clear violation of the Establishment Clause.[47]

In 1962, the Supreme Court provided its first analysis of the Establishment Clause and school prayer.[48] In *Engel v. Vitale*, the Court established that coercive governmental prayer exceeded the constitutional bounds of neutrality required by the First Amendment and that invalidation of these school prayers was necessary to protect both conscientious liberty and religion from degradation by the State.[49] In this case, the parents of ten New York schoolchildren challenged the constitutionality of a State-authored prayer that was recited by public school students at the start of each school day as a part of the schools' moral and spiritual training.[50] This prayer provided: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[51]

In its decision, the Court rejected the State's argument that the prayer's noncompulsory nature—that students could "remain silent or be excused from the room" during the recitation—saved it from constitutional deficiencies.[52] Instead, the Court found that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[53] Although the Establishment Clause does not require "any showing of direct governmental compulsion" or coercion as a minimal threshold for violation, the Court determined that the school prayer's coercion was a direct violation of that clause's key purpose of protection

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46 *See id.* at 212 ("For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

47 *Id.*

48 *See* Engel v. Vitale, 370 U.S. 421 (1962); Jared A. Goldstein, *How the Constitution Became Christian*, 68 HASTINGS L.J. 259, 293 (2017) (noting how this was the first school prayer case decided by the Supreme Court); Charles J. Russo, *Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?*, 1999 B.Y.U. EDUC. & L.J. 1, 6 (1999) (same).

49 *See Engel*, 370 U.S. at 431–32.

50 *See id.* at 423–24, 430 (discussing the prayer's inclusion in a school district manual entitled a "Statement on Moral and Spiritual Training in the Schools").

51 *Id.* at 422.

52 *Id.* at 430.

53 *Id.* at 431.

of individual religious and conscientious liberties.[54] Like in *McCollum*,[55] the Court also urged that the prayer's invalidation was necessary to effect the other core purpose of the Establishment Clause—to preserve the sanctity of both religion and government.[56] Consequently, the Court determined that the prayer contravened the First Amendment, stating:

> [T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.[57]

One year later, the Court held that a Pennsylvania statute and a Baltimore rule, requiring Bible readings and Lord's Prayer recitations at the start of each public school day, were unconstitutional in *School District of Abington Township v. Schempp*.[58] The challenged provisions permitted children to be excused from participating in the religious exercises upon parental request.[59] However, multiple parents did not exercise these opt-out rights based on the belief that their "children's relationships with their teachers and classmates would be adversely affected."[60]

In *Schempp*, the Court framed its analysis by acknowledging the balance of religious freedom and religious liberty required by the First Amendment.[61] It emphasized the integral role of religion in American history and government, which included the use of an official chaplain to give an opening legislative prayer for federal congressional sessions.[62] It also noted that religious liberty and freedom were equally and "strongly [e]mbed[d]ed" in American public and private life.[63]

Then, citing *Engel*, the Court made clear that coercive governmental prayer violated the Establishment Clause because it breached the neutrality required by the First Amendment.[64] This

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54 *See id.* at 430.

55 Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

56 *See Engel*, 370 U.S. at 431–32 ("[The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." (citing James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 THE WRITINGS OF JAMES MADISON 183, 187 (Gaillard Hunt ed., 1901))).

57 *Id.* at 425, 433.

58 *See* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 205–06, 211–12 (1963).

59 *See id.* at 205, 211–12.

60 *Id.* at 208.

61 *See id.* at 215.

62 *See id.* at 212–13.

63 *Id.* at 214.

64 *See id.* at 221, 223 (citing Engel v. Vitale, 370 U.S. 421, 430–31 (1962)) (discussing how state action can still violate the Establishment Clause without coercion).

provided the foundation for the Court's articulation of an explicit establishment test to ensure against the creation of government orthodoxy by State-sponsored religious exercises like school prayer.[65] Under this test, "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[66]

The prescribed public school Bible readings and Lord's Prayer recitations by public school teachers for students who were subject to compulsory attendance laws failed this test.[67] The clearly religious purpose of this statute and rule violated the First Amendment's requirement "that the Government maintain strict neutrality, neither aiding nor opposing religion."[68] The Court rejected the State's mitigation arguments that students could "absent themselves upon parental request" and that the religious exercises were mere minor encroachments, as neither of these arguments provided a defense to an Establishment Clause violation.[69] Finally, the Court reaffirmed that the constitutional neutrality that required the invalidation of these school prayers served to protect conscientious liberties as well as the exalted role of religion in American society.[70]

The Court expanded the *Schempp* test in *Lemon v. Kurtzman*.[71] Under *Lemon*, to pass constitutional muster: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion[; and] finally, the statute must not foster 'an excessive government entanglement with religion.'"[72] Although this oft-maligned case did not involve school prayer,[73] it has been used as the touchstone for several of the Court's Establishment Clause school prayer cases.[74] In these cases, the Court has

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65 *See id.* at 222.

66 *Id.*

67 *See id.* at 223.

68 *Id.* at 223–25.

69 *See id.* at 224–25.

70 *See id.* at 225–26 (basing its rationale on these protections).

71 Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also* Gary J. Simson, *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514, 515 n.8 (1994) (noting that *Lemon* added a third prong to the *Schempp* two-prong test "without altering the original two").

72 *Lemon*, 403 U.S. at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

73 *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) (discussing the evangelical movement's discontent with *Lemon*); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 495 (2002) (discussing rampant criticism of *Lemon*).

74 *See* Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987) (noting that, aside from the legislative prayer exception of *Marsh v. Chambers*, the *Lemon* test had been applied in all the

spent significant time specifically analyzing *Lemon*'s first prong.[75] For example, in *Wallace v. Jaffree*, the Court found that an Alabama public school prayer and meditation statute violated the Establishment Clause, as it failed this secular purpose prong.[76] The Court found that "the statute had *no* secular purpose" because the legislative record indicated that its express purpose was "'to return voluntary prayer' to the public schools."[77] The Court concluded this State-favored public school prayer practice constituted "an endorsement [that] is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion."[78]

However, in its 1992 *Lee v. Weisman* decision, the Court used a coercion analysis, rather than *Lemon*, to hold that school prayer that harmed students' conscientious liberties and religious autonomy violated the Establishment Clause.[79] Here, the Court examined a Rhode Island policy that permitted public school administrators to invite clergy members to give opening and closing prayers at graduation ceremonies.[80] Under this policy, a rabbi delivered an invocation and benediction addressed to God at a noncompulsory, on-campus middle school graduation, where the students stood silently during the prayers.[81] Subsequently, a middle school student and her parent brought suit, claiming that this policy and practice violated the First Amendment.[82]

At the outset of its opinion, the Court declined to reconsider either "the general constitutional framework by which public schools' efforts to accommodate religion [were] measured" or the *Lemon* test.[83] For the

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Court's Establishment Clause cases to that point since its adoption in 1971); Harlan A. Loeb, *Suffering in Silence: Camouflaging the Redefinition of the Establishment Clause*, 77 OR. L. REV. 1305, 1313 (1998) (discussing the multiple applications of *Lemon* to school religious exercises cases); Karthik Ravishankar, *The Establishment Clause's Hydra: The* Lemon *Test in the Circuit Courts*, 41 U. DAYTON L. REV. 261, 267 (2016) (discussing the application of a modified *Lemon* test in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 316 (2000)).

75 *See* Erwin Chemerinsky & Barry P. McDonald, *Eviscerating A Healthy Church-State Separation*, 96 WASH. U. L. REV. 1009, 1055 (2019) (discussing the uniform invalidation of school prayer as lacking a secular purpose under the first prong of the *Lemon* test by the Warren and Burger Courts).

76 *See* Wallace v. Jaffree, 472 U.S. 38, 40, 42, 56–57, 61 (1985).

77 *Id.* at 56–57.

78 *Id.* at 60.

79 *See* Lee v. Weisman, 505 U.S. 577, 593–94, 599 (1992); *see also* Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1343 (discussing how *Lee* did not apply the *Lemon* test).

80 *See Lee*, 505 U.S. at 580–81, 584.

81 *See id.* at 581–84.

82 *See id.* at 577.

83 *Id.* at 587.

Court, the pervasive state involvement with the prayer "creat[ed] a state-sponsored and state-directed religious exercise in a public school," which directly contravened the requirements of the Establishment Clause.[84] The Court emphasized that its holding was necessary to protect conscientious liberty and religious sanctity.[85] With respect to the former, the Court found that a "timeless lesson" of the First Amendment "is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."[86] With respect to the latter, the Court urged that the religion clauses of the First Amendment "exist to protect religion from government interference."[87]

To safeguard these aims, the Court confirmed that coercion was a tipping point for the Establishment Clause, finding it indisputable "that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[88] The coercion that attends school prayer, and its resulting potential for divisiveness, raised acute constitutional concerns, "because it centers around an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation."[89] And minor nonadherents to the promoted religion required special protection, because, to them, this religious practice was a state enforcement of "religious orthodoxy."[90] Consequently, given these magnified concerns, the Court found that the "subtle coercive pressure" to participate in the graduation prayers tipped to unconstitutional indoctrination in this public school context.[91]

The Court dismissed the State's proffered choice theory that school graduation prayer merely provides an option for schoolchildren to participate or not participate in the prayer.[92] The Court deemed this to be a constitutionally inapposite choice based on students' acute

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84 *Id.*

85 *See id.* at 589–90, 592.

86 *Id.* at 592.

87 *Id.* at 589–90.

88 *Id.* at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

89 *Id.* at 588.

90 *Id.* at 592.

91 *Id.*

92 *See id.* at 591.

vulnerability to the inherent pressures of the school environment.[93] For the Court, upholding this policy would place student "objectors in the dilemma of participating, with all that implies, or protesting."[94] As such, this governmental prayer "force[d] students to choose between compliance or forfeiture" of their conscientious liberties.[95] However, under the Establishment Clause, "the government may no more use social pressure to enforce orthodoxy than it may use more direct means."[96] Here, the Court stressed the differences between adults and children in deeming this State-imposed "choice" an illusory one.[97]

The Court also rejected the State's de minimis and majoritarian arguments in support of the graduation prayer's constitutionality.[98] The Court made clear that, despite the brief duration of the religious exercise, the constitutional intrusion itself could not be characterized as minor.[99] Further, to allow the State's de minimis framing to elude a finding of an Establishment Clause violation would be disrespectful to the rabbi, religion, and religious adherents.[100] Similarly, the "civic or nonsectarian" nature of the prayer, which the State argued minimized the intrusion for most of the graduation audience, did not provide a defense to the constitutional violation.[101] The Court found that this majoritarian approach was not a way to evade the contours of the Establishment Clause.[102]

Finally, the Court rejected the claims by the State that the voluntary nature of the graduation ceremony was a defense to an Establishment Clause violation.[103] This voluntariness argument was "a center point" of the State's case, which claimed "that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself."[104] The Court found that this argument was formalism at its extreme because the universal social and cultural awareness of the

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93 *See id.* at 593–94 (internal citations omitted) ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.").

94 *Id.* at 593.

95 *Id.* at 595–96.

96 *Id.* at 594.

97 *See id.* at 593 (declining to address whether such "[a] choice is acceptable if the affected citizens are mature adults," but finding that the State may not constitutionally "place primary and secondary school children in this position").

98 *Id.* at 594.

99 *See id.*

100 *See id.*

101 *Id.*

102 *See id.*

103 *See id.* at 594–95.

104 *Id.* at 595.

importance of school graduation ceremonies contravened any notions of noncompulsory attendance as a mitigator to coercion.[105] Although the State did not require graduation attendance, students were not truly free to voluntarily absent themselves from it without forfeiting all of the benefits that motivated them throughout their school attendance.[106] So, the Court concluded that "[e]ven for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory."[107]

Consequently, the Court determined that this coercive school graduation invocation policy and practice violated the Establishment Clause.[108] It "exact[ed] religious conformity from a student as the price" of the graduation ceremony attendance, in direct contravention of the Constitution.[109] The Court concluded that this was a clear breach of the central tenet of the First Amendment: "that the State cannot require one of its citizens to forfeit [their] rights and benefits as the price of resisting conformance to state-sponsored religious practice."[110]

The Supreme Court's next and last-to-date school prayer case was *Santa Fe Independent School District v. Doe* in 2000.[111] In this case, a Mormon student and a Catholic student, with their mothers, claimed that student-delivered Christian prayers at football games violated the Establishment Clause.[112] Pursuant to school policy, the high school principal tasked the student government to conduct a secret ballot election to determine whether student invocations would be part of the home varsity football game ceremonies and, if so, to elect a student to deliver them.[113] These invocations would "solemnize the event, [promote] good sportsmanship and student safety, and [establish] the appropriate environment for the competition."[114]

In its analysis, the Court first made clear that the Establishment Clause only applies to government speech and not to private speech.[115] Then, the Court rejected the State's claims that the policy's election mechanisms transformed the public speech into private speech, which would insulate the school district from unconstitutional coercion with

105 *See id.*

106 *See id.*

107 *Id.* at 586.

108 *See id.* at 596.

109 *See id.*

110 *Id.*

111 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

112 *See id.* at 290, 295.

113 *See id.* at 298 n.6.

114 *Id.*

115 *See id.* at 302.

these prayers.[116] There was no evidence that the school officials intended to provide an indiscriminate open student-body-speech public forum.[117] Instead, "[t]hese invocations [were] authorized by a government policy," "[took] place on government property at government-sponsored school-related events," and were delivered by the same student all season.[118] This selective access process countervailed the government's claims that it created a constitutional private speech zone for student prayer.[119]

The selective access process was not the sole crucible for finding that the prayer was not private speech. The fact that the speaker selection was the result of a majoritarian process was also determinative in classifying the prayer as government speech.[120] Likening the case to *Lee*, the Court found the school's election approach did not cure its constitutional deficiencies, given its lack of any protection for minority student perspectives.[121] This district-implemented majoritarian process guaranteed that minority-perspective students would "never prevail and that their views [would] be effectively silenced."[122] Protection of minority students was especially important here, given that the plaintiffs had to seek a protective order to litigate anonymously to shelter them "from intimidation or harassment" from school district employees, parents, and other students.[123]

The Court also found that the prayer was not insulated private speech because only religious messages were invited and encouraged by the school policy.[124] In addition to the history and text of the policy, other factors established "[t]he actual or perceived [school] endorsement of the message," which took the prayer outside the realm of private speech.[125] These factors included the invocation's broadcast over the school-controlled public address system; the presence of the football team, cheerleaders, school mascot, and band members all "clothed in the [school's] traditional indicia" for the invocation; and the appearance of the school's name on the field, banners, flags, and the crowd's regalia during the pregame ceremony.[126] The Court found that

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116 *See id.* at 310.

117 *See id.* at 303.

118 *Id.* at 302–03.

119 *See id.* at 303.

120 *See id.* at 303–04.

121 *Id.* at 305.

122 *Id.* at 304.

123 *See id.* at 294.

124 *See id.* at 306–07 (finding that all the school constituencies understood the election to be a referendum on prayer).

125 *Id.* at 307.

126 *Id.* at 307–08.

these factors would lead an objective high school student to "unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[127]

Similar to *Lee*, the Court emphasized that the State could not assert sham secular purposes as a way to evade the Establishment Clause.[128] Here, the State's asserted secular purposes of fostering private free expression, solemnizing the game, promoting good sports conduct and student safety, and establishing an appropriately competitive environment were not furthered when only one student was allowed to deliver a content-restricted, school-sponsored prayer.[129] The Court also emphasized that the previously iterated policy's name, "Prayer at Football Games," demonstrated its clearly nonsecular purpose "was to preserve a popular 'state-sponsored religious practice.'"[130] The Court stressed that this purpose and practice communicated to the nonadherents in the audience "that they are outsiders, not full members of the political community, and [conveyed] an accompanying message to adherents that they are insiders, favored members of the political community."[131] As a result, the Court concluded that the invocation was not private speech based on its State-controlled delivery pursuant to a state "policy that explicitly and implicitly encourage[d] public prayer."[132]

After rejecting the State's characterization of the student prayer as private speech, the Court applied a coercion analysis to determine that the policy violated the Establishment Clause.[133] The Court found that the school district's choice to have a majoritarian election on prayer at football games "encourage[d] divisiveness along religious lines in a public school setting," resulting in impermissible governmental coercion.[134] The prayer was not merely the product of student choices to have religious messages included in the pregame ceremonies; it was the product of the school district's decision to have the elections that allowed for such choices.[135]

The Court also dismissed the State's claim of a lack of coercion based on attendance of an extracurricular football game being voluntary

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127 *Id.* at 308.

128 *See id.*

129 *See id.* at 309.

130 *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).

131 *Id.* at 309–10 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring)).

132 *Id.* at 310.

133 *See id.* at 311.

134 *Id.*

135 *See id.*

because certain students, like cheerleaders, band members, and players, were required to attend the games and other students attended based on their adolescent susceptibility to conform to peer pressure.[136] Here, the Court echoed its disavowal of a forfeiture proposition in Establishment Clause educational law, finding that "[t]he Constitution . . . demands that the school may not force this difficult choice" upon students between attending games or avoiding state religious rituals.[137]

After these declinations of the State's defenses to an Establishment Clause violation, the Court concluded "that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship."[138] The special circumstances of the school context meant that this state action resulted in the enforcement of religious orthodoxy through direct means and social pressure.[139] However, nonadherent schoolchildren merit vigilant protection against this coercive environment.[140] Therefore, the Court found this policy violated the First Amendment because the State's affirmative sponsorship of the particularly religious practice of prayer abridged "the religious liberty protected by the Constitution."[141]

Then, in addressing the State's "premature facial challenge" claim, the Court found that "the mere passage by the District of a policy that has the purpose and perception of government establishment of religion" was a constitutional injury in and of itself.[142] Here, the Court directly utilized the secular purpose prong of the *Lemon* test to determine that:

> the text of the . . . policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker and the content of the message. Additionally, the . . . policy specifies only one, clearly preferred message—that of Santa Fe's traditional religious "invocation." Finally, the extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum for . . . student speech.[143]

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136 *See id.* (citing *Lee*, 505 U.S. at 595).

137 *Id.* at 312.

138 *Id.*

139 *See id.*

140 *See id.*

141 *Id.* at 313.

142 *Id.* at 313–14.

143 *Id.* at 314–15 ("Under the *Lemon* standard, a court must invalidate a statute if it lacks 'a secular legislative purpose.'" (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971))).

Further, the Court found that the history of the school's institutional practices and direct involvement with pregame prayers violated the First Amendment.[144] The Court refused to defer to the state's sham asserted secular purpose by "recogniz[ing] what every Santa Fe High School student understands clearly—that this policy is about prayer."[145] In doing so, it stated that it would not "turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer."[146] Therefore, the Court found that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation."[147]

Finally, the Court found that the prayer policy did "not survive a facial challenge because it impermissibly impose[d] upon the student body a majoritarian election on the issue of prayer."[148] The school's institution of this election provided no minority viewpoint protections, promoted divisions based on religious ideology, and created a coercive environment for the schoolchildren who did not want to participate in school prayer.[149] Thus, the Court rejected the State's request for a constitutional safe harbor with this prayer policy and invalidated the policy on its face.[150]

Throughout its almost seventy-five-year school prayer jurisprudence, the Supreme Court has consistently and correctly held that such prayer is a violation of the First Amendment.[151] By doing so, the Court has maintained fidelity with the "original purposes of the Establishment Clause to secure religious and conscientious liberties of all the people" and to preserve the spheres of religion and government.[152] The entire corpus of this school prayer case law has reflected a proper equipoise of neutrality as intended by the Framers in the adoption of the Establishment Clause and has been recognizant of the special constitutional environment of the public schools.[153]

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144 *See id.* at 315.

145 *Id.*

146 *Id.*

147 *Id.* at 316.

148 *Id.*

149 *See id.* at 317.

150 *See id.*

151 *See supra* notes 37–150 and accompanying text.

152 *See* Cooley, *Framers' Fidelity*, *supra* note 26, at 13, 46–53 (identifying neutrality as the touchstone for constitutional analysis of public school religious exercises).

153 *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947); Mitchell v. Helms, 530 U.S. 793, 883 (2000) (Souter, J., dissenting) (discussing the required equipoise in the *Everson* notion of neutrality).

II. THE LEGISLATIVE PRAYER EXCEPTION TO THE ESTABLISHMENT CLAUSE

In 1983, the Court inappropriately "carv[ed] out an exception" to its Establishment Clause jurisprudence and broke with the stare decisis of its school prayer and other State-sponsored prayer cases in *Marsh v. Chambers*.[154] In *Marsh*, the Court used a historical approach, rather than any of its formally structured tests, to hold that the Nebraska Legislature's practice of having a State-paid chaplain open its sessions with a prayer was not a violation of the Establishment Clause.[155] In this case, the Court determined that, although religious in nature, legislative prayer was constitutional, given the maintenance of official paid chaplains since the First Congress and the two-hundred-year history of opening legislative sessions with prayer.[156] Because the Court found that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," there was no Establishment Clause violation.[157]

The Court supported its holding through an emphasis on the age of the litigants in *Marsh* because adults are "presumably not readily susceptible to 'religious indoctrination,' or peer pressure" from state-sponsored prayer.[158] The Court found that the legislative prayer was not an impermissible foisting of religious participation upon the adults in attendance; it was a "tolerable acknowledgment of beliefs widely held among the people of this country."[159] Therefore, history became primacy with this case, and the legislative prayer exception to the Establishment Clause was first borne as faulty precedent in *Marsh*.[160]

Thirty years later, in *Town of Greece v. Galloway*, the Court applied *Marsh* to hold that prayers delivered by religious leaders before monthly town board meetings were also not a violation of the Establishment Clause.[161] Although no one was "excluded or denied an opportunity to" pray under the policy, all of the prayer givers were Christian ministers and all the prayers were pervasively Christian-themed for eight years,

154 Marsh v. Chambers, 463 U.S. 783, 813–14 (1983) (Brennan, J., dissenting).

155 *See id.* at 793–94, 796 (majority opinion).

156 *See id.* at 792, 794.

157 *Id.* at 786.

158 *Id.* at 792 (internal citations omitted).

159 *Id.*

160 *See* Town of Greece v. Galloway, 572 U.S. 565, 577 (2014) ("*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.").

161 *See id.* at 569–70 (citing *Marsh*, 463 U.S. 783).

until complaints were lodged against the policy.[162] After these complaints that the sectarian prayers were exclusionary, a Jewish layperson, a Baha'i temple chairperson, and a Wiccan priestess were asked to provide an invocation.[163]

In *Town of Greece*, the Court determined that the Christian prayers before the town board meetings did not violate constitutional establishment restraints because they were consistent with the historical practice provisions of *Marsh*.[164] By doing so, the Court abrogated its *County of Allegheny v. ACLU* finding that the *Marsh* legislative prayer exception only extended to nonsectarian prayer,[165] because *Marsh*'s constitutionality analysis did not "turn[] on the neutrality of [the prayer's] content."[166] The Court then applied this historical approach to find that the American "tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith."[167] Consequently, like *Marsh*, the age of the adult litigants was a crucial factor in finding that these State-sponsored prayers did not create an unconstitutionally coercive environment.

This sectarian holding, though, was not completely without limits, and those limits reflected the Court's protections of nonadherent constituents in its Establishment Clause doctrine. The Court cautioned against future claims that all legislative prayers have no constitutional constraints and made clear that these prayers must "lend gravity to the occasion and reflect values long part of the Nation's heritage" to be constitutionally permissible.[168] Only a respectful and solemn prayer that "invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function."[169] The Court also stressed that future State-sponsored "invocations [that] denigrate nonbelievers or religious minorities, threaten damnation," "preach conversion," "proselytize, or betray an impermissible government purpose" would not fall under the legislative prayer exception.[170] As a result, the Court did not completely abandon the coercion approach of its previous prayer cases. Indeed, the

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162 *See id.* at 571–72.

163 *See id.* at 572.

164 *See id.* at 570, 587, 591–92.

165 *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 603 (1989) (citing *Marsh*, 463 U.S. at 793 n.14) (finding that *Marsh*'s legislative prayer exception only encompassed prayer with no overtly Christian references).

166 *Town of Greece*, 572 U.S. at 580.

167 *Id.* at 584.

168 *See id.* at 582–83.

169 *Id.* at 583.

170 *Id.* at 583, 585.

decision recognized that "[i]f circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others," such coercion could give rise to an Establishment Clause violation.[171]

However, the Court did not find coercion in the present case, as the town's "act of offering a brief, solemn, and respectful prayer to open its monthly meetings, [did not] compel[] its citizens to engage in a religious observance."[172] This finding was bolstered by the Court's conclusion that, like *Marsh*, the primary audience for the prayer was the adult lawmakers, and not the general public.[173] Here, the Court juxtaposed the case with *Lee*, where "a religious invocation was coercive as to an objecting student" when it took place in "a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony."[174] Unlike *Lee*, the Court found that there was no Establishment Clause violation for these "mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'"[175]

The Court also applied a choice theory for these adult board members and constituents in terms of whether they would participate in the state religious practice—a theory that the Court found to be constitutionally infirm for children in *Lee*.[176] Specifically, the Court found that "in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate."[177] Here, the Court found that the adult nonadherents could choose to exit or remain in quiet acquiescence in the room without an interpretation of acceptance of the prayer, and "[n]either choice represents an unconstitutional imposition."[178] Consequently, the Court determined that this ceremonial prayer had a permissible purpose and was not a violation of the Establishment Clause.[179]

Unlike the majority opinion, Justice Kagan's dissent in *Town of Greece* emphasized the importance of the typical presence of children

171 *Id.* at 589.

172 *Id.* at 587.

173 *See id.* at 587–88 (citing Chambers v. Marsh, 504 F. Supp. 585, 588 (D. Neb. 1980)).

174 *Id.* at 590 (citing Lee v. Weisman, 505 U.S. 577 (1992)).

175 *Id.* (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

176 *See supra* text accompanying note 139.

177 *Town of Greece*, 572 U.S. at 590.

178 *Id.*

179 *See id.* at 591.

in the constituency of these meetings.[180] For the dissent, the demographics of the board attendees were crucial in terms of the targeted audience of the state prayers. Unlike the majority and Justice Alito's apparently mocking concurrence,[181] the dissent argued that "the prayers there are directed squarely at the citizens," which included children.[182] And the presence of this minority constituency, as well as the unconstitutionally coercive environment that was created by the State-sponsored prayer practice given these children's exposure to it, were central reasons for the dissent's accurate determination that the invocation policy was a violation of the Establishment Clause under the Court's longstanding First Amendment jurisprudence.[183]

III. THE ESTABLISHMENT CLAUSE AND PUBLIC SCHOOL BOARD MEETING PRAYER

The Supreme Court has yet to determine whether public school board meeting prayer is governed by its Establishment Clause school prayer jurisprudence or whether it falls within the legislative prayer exception to the Establishment Clause. And the federal circuit courts are divided on the constitutionality of school board meeting prayer.[184] It has been examined by the Third, Fifth, Sixth, and Ninth Circuits, with mixed results.[185] Given the thicket that is Establishment Clause

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180 *See id.* at 624 (Kagan, J., dissenting) (noting that children were typically in the attending group of about ten citizens at each meeting).

181 *See id.* at 598 (Alito, J., concurring) ("At Greece Town Board meetings, the principal dissent pointedly notes, ordinary citizens (and even children!) are often present.").

182 *Id.* at 627 (Kagan, J., dissenting).

183 *See id.* at 627, 629 (noting that the presence of children as intended audience members of the State-sponsored invocation took the case outside of the ambit of the *Marsh* legislative history exception); *see also* Alan Brownstein, *Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in* Town of Greece v. Galloway, 48 LOY. L.A. L. REV. 371, 385, 419 (2015) (arguing that *Town of Greece* incorrectly interpreted the Establishment Clause).

184 *See* Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1148 (2020) (discussing the judicial division over the constitutionality of school board meeting prayer); Marie Elizabeth Wicks, *Prayer Is Prologue: The Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & POL. 1, 4 (2015) (discussing the circuit split on whether school board meeting prayer violates the Establishment Clause).

185 Two of these cases predated and two of these cases postdated *Town of Greece*, 572 U.S. 565. *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1152 (9th Cir. 2018) (finding that a school board meeting prayer policy violated the Establishment Clause); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017) (finding that a school board student invocation practice did not violate the Establishment

jurisprudence and the absence of Supreme Court guidance on this issue,[186] it is unsurprising that there is uncertainty as to how this religion clause applies to school board meeting invocations.[187]

The first circuit court examination of the constitutionality of public school board meeting prayer was the 1999 Sixth Circuit decision of *Coles ex rel. Coles v. Cleveland Board of Education*, which held that these prayers violated the Establishment Clause.[188] In *Coles*, the Court analyzed the Cleveland Board of Education's practice of beginning its twice-monthly meetings with a prayer.[189] These school board meetings took place in the public schools or in the board's administration building.[190] A variety of students attended these meetings and "actively participate[d] in the board's agenda."[191] A student representative regularly sat on the school board to report on school activities.[192] Often, students voiced concerns regarding the public school system during the meetings' public comment time.[193] Students regularly received academic, athletic, and community service awards at these meetings.[194] These meetings were also student grievance forums because the school board was statutorily required to conduct exclusionary discipline hearings in them upon disciplined students' requests.[195]

Since 1992, the meetings opened with a moment of silent or spoken prayer led by an invited community religious leader or the school board

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Clause); Doe v. Indian River Sch. Dist., 653 F.3d 256, 290 (3d Cir. 2011) (finding that a school board prayer policy violated the Establishment Clause); Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 385–86 (6th Cir. 1999) (same); s*ee also* Doe v. Tangipahoa Par. Sch. Bd., 494 F.3d 494, 499 (5th Cir. 2007) (en banc) (reversing the appellate court's previous invalidation of a school board meeting prayer practice under the Establishment Clause on a standing determination); Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ., 52 F. App'x 355, 356 (9th Cir. 2002) (finding an Establishment Clause violation without deciding whether these school board meeting prayers were subject to the legislative prayer exception or the Court's school prayer jurisprudence because, regardless of this classification, these prayers delivered "in the name of Jesus" by an individual Christian violated the Establishment Clause).

186 *See* Joe Dryden, *The Religious Viewpoint Antidiscrimination Act: Using Students as Surrogates to Subjugate the Establishment Clause*, 82 MISS. L.J. 127, 136 (2013) (quoting Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 620 (2d Cir. 2005)) (describing this jurisprudence as "the 'thorniest of constitutional thickets'").

187 *See* Bruce Ledewitz, *Toward A Meaning-Full Establishment Clause Neutrality*, 87 CHI.-KENT L. REV. 725, 763 (2012) (discussing how school board invocations continue despite the Supreme Court's decision in *Lee*).

188 *See Coles*, 171 F.3d at 371.

189 *See id.* at 371–73.

190 *See id.* at 372.

191 *Id.*

192 *See id.*

193 *See id.*

194 *See id.*

195 *See id.* (citing OHIO REV. CODE ANN. § 3313.66(D)–(E) (Anderson 1997)).

president.[196] Invited clergy members were predominantly Christian.[197] The board president would invite the clergy members to lead those in attendance in prayer and would say "amen" after the prayer.[198] Most prayers incorporated explicit religious references, and many explicitly referred to Jesus.[199] In 1996, a regularly invited religious leader was elected school board president and subsequently requested silent prayer or delivered the school board meeting prayers in each meeting.[200] A high school student who was twice recognized for her academic achievements at these meetings and a public school teacher who regularly attended the meetings challenged the prayers' constitutionality.[201]

At the outset of its opinion, the Sixth Circuit emphasized the Supreme Court's consistent jurisprudence that held "school-sponsored religious activity transgresses the Establishment Clause."[202] However, the court acknowledged that school board prayers did not fit neatly into either the *Lee* school-sponsored prayer category because these prayers did not take place in front of the entire student body, or the *Marsh* legislative prayer exception because of the school board's role in the public education system.[203] Ultimately, the court found that the *Marsh* exception did not apply to the public school board meeting prayers based on two predominant principles from the Supreme Court's school prayer cases: "'coercion' of impressionable young minds is to be avoided, and . . . endorsement of religion is prohibited in the public schools context."[204] The court also rejected the application of *Marsh* to these prayers because it did not create "a presumption of validity for government-sponsored prayer at all deliberative public bodies" and the school board was not "a deliberative public body" as that term was used in *Marsh*.[205]

Instead, the Sixth Circuit held that these school board meeting prayers were governed by the Supreme Court's school prayer jurisprudence because "the school board, unlike other public bodies, is an integral part of the public school system."[206] These meetings were

196 *See id.* at 372–73.

197 *See id.* at 373.

198 *Id.*

199 *See id.*

200 *See id.* at 373–74.

201 *See id.* at 374.

202 *Id.* at 376.

203 *See id.*

204 *Id.* at 377, 379.

205 *Id.* at 380–81.

206 *Id.* at 381.

integral to the public school system, as they were "conducted on school property by school officials, and . . . attended by students who actively and regularly participate[d] in the discussions of school-related matters."[207] The court emphasized that the school board's distinct student constituency set its function apart from other legislative bodies.[208] Here, the court spent considerable time outlining the unique nature of this constituency of minors and its lack of access to the electoral process: "Unlike ordinary constituencies, students cannot vote. They are thus unable to express their discomfort with state-sponsored religious practices through the democratic process. Lacking a voice in the electoral process, students have a heightened interest in expressing their views about the school system through their participation in school board meetings."[209]

Student attendance of these meetings also contributed to the court's determination that the school board prayer was subject to school prayer jurisprudence, rather than the legislative prayer exception.[210] Students were incentivized to attend the school board meetings because the board made all-encompassing policies regarding student activities in the public schools.[211] Students were regularly honored at these meetings, and students who wanted to challenge their exclusionary discipline were statutorily required to do so at the meetings.[212] Consequently, these students attended the meetings not as "a matter of choice, but a matter of necessity."[213]

The court also rejected the State's argument that the school board's deliberative processes were "basically between adults" for multiple reasons.[214] First, the board members directly communicated with students, and such communication should exemplify the democratic values that the public school system was designed to foster in the nation's youth.[215] Second, the students were unique participants who were "directly involved in the discussion and debate" of the meetings.[216] They were not idle or incidental spectators like legislative gallery members.[217] Finally, the court focused on the coercive environment of

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207 *Id.*

208 *Id.*

209 *Id.*

210 *See id.* at 381–82.

211 *See id.*

212 *See id.* at 382.

213 *Id.*

214 *Id.*

215 *See id.*

216 *Id.*

217 *See id.*

the school board meetings with the "far more captive audience" of students there as compared to school graduations.[218] This included students who challenged their disciplinary action in that forum as required by law, the student board representative, and the "students who would simply like to have a say in their education by commenting on or otherwise influencing school policy."[219]

Based on these findings and given the school board's nature as "an integral part of the public school system," the court held that the *Lemon* test, rather than the *Marsh* legislative prayer exception, applied to these prayers.[220] The court was clear that the policy was "so inextricably intertwined with the public schools that it must be evaluated on the same basis as the schools themselves."[221] In applying *Lemon*, the court found the school board's claimed secular purpose of the prayers—to bring increased decorum to the meetings—was dubious, given the board president's express linkage of the prayers to Christian beliefs.[222] It also found that the prayers' calls for divine assistance and references to Jesus exceeded what was needed "to solemnize or bring a more businesslike decorum" to the meetings.[223] As a result, the court determined the prayers did not satisfy the secular purpose prong of *Lemon*.[224]

The court also found that the prayer practice failed the second *Lemon* prong, because "the practice of opening each school board meeting with a prayer has the primary effect of endorsing religion."[225] This was based on the facts that the "prayers in this case were clearly sectarian, with repeated references to Jesus and the Bible, the current school board president is himself a Christian minister who personally delivers the majority of the prayers, and the setting is the public body that constantly interacts with elementary and secondary school children."[226] Because these circumstances would lead any reasonable observer to conclude "that the school board was endorsing Christianity," the primary effect prong of *Lemon* was also not satisfied.[227]

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218 *Id.* at 383.

219 *Id.*

220 *Id.*

221 *Id.*

222 *See id.* at 384.

223 *Id.*

224 *See id.*

225 *Id.* at 384–85.

226 *Id.* at 385.

227 *Id.*

Finally, the court determined that the prayers did not pass the third prong of the *Lemon* test because they resulted in an "excessive entanglement of government with religion."[228] Similar to *Lee*, the court found that the prayer bore "the imprint of the State" because the school board chose to have a public meeting prayer, selected the religious leader to deliver the prayer, and most recently allowed the board president to give the prayer.[229]

Consequently, the court held that the school board meeting prayers violated the Establishment Clause.[230] Here, the court found that "the government, through its school officials, [chose] to introduce and exhort religion in the school system" to the point where "the school board's involvement in promoting prayer cross[ed] the line of constitutional infirmity."[231] Therefore, "[b]ecause the school board's practice . . . convey[ed] the message of government endorsement of religion in the public school system," the Sixth Circuit found the public school board meeting prayers were inconsistent with the First Amendment.[232]

In 2011, the Third Circuit also deemed school board meeting prayers unconstitutional in *Doe v. Indian River School District*.[233] Like *Coles*, the court determined that the key issue in analyzing the school board's "long-standing policy of praying at its regularly-scheduled meetings, which [were] routinely attended by students from the local school district," was whether this practice fell under the *Marsh* legislative prayer exception or was subject to traditional school prayer jurisprudence.[234] The court determined that the legislative prayer exception did not apply and that the prayers failed the *Lemon* test and the endorsement test.[235]

Prayers had been recited at every school board meeting in the Indian River School District since the district's creation in 1969.[236] In 2004, the school board formalized this prayer policy:

> 1. In order to solemnify its proceedings, the Board of Education may choose to open its meetings with a prayer or a moment of silence, all in accord with the freedom of conscience of the individual adult Board member.

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228 *Id.*

229 *Id.*

230 *See id.* at 385–86.

231 *Id.*

232 *Id.* at 386.

233 *See* Doe v. Indian River Sch. Dist., 653 F.3d 256, 259 (3d Cir. 2011).

234 *Id.*

235 *See id.* at 282–84.

236 *See id.* at 261.

> 2. On a rotating basis one individual adult Board member per meeting will be given the opportunity to offer a prayer or request a moment of silence. If the member chooses not to exercise this opportunity, the next member in rotation shall have the opportunity.
>
> 3. Such opportunity shall not be used or exploited to proselytize, advance or convert anyone, or to derogate or otherwise disparage any particular faith or belief.
>
> 4. Such prayer is voluntary, and it is among only the adult members of the Board. No school employee, student in attendance, or member of the community shall be required to participate in any such prayer or moment of silence.
>
> 5. Any such prayers may be sectarian or non-sectarian, denominational or non-denominational, in the name of a Supreme Being, Jehovah, Jesus Christ, Buddha, Allah, or any other person or entity, all in accord with the freedom of conscience, speech and religion of the individual Board member, and his or her particular religious heritage.[237]

Before each prayer, a board member offered a disclaimer on the history, custom, and nature of the prayer.[238] Almost all of the prayers were Christian, with references to Jesus or "the Christian God."[239] A proffered moment of silence, rather than prayer, was a rarity.[240]

Students regularly attended each board meeting where these prayers were delivered,[241] given that the school board's policymaking duties impacted almost every aspect of students' lives.[242] Students who were subject to serious disciplinary action were given the opportunity to discuss this potential discipline with the board; Junior Reserve Officers' Training Corps (JROTC) students attended every meeting to present the colors; student government representatives regularly presented as an official part of the meetings; students often presented a piece of performance art or received individual or team achievement recognitions at the meetings; and students often contributed to the public comment portion of the meetings.[243] Two families with schoolchildren in the district, one of which proceeded anonymously,

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237 *Id.* at 261–62 (quoting the Board's Policy Committee's "Board Prayer at Regular Board Meetings Policy").

238 *See id.* at 262.

239 *Id.* at 265–66.

240 *See id.* at 266 (stating that only three of thirty-six meetings had a moment of silence instead of prayers).

241 *See id.* at 263–64.

242 *See id.* at 263.

243 *See id.* at 264–65.

claimed the school board prayer practice violated the Establishment Clause.[244]

In its analysis, the Third Circuit determined that the legislative prayer exception did not apply, as it did not adequately address the key concern of the Supreme Court: "the need to protect students from government coercion in the form of endorsed or sponsored religion . . . at the heart of the school prayer cases."[245] The school board's prayer practice implicated "many of the same indicia of coercion and involuntariness" of this jurisprudence.[246] Because the board deliberately changed the location of student achievement recognition from school assemblies to board meetings, it ensured student attendance of almost all meetings.[247] Like in *Lee*, by imbuing these meetings with this important meaning, students who might absent themselves from the recognition would forfeit "tangible and intangible benefits."[248] For team recognitions, the peer pressure to attend would be so acute that it would be unlikely for a teammate to feel any freedom to opt out of attendance to avoid participating in the prayer.[249] The record indeed indicated that no student had ever "decided *not* to attend the meetings, other than for a scheduling conflict."[250] Similar to the required attendance of team members, band members, and cheerleaders in *Santa Fe*,[251] the near-compulsory attendance of the JROTC students and student government representatives also contravened any state argument of voluntary attendance as a way to insulate the meetings from violating the Establishment Clause.[252] Consequently, the court expressly rejected the school board's argument—that there was no coercion of the students in attendance because the students could "easily absent themselves" for the prayer if they found "it truly intolerable."[253] The Third Circuit found that the Establishment Clause "does not allow the state to force this kind of choice upon a student" and that "giving a student the option to leave a prayer 'is not a cure for a constitutional violation.'"[254]

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244 *See id.* at 259–60.

245 *Id.* at 275.

246 *Id.*

247 *See id.* at 276.

248 *Id.* at 276–77.

249 *See id.* at 277.

250 *Id.*

251 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000).

252 *See Indian River Sch. Dist.*, 653 F.3d at 277–78.

253 *Id.* at 278.

254 *Id.* (citation omitted).

Finally, the court found a multitude of contextual factors that illustrated the coercive nature of the prayers for the students in attendance.[255] The school board had complete control over all aspects of the meetings, which occurred on school property.[256] The school board composed and recited the prayers.[257] Thus, the court found it "particularly difficult to imagine that a student would not feel pressure to participate in the practice, or at least appear to agree with it—particularly a student appearing in front of the Board to contest a disciplinary action."[258]

In addition to finding that the *Marsh* legislative prayer exception was ill suited for this case based on the coerciveness and involuntariness of the school board prayers, the court determined the exception did not apply "because the entire purpose and structure of the [school board] revolves around public school education."[259] All aspects of the board's policymaking responsibilities promoted and supported the public school system, which "highlight[ed] the compulsory nature of student attendance at Board meetings."[260] Because students who wished to participate in the decision-making process that directly impacted their education were required to attend these meetings to do so, the court determined that "while such meetings may technically be 'voluntary,' in practice they are not."[261] Here, the court found that *Lee*, rather than *Marsh*, controlled and that "[t]he First Amendment does not require students to give up their right to participate in their educational system or be rewarded for their school-related achievements as a price for dissenting from a state-sponsored religious practice."[262] Because the core purpose of the school board is distinct from other deliberative bodies, the extension of the *Marsh* legislative prayer exception to other deliberative bodies was neither relevant nor determinative.[263] Similarly, the court found that the "narrow historical context" of *Marsh* did not encompass the school board meeting prayers.[264] Consequently, based on "the need to protect students from coercion," which "is of the utmost importance" within the context of public schools, the court determined

255 *See id.*
256 *See id.*
257 *See id.*
258 *Id.*
259 *Id.*
260 *Id.* at 279.
261 *Id.*
262 *Id.* at 278–79.
263 *See id.* at 280.
264 *Id.* at 282.

that the school prayer cases, rather than the legislative prayer exception, governed the case.[265]

Based on that conclusion, the court applied the *Lemon* test and the endorsement test.[266] The court first gave some deference to the school board's classification of the prayers' primary purpose as a secular one: "to 'solemnify' its meetings."[267] However, it next found that the policy's primary effect was the impermissible endorsement of religion based on the religious prayers being almost exclusively Christian, with explicit Christian references, and the policy's history and context.[268] Because the policy was drafted to defend the school board from potential challenges to its "unwritten practice of praying at every public meeting," and "in an atmosphere of contention and hostility towards those who wanted prayers to be eliminated from school events," the court determined a reasonable observer "would conclude that the primary effect of the Board's Policy was to endorse religion."[269] The court also found that the policy violated the excessive entanglement prong of the *Lemon* test.[270] The institutional aspects of the prayer—including the formal incorporation of the prayers into the meetings, the board's vote to sanction the prayers, and the board's composition and the recitation of the prayers—indicated an excessive entanglement of government and religion,[271] as "the Board's complete control over the Policy, combined with its explicit sectarian content, [rose] above the level of interaction between church and state that the Establishment Clause permits."[272] Consequently, the policy failed the *Lemon* test.[273] Similarly, the policy failed to pass muster under the endorsement test, which mirrors *Lemon*'s primary effect prong.[274]

As a result of this analysis, the court determined that the policy was unconstitutional.[275] Although the court noted "that the proper role" of school board meeting prayer was "the subject of sincere and passionate debate" and "that religion has been closely identified with our history

265 *Id.* at 281–82.
266 *See id.* at 282–83.
267 *Id.* at 283.
268 *See id.* at 284–87.
269 *Id.* at 287.
270 *Id.* at 288–90.
271 *See id.*
272 *Id.* at 290.
273 *See id.* at 283–90.
274 *See id.* at 290.
275 *Id.*

and government," this policy "[rose] above the level of interaction between church and state that the Establishment Clause permits."[276]

The first post–*Town of Greece* circuit court decision regarding the constitutionality of school prayer was the 2017 *American Humanist Ass'n v. McCarty* decision.[277] In this case, the Fifth Circuit found that school board meeting prayers delivered by students did not violate the Establishment Clause.[278] Here, the Birdville Independent School District (BISD) held monthly public meetings in a non-school administrative building.[279] The meeting's attendees had the freedom to come and go as they chose.[280] Although most of the attendees were adults, students often attended the meetings to perform with bands or choirs, to receive awards, or to open the school board session meeting with prayer.[281]

From 1997 to 2015, BISD had an "invocation policy" to have two students open each school board session meeting; one student would recite the Pledge of Allegiance and the Texas pledge, and the other student would deliver a one-minute "invocation."[282] School officials instructed students to give relevant and appropriate invocations.[283] Most invocations were prayers that frequently incorporated references to "Jesus" or "Christ."[284] Some students would direct the audience to pray together, stand, or bow their heads.[285] Occasionally, a school board member would also request that everyone stand for the prayer.[286] Most of the invocations were delivered by elementary or middle school students.[287] In fact, "[o]f the 101 meetings from February 2008 to June 2016, elementary- and middle-school students delivered the presentations 84 times."[288] These students were selected by school officials to give these invocations based on merit in "academic achievement, leadership, citizenship, [and] extracurricular activities."[289]

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276 *Id.* (quoting Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 212 (1963)).

277 Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir. 2017).

278 *See id.* at 529–30.

279 *See id.* at 524.

280 *See id.*

281 *See id.*

282 *See id.*

283 *See id.*

284 *See id.*

285 *See id.*

286 *See id.* at 524 n.3.

287 *See id.* at 524.

288 *Id.* at 524 n.2.

289 *Id.* at 524 n.4.

In response to complaints regarding the prayers and in an attempt to avoid litigation,[290] BISD started calling the invocations "student expressions."[291] The school district also began to "provid[e] disclaimers that the students' statements [did] not reflect BISD's views."[292] Finally, the school district changed its student selection process to be a random selection process from a list composed only of student-leader volunteers.[293] However, a BISD alumnus and the American Humanist Association still challenged the school district's school board meeting prayer policy and practices as being a violation of the Establishment Clause.[294]

Although one of the State's primary arguments was that the student-delivered school board meeting prayers were protected private speech, rather than government speech,[295] the Fifth Circuit declined to decide this issue.[296] Instead, the court determined that these school board meeting prayers were legislative prayers that fell beyond the purview of the Establishment Clause under the legislative prayer exception.[297] The court found that the school board meeting invocations were legislative prayers, rather than school prayers, because "a school board is more like a legislature than a school classroom or event."[298] Because the school board was a "deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative," it was "a deliberative legislative body" that was the equivalent of the *Town of Greece* town board.[299]

The court also summarily rejected the plaintiffs' coercion argument that challenged the legislative prayer exception application to the school board meeting prayers:

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290 *See id.* at 524 n.5 (noting testimony that the policy was changed to avoid litigation).

291 *Id.* at 524.

292 *Id.*

293 *See id.* at 524 & n.7.

294 *See id.* at 523, 525.

295 *See* Appellants' Brief at *6, *Am. Humanist Ass'n*, 851 F.3d 521 (No. 15-11067), 2016 WL 284831 ("Appellants assert that the speech at issue is student speech, rather than government speech, and Appellants may not prohibit such expression of religious belief without violating the rights of its students.").

296 *See Am. Humanist Ass'n*, 851 F.3d at 529 n.25 ("We do not reach BISD's arguments that the student-led invocations are private speech and that the district's policy satisfies the conventional Establishment Clause tests.").

297 *See id.* at 525–26, 529–30 (citing Marsh v. Chambers, 463 U.S. 783, 784–86 (1983); Town of Greece v. Galloway, 572 U.S. 565, 578–84, 589–90 (2014)).

298 *Id.* at 526 (citation omitted).

299 *Id.*

> Most attendees at school-board meetings . . . are "mature adults," and the invocations are "delivered during the ceremonial portion of the [school board's] meeting. Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even . . . making a later protest." Occasionally, BISD board members and other school officials will ask the audience, including any students in the audience, to stand for the invocation. Those polite requests, however, do not coerce prayer.[300]

The court recognized that the presence of students at the school board meetings did distinguish the case from *Marsh* and *Town of Greece*, and it found this distinction significant as "courts must consider 'both the setting in which the prayer arises and the audience to whom it is directed.'"[301] However, while recognizing that "[c]hildren are especially susceptible to peer pressure and other forms of coercion," the court found that student attendance of the meetings "[did] not transform this into a school-prayer case" as there were children attendees at the *Town of Greece* meetings and the Supreme Court still applied the legislative prayer exception.[302]

The Fifth Circuit determined that these invocations did not have to be "'internal acts' that are 'entirely' for the benefit of lawmakers" to qualify as legislative prayers.[303] Although the school board acknowledged that the invocations were also designed "to benefit students and other attendees," the court focused on the school district's statement that the primary audience for the invocations was the board members.[304] That was enough for these to be legislative prayers as *Town of Greece* suggested: that so long as "lawmakers were merely the 'principal audience' for the invocations," they satisfied the legislative prayer exception.[305]

The court also rejected the argument that these school board prayers did not fall within the legislative prayer exception of Establishment Clause jurisprudence because they did not come from the "unique history" that was at the core of *Town of Greece* and *Marsh*.[306] In doing so, the court recognized that school board meeting prayers "[did] not date back to the Constitution's adoption" and the student-led invocations departed from other legislative bodies'

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300 *Id.* (quoting *Town of Greece*, 572 U.S. at 590–91) (internal citations omitted).

301 *Id.* at 527 (quoting *Town of Greece*, 572 U.S. at 587).

302 *Id.* at 527–28.

303 *Id.* at 526–27 (citation omitted).

304 *See id.* at 527.

305 *Id.* (quoting *Town of Greece*, 572 U.S. at 587).

306 *See id.* (citation omitted).

chaplain-led invocations, which admittedly undermined the State's historical claim.[307] Despite these acknowledgments, the court still summarily found that the student invocations "fit[] within the legislative-prayer exception, notwithstanding [their] departure[s] from the historical [state prayer] practice[s]" that had been upheld in *Marsh* and *Town of Greece*.[308] As a result, the Fifth Circuit determined that this school board invocation policy and practice did not violate the Establishment Clause, although it conceded that other school board meeting prayer practices could conflict with the First Amendment.[309] On appeal, the Supreme Court denied the appellants' petition for writ of certiorari in the case without issuing an opinion.[310]

The latest federal circuit decision on school board prayer was the 2018 Ninth Circuit case of *Freedom from Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education*.[311] In it, the court determined that a public school board meeting prayer in the presence of "student attendees and participants" was a violation of the Establishment Clause,[312] creating a post–*Town of Greece* circuit split with *American Humanist Ass'n* on the constitutionality of this state practice.[313] At issue were the inclusion of prayers in the school district's Board of Education public meetings since 2010 and the adoption of a formal invocation policy for these prayers in 2013.[314] These meetings began with the Pledge of Allegiance, often led by students; the presentation of the colors by the JROTC; and an opening prayer that was typically given by a clergy member, a board member, or a member of the session audience.[315] Following the prayer, there would be group presentations by K–12 students, a formal recognition of student academic and extracurricular achievements, student and employee representative commentary, a public comment period, and district administration decision-making by the board.[316] This administrative

307 *See id.* at 527 & n.16.

308 *See id.* at 527 n.16.

309 *See id.* at 529–30.

310 Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir.), *cert. denied sub nom.* Am. Humanist Ass'n v. Birdville Indep. Sch. Dist., 138 S. Ct. 470 (2017).

311 *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018).

312 *See id.* at 1137–38.

313 *See* Noah C. Chauvin, *Unifying Establishment Clause Purpose, Standing, and Standards*, 50 U. MEM. L. REV. 319, 355 n.202 (2019) (discussing this circuit split); Lisa Shaw Roy, *The Unexplored Implications of* Town of Greece v. Galloway, 80 ALB. L. REV. 877, 878 n.5 (2017) (same).

314 *Freedom from Religion Found., Inc.*, 896 F.3d at 1139–40.

315 *See id.* at 1138.

316 *See id.* at 1138–39.

decision-making included approval of "student discipline and readmission cases, and requests for waiver of high school graduation requirements."[317] A student representative sat on the board to voice important issues in the student community and to vote during the open session.[318]

In addition to these prayers, board members regularly invoked Christian beliefs; made references to God, Jesus Christ, and Heaven; read the Bible aloud, and offered additional prayer.[319] Several board members also frequently linked "the work of the Board, teachers, and the school community to Christianity" and endorsed faculty prayer.[320] "[P]reaching to the district community" was also a common occurrence in the meetings.[321] In 2014, the "Freedom From Religion Foundation, two parents of students in the district, and twenty Doe plaintiffs—students, parents, district employees, a former district employee, and attendees of school board meetings" brought suit against the school district and the adult board members, claiming that the prayers, invocation policy, and other religious activities violated the Establishment Clause.[322]

At the outset of its opinion, the Ninth Circuit emphasized the dual purposes of the Establishment Clause as safeguarding both "individual freedom and the democratic nature of our system of government."[323] So, while this religion clause protects "the individual's freedom to believe, to worship, and to express [oneself] in accordance with the dictates of [one's] own conscience," it also "ensures that the government in no way acts to make belief—whether theistic or nontheistic, religious or nonreligious—relevant to an individual's membership or standing in our political community."[324] For the court, the core truth of the Establishment Clause was that individuals have "a valued place in the political community," regardless of their religious or conscientious beliefs.[325] This truth required both judicial awareness that children cannot be treated like "miniature adults" and judicial vigilance

317 *Id.*

318 *See id.* at 1139.

319 *See id.* at 1140–41.

320 *Id.* at 1140.

321 *Id.* at 1141.

322 *See id.* at 1137–38, 1141.

323 *Id.* at 1137.

324 *Id.* (quoting Wallace v. Jaffree, 472 U.S. 38, 49 (1985)) (citing Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

325 *Id.*

in analyzing religious activities within the public school setting due to their impact on values formation in school children.[326]

In applying this heightened scrutiny, the court first conducted the "'fact-sensitive' inquiry" of whether the prayers were subject to the legislative prayer exception by analyzing their setting, audience, content, and their relationship to "the backdrop of historical practice."[327] With respect to setting and audience, the court found that these public school board meetings were dissimilar to the legislative prayer settings of *Marsh* and *Town of Greece*, "where the audience comprise[d] 'mature adults' who [were] 'free to enter and leave with little comment and for any number of reasons'"[328] and who were "not readily susceptible to religious indoctrination or peer pressure."[329] The court determined that the public school board meetings were not like congressional sessions, state legislature sessions, or town board meetings because they "function as extensions of the educational experience of the district's public schools."[330] These meetings included school district policymaking, student academic and extracurricular showcases and recognition, and student discipline adjudications.[331] As a result, the court determined that many of the schoolchildren, who were active meeting participants, were not attending in a "truly voluntary" way and stood in an unequal relationship with the board.[332] Also, unlike adults, these minors and adolescents were "more vulnerable to outside influence" and indoctrination, especially with respect to the pressures to "conform to social norms and adult expectations."[333] Consequently, this audience of "large numbers of children and adolescents, in a setting under the control of public-school authorities," was deemed "inconsonant with the legislative-prayer tradition."[334]

Further, the relationship between the board and its policymaking body was deemed markedly different than the *Marsh* and *Town of Greece* legislative sessions based on the amount of control and authority the board had over its constituents.[335] "Unlike . . . *Marsh* and *Town of Greece*, where constituents may replace legislators and need not fear

326 *Id.* at 1137, 1146 (quoting J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011)).

327 *Id.* at 1144 (quoting Town of Greece v. Galloway, 572 U.S. 565, 587 (2014)).

328 *Id.* at 1145 (quoting *Town of Greece*, 572 U.S. at 590).

329 *Id.* (quoting *Town of Greece*, 572 U.S. at 590).

330 *Id.*

331 *See id.*

332 *Id.*

333 *Id.* at 1145–46.

334 *Id.* at 1145.

335 *See id.* at 1146.

their exercise of comprehensive control, students do not enjoy such autonomy."[336] The equal status of adult legislators and their constituents within the political community in the legislative prayer exception cases, which allowed those constituents to "feel free to exit or voice dissent in response to a prayer at a legislative session," was lacking for schoolchildren at these board meetings.[337] As a result, the court found that the "democratic hallmarks present in legislative sessions and in constituents' relationship with the legislature" were absent in the school board meetings.[338]

Additionally, the student presence at the board meetings was "not meaningfully voluntary" given the "academic and social pressures" attendant to the meeting components that involved children.[339] The court determined that the school board meetings' forced choice between children participating in a religious prayer or dissenting "in order to participate in a complete educational experience, on par with that of her peers, implicate[d] graver Establishment Clause considerations than the prayers at public meetings found to be within the *Marsh*-*Greece* tradition."[340]

Finally, the court emphasized that the *Marsh* and *Town of Greece* historical approach to Establishment Clause interpretation was inapposite to the application of the clause to school board meeting prayers because "[a]t the time of the Framing . . . 'free public education was virtually nonexistent.'"[341] So this historical framework could not apply "to an institution essentially unknown to the Framers—a public-school board."[342] Consequently, the court determined that the invocations did not fall under the legislative prayer exception to the Establishment Clause because they were "not the sort of solemnizing and unifying prayer, directed at lawmakers themselves and conducted before an audience of mature adults free from coercive pressures to participate, that the legislative-prayer tradition contemplates" and that aligned with the *Marsh* and *Town of Greece* historical approach.[343] Instead, "these prayers typically [took] place before groups of schoolchildren whose attendance is not truly voluntary and whose

336 *Id.* at 1147.

337 *Id.*

338 *See id.*

339 *Id.*

340 *Id.*

341 *Id.* at 1147–48 (quoting Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987)).

342 *Id.* at 1148.

343 *Id.* at 1142.

relationship to school district officials, including the Board, is not one of full parity."[344]

The court thus applied the *Lemon* test to the prayer policy, and it held that the policy violated the Establishment Clause as it lacked a secular legislative purpose.[345] Here, the court reiterated that an articulated secular purpose "must 'be genuine, not a sham'" and that the "government's predominant purpose" cannot be "to advance or favor religion" in accordance with the Madisonian neutrality required by the First Amendment.[346] The purported secular purposes of the board meeting prayer policy—"'solemnization' of the Board meetings, and 'acknowledg[ment] and express[ion of] the Board of Education's respect for the diversity of religious denominations and faiths represented and practiced' among the district's residents"—were contradicted by a board member's public statement that the policy's goal was actually "the furtherance of Christianity."[347] This public governmental contradiction of purpose raised express doubts as to the authenticity and validity of the State's claimed secular purposes of the invocation policy.[348] The court then found that the solemnization purpose was a religious one, and not "a permissible secular purpose," because "[t]here is no secular reason to limit the solemnization to prayers or, relatedly, to have a presupposition in the policy that the solemnizers will be religious leaders."[349] The court also found that the respect for diversity of religion purpose "fail[ed] the secularity test" because of a means-ends asymmetry.[350] The court stressed the invocation policy did "not capture all the religious diversity in Chino Valley" and "the purpose of respecting religious diversity, to the extent that it does not encompass nonreligious belief systems and their diversity, is itself constitutionally suspect."[351] Therefore, the board's policy and practice lacked a secular purpose and were unconstitutional under the Establishment Clause.[352]

The Ninth Circuit also found that these public school board meeting prayers failed the other *Lemon* criteria.[353] Because "the prayers frequently advanced religion in general and Christianity in particular,"

344 *Id.*

345 *See id.* at 1142–43, 1148.

346 *Id.* at 1149 (quoting McCreary Cnty. v. ACLU, 545 U.S. 844, 864 (2005)).

347 *Id.* (citations omitted).

348 *See id.* at 1149–50.

349 *Id.* at 1150.

350 *Id.*

351 *Id.* (emphasis omitted).

352 *See id.* at 1151.

353 *See id.*

their principal or primary effect was to advance religion.[354] Finally, the court determined that the prayer policy and practice constituted an "'excessive government entanglement' with religion," as there were multiple ways to solemnize the meetings and to recognize the community's religious diversity aside from a religious invocation.[355] Consequently, the board meeting prayer practice and policy violated the Establishment Clause.[356]

After the Ninth Circuit decision, the school district filed a petition for rehearing en banc, which was denied.[357] The board did not appeal to the Supreme Court, and the OCBE's attempt to intervene in the case to do so was unsuccessful.[358] The OCBE continues to allow prayer in its public school board meetings, albeit with a new provision that absents students from those invocations; it anticipates that this policy will be the subject of another Establishment Clause lawsuit.[359]

IV. SOLVING THE PROBLEMS OF PUBLIC SCHOOL BOARD MEETING PRAYER POLICIES AND PRACTICES BY HOLDING THAT THESE PRAYERS ARE ESTABLISHMENT CLAUSE VIOLATIONS

A. *Student-Led Prayer at Public School Board Meetings Is Not Private Speech that Is Insulated from the Establishment Clause*

It is vitally important that federal courts deem student-led prayer at public school board meetings to be school-sponsored speech to combat particularly pernicious arguments that such speech is private speech that is insulated from the protections of the Establishment Clause. The *American Humanist Ass'n* decision is demonstrative of this acute problem that should be avoided by future federal courts.[360] The Fifth Circuit failed to explicitly reject the State's argument that the student prayer at issue was private speech, and it inaccurately held that the school board invocations fell under the legislative prayer exception

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354 *Id.*

355 *Id.*

356 *See id.*

357 *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir.) (per curiam), *reh'g denied*, 910 F.3d 1297, 1298 (9th Cir. 2018).

358 *See supra* 14–17 and accompanying text.

359 OCBE MEETING TRANSCRIPTION, *supra* note 18, at 63 (discussing how the new policy is designed to pass muster in the Ninth Circuit and the Supreme Court).

360 *See* Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 847 n.98, 859 (2020) [hereinafter Corbin, *The Supreme Court's Facilitation*] (arguing that decisions like *American Humanist Ass'n* prop up white Christian nationalism and incorrectly interpret the Establishment Clause).

to the Establishment Clause.[361] The subsequent failure of the Supreme Court to grant review and reverse this decision on these two bases was also error,[362] and this error should be rectified when the Court has a similar opportunity to review student-led prayer at public school board meetings in the future.[363] A failure to do so will allow state forces the opportunity to continue to engage in coercive prayer in public school board meetings and to avoid the restrictions of the Establishment Clause by labeling the speech of these schoolchildren as private speech that falls outside of the purview of this clause, rather than government speech that violates it.[364]

Identifying the nature of the speech at issue in an Establishment Clause case is a foundational first step in a proper constitutional analysis.[365] With purely private speech, the lack of government action means the Establishment Clause does not apply.[366] Conversely, when speech delivered by students is at the behest of the State, then it is government or State-sponsored speech, which is constrained by the bounds of that clause.[367] This basic premise that the Establishment Clause only applies to government speech and not to private speech has been firmly established by the Court's school law jurisprudence.[368]

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361 *See supra* text accompanying notes 279–312.

362 *See* McCarthy, *supra* note 39, at 165 (discussing the dilemma of mixed judicial signals when the Court "continues to decline review" on topics like student-delivered prayer).

363 *See* Corbin, *The Supreme Court's Facilitation*, *supra* note 360, at 847 (discussing the rapid recent proliferation of Christian prayers at public school board meetings).

364 *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 30 (1986) (discussing the applicability of the Establishment Clause only to government speech and not private speech); Michael W. McConnell, *"God Is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 184 ("The very same conduct can be either constitutionally protected or constitutionally forbidden, depending on whether those who engage in it are acting in their 'private' or their 'public' capacities.").

365 *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) (noting that government speech "must comport with the Establishment Clause"); Paul E. McGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 ARIZ. ST. L.J. 585, 586 (2008) (highlighting that "[t]he distinction between private and government action lies at the heart of constitutional law").

366 *See* Esbeck, *supra* note 38, at 611 (discussing the differences between private and government speech for establishment analysis).

367 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (discussing the constraints of the Establishment Clause on student speech that is delivered via state initiation); B. Jessie Hill, *(Dis)owning Religious Speech*, 20 GEO. MASON L. REV. 361, 376 (2013) (same); *see also* Leslie C. Griffin, *Their Own Prepossessions: The Establishment Clause, 1999–2000*, 33 LOY. U. CHI. L.J. 237, 241 (2001) (classifying student speech that is reasonably attributed to the government as government speech).

368 *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302 ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private*

This delineation between government speech and private speech can be difficult to discern when analyzing religious expressive activities within the public school environment.[369] And while considerable discretion is afforded to the states and school boards for the operation of the public schools,[370] this discretion is not unlimited when it comes to the application of the Establishment Clause to religious activities in public school environments.[371] This would violate the Supreme Court's fundamental recognition "that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."[372]

Given these limits, the unique circumstances of this area of school law require prudent, disciplined, and careful judicial scrutiny.[373] This especially resonates in an environment where students are delivering invited invocations to open public school board meetings and where school boards are attempting to disclaim such speech as private speech as a way to comply with the Constitution. An exceedingly cautious analysis of these private speech claims will dovetail with the Court's constitutionally cautious treatment of children and will reflect the Court's recognition that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[374] So, like the Supreme Court's proper

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speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion))); Jay Alan Sekulow, James Henderson & John Tuskey, *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1018 (1995) (identifying this distinction as a core principle of school Establishment Clause jurisprudence).

369 *See* Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147, 1172 (2002) (characterizing student religious speech in schoolhouse environments as "grey area speech"); Lund, *supra* note 28, at 1016 (discussing the difficulties in classifying many types of speech as private speech or government speech).

370 *See* Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (noting this judicial deference to state and local school entities); Patrick M. Garry, *The Flip Side of the First Amendment: A Right to Filter*, 2004 MICH. ST. L. REV. 57, 65 ("[S]chool boards have broad discretion in the management of school affairs . . . .").

371 *See* Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 491 n.269 (2012) (discussing the critical First Amendment scholarship regarding speech limitations in institutions like public schools).

372 Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982).

373 *See* Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J. concurring) ("Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny."); Leonard I. Garth, *The 2001 Chief Justice Joseph Weintraub Lecture: The Establishment Clause and the Supreme Court: Religion in the Public Schools*, 54 RUTGERS L. REV. 685, 690 (2002) (highlighting the unique locality of public schools within American society and its values).

374 Lee v. Weisman, 505 U.S. 577, 592 (1992).

approach in classifying the student-delivered invocations in *Santa Fe*,[375] federal courts should be particularly skeptical when faced with claims of private student speech in the context of student-led invocations at school board meetings.

This is necessary because these calls for private student speech have often originated from circumspect forces. These state actors should not be allowed to do an end run around the restraints of the Establishment Clause by attempting to have these cases resolved incorrectly on the threshold issue of private speech and by exploiting children to avoid the harder question of establishment jurisprudence under the First Amendment.[376] The federal courts should not allow a group of well-respected adults who were elected to guide public school policy to elevate children in the school community by bestowing them with the honor of leading a school board meeting prayer and then claim that this process is shielded from the Establishment Clause as the student is engaging in purely private speech.[377]

Courts need not be deferential to state entities' claims, like these, that the religious speech at issue is private student speech, when such a statement is not sincere.[378] Essentially, Establishment Clause jurisprudence requires no such deference when state claims are a sham and an attempt to evade the application of the First Amendment restraints on the establishment of religion.[379] The Court cemented this principle into its school law establishment jurisprudence in invalidating a school creation-science statute in *Edwards v. Aguillard*.[380] There, the

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375 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 303, 306, 310 (2000).

376 *See, e.g.*, Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 710 (2001) ("If officially sanctioned prayers at public events are unconstitutional, government bodies cannot evade constitutional limitations by clever stratagems."); Timothy Zick, *Property as/and Constitutional Settlement*, 104 NW. U. L. REV. 1361, 1413 (2010) (identifying the "disconcerting . . . possibility that the government speech principle might be used to effect an end-run around the Establishment Clause").

377 *See generally* Jeffrey M. Cohen, *The Right to Learn: Intellectual Honesty and the First Amendment*, 39 HASTINGS CONST. L.Q. 659, 676 (2012) (noting that "savvy public officials, intent on hiding their religious purpose and watering down the effect of their acts, may evade constitutional bars" with religious activities in the public school environment).

378 *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1149–50 (9th Cir. 2018) (determining that a claimed secular purpose for a school board invocation policy and practice was not sincere).

379 *See generally* Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 405 (discussing how the government should not be allowed to evade Establishment Clause liability through the use of the claim that its surrogates are engaging in private speech, when such surrogates are acting as mouthpieces of the State).

380 Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.").

Court did not allow the State to go beyond the constraints of the Establishment Clause by articulating a neutral purpose that would have a coercive effect or an effect of endorsement of religion.[381] Similarly, in *Santa Fe*, the Court found that even if the football game prayer policy was facially neutral—which it was not—the Establishment Clause would not allow the "State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions."[382] Analogously, the lower federal courts and the Supreme Court should reject any similar sham claims that student-delivered school board meeting prayer is private student speech that is not bound by the dictates of the Establishment Clause.

In doing so, federal courts will properly apply the Supreme Court's protective "schools are different" establishment ideology and will provide the necessary safeguards for America's vulnerable schoolchildren that are at the core of this ideology in a beneficent, liberties-recognitive way.[383] In properly classifying this type of school board meeting prayer as government speech, courts will acknowledge the unequal power dynamic between students who are invited to pray and the adult leaders of the school community who extend those invitations.[384] This power discrepancy creates a significantly diminished capacity for students to refuse to participate in a religious exercise with these school board meeting prayers without forfeiting those tangible and intangible benefits that motivate them throughout their school attendance.[385] Consequently, courts should apply this special establishment jurisprudential approach and should characterize any argument that this speech is the organic private speech of a schoolchild,

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381 *See id.*

382 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307 n.21 (2000) (quoting Capitol Square Rev. and Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring)).

383 *See* Cooley, *Framers' Fidelity*, *supra* note 26, at 56 (discussing the Court's "repeated recognition of the special school setting [that] has resulted in the creation of a protective 'schools are different' ideology for Establishment Clause analysis" (footnotes omitted)).

384 *See generally* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 478 (1982) (discussing the broad general powers of school boards); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("Boards of Education . . . have, of course, important, delicate, and highly discretionary functions . . . ."); Stephen R. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 377–79 (1969) (discussing the broad disciplinary and administrative powers of school boards over student actions that have been upheld by courts).

385 *See* Lee v. Weisman, 505 U.S. 577, 586 (1992) (discussing how noncompulsory arguments attendant to school prayer ignore the student forfeiture of benefits that motivate them to attend school).

who has freely chosen to lead the prayer without any active or indirect state pressures to deliver such an invocation, as a specious one.[386]

Such a judicial determination by the Supreme Court ultimately will be necessary to curb the particular and pernicious problem with state entities asserting, or with lower federal courts finding, that student-delivered school board meeting prayers are the private speech of schoolchildren that takes these prayers outside of the ambit of Establishment Clause analysis. Rather than constituting pure private speech,[387] the religious speech in these cases is governmental speech, which qualifies as official state conduct that is subject to Establishment Clause jurisprudence.[388] Specifically, when students pray or communicate religious messages on government property at government-sponsored, school-related events, which include public school board meetings, (1) as a result of a state-initiated, selective-access, majoritarian-process government practice or policy that invites religious speech and (2) as representatives of the school who are objectively cloaked in the indicia of actual or reasonably perceived state messaging endorsement that creates a religious insider/outsider polarity, the courts should not defer to state claims that this is private student speech.[389] Instead, this is a particular type of school-sponsored speech—state loudspeaker speech—that constitutes government speech.[390] This test produces a clear rule that state loudspeaker speech qualifies as official state conduct that is subject to Establishment Clause jurisprudence. Further, this religious loudspeaker speech at school

386 *See* Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of 'Bending' History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 543 (1987) (arguing that there are First Amendment limits to the extent that school boards can engage in indoctrination based on "the special captive status of public school students").

387 *See* Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 616–18 (2011) (arguing that the government maintenance of control over an institutional setting, like the public school environment, where individuals are invited to deliver prayer, triggers Establishment Clause limitations).

388 *See* Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 378 (2009) (discussing how the characterization of student speech via the loudspeaker in *Santa Fe* was deemed to be government speech, rather than private speech). Nelson Tebbe has deemed analogous action in other areas of Establishment Clause jurisprudence as "ventriloquism—using a private party to convey what essentially remained a government message." Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. 70, 71 (2009).

389 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302–04, 306–10 (2000) (providing the baseline for the determination that this speech is government speech and not private speech for Establishment Clause analysis).

390 Here, the governmental control over and initiation of the speech is akin to the governmental control over and initiation of the prayer delivered by students via the loudspeaker in the *Santa Fe* case. *See id.* at 295. So, this provides an apt metaphor to this Article's creation of this categorical designation of student-delivered school environment prayer as state loudspeaker speech.

board meetings is a violation of the Establishment Clause, given the coercion that is endemic in the environment that gives rise to it.[391]

An inapposite judicial finding—that this school board meeting invocation-loudspeaker speech is private speech not subject to the Establishment Clause—would diminish respect for children's autonomy to engage in core protected private religious speech and would teach antidemocratic principles in an environment that is designed to do the opposite.[392] State claims of free exercise of religion through private speech framing of student prayers that are delivered through state sponsorship cannot be used to circumscribe the limits of the Establishment Clause.[393] Such claims muddy the waters about the actuality of protected religious speech of students in the schoolhouse environment. Such claims also violate the charge of state school boards to act in a pedagogical role to inculcate students with truly democratic and constitutional values.[394] This charge requires courts and these entities to acknowledge that student-delivered prayer is State-sponsored government speech for First Amendment purposes.

Consequently, all courts, including the Supreme Court, should reject this threshold argument of private speech, when evaluating the boundaries of the Establishment Clause, in contexts involving student-delivered prayers or religious speech that are delivered through the loudspeaker of the State at public school board meetings. This will prevent sham state attempts to do an improper end run around the

391 *See* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 377 (1992) (characterizing school prayer as "coerced worship," which is an "abuse forbidden by the Establishment Clause"); Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 502 (1995) (discussing the "indirect coercion—unwanted exposure to religion by virtue of state action, even in the absence of official compulsion" that takes place with school prayer); James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 653 (2011) (discussing the "basic democratic premise that government decision making is to be influenced by public opinion representing the uncoerced views of the people, not the government using citizens as its mouthpiece").

392 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (charging boards of education with "educating the young for citizenship").

393 *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.").

394 *See* Bd. of Educ. v. Pico, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting) (arguing that local school boards are the drivers of "democracy in a microcosm"); Michelle S. Simon, *Walking Out: Schools, Students, and Civil Disobedience*, 69 SYRACUSE L. REV. 309, 349 (2019) ("It is the responsibility of school board members to educate their constituencies and ensure that students are being protected and nurtured.").

restraints of the Establishment Clause.[395] It will provide the necessary legal protections for public schoolchildren, whose constitutional rights merit vigilant protection given their future leadership of our country.[396] Finally, a proper application of this framework will ensure respect for children's religious liberty and teach actual democratic principles to schoolchildren in the environment that is designed to do so.[397] This proper judicial approach will classify this government speech as the official state action that it is and will proceed to a complete Establishment Clause analysis. Alternative judicial approaches will "convert[] school law Establishment Clause jurisprudence into a sword that harms religion and the state, rather than preserving it as the shield that it was meant to be for both parts of the axiomatic Jeffersonian principle."[398] And the people who will be most harmed by this jurisprudential confusion are the most vulnerable among us—American public schoolchildren.[399]

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395 *See* Adler v. Duval Cnty. Sch. Bd., 250 F.3d 1330, 1348 (11th Cir. 2001) (Carnes, J., dissenting) ("[A] school board may not delegate to the student body or some subgroup of it the power to do by majority vote what the school board itself may not do.").

396 *See* Christopher M. LaVigne, Comment, *Bloods, Crips, and Christians: Fighting Gangs or Fighting the First Amendment?*, 51 BAYLOR L. REV. 389, 412–13 (1999) ("Freedom flourishes when those who will one day lead are trained in, and have respect for, the constitutional safeguards that protect that freedom.").

397 *See* Donald L. Beschle, *Conditional Spending and the First Amendment: Maintaining the Commitment to Rational Liberal Dialogue*, 57 MO. L. REV. 1117, 1152 (1992) (discussing the "obligations of the government as teacher" in the context of proper judicial enforcement of Establishment Clause limitations in public schools); Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 85–86 (1990) [hereinafter Ingber, *Rediscovering*] ("[P]ublic recognition of first-amendment rights for students itself serves a necessary indoctrinative function.").

398 Amanda Harmon Cooley, *Justiciability and Judicial Fiat in Establishment Clause Cases Involving Religious Speech of Students*, 22 U. PA. J. CONST. L. 911, 1000 (2020) [hereinafter Cooley, *Justiciability and Judicial Fiat*] (citation omitted).

399 *See* N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 661 (Fla. 2003) (framing constitutional analysis within the perceptual context "that children are vulnerable and commonly have different maturity and experience levels than adults"); Cecelia M. Espenoza, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407, 408 (1996) (discussing the constitutional vulnerability of children "as nonvoting actors in society").

B. *Public School Board Meeting Prayer Does Not Fit Within the Legislative Prayer Exception to the Establishment Clause*

In addition to its failure to explicitly reject the State's argument that the student prayer at issue was private speech in *American Humanist Ass'n*, the Fifth Circuit also set faulty precedent by deeming public school board meeting prayer to be subject to the legislative prayer exception to the Establishment Clause.[400] The historical approach to Establishment Clause analysis that is at the core of the legislative prayer exception cannot be constitutionally applied to public school board meeting prayer cases. In *Marsh*, the Supreme Court explicitly "carv[ed] out an exception" to its Establishment Clause prayer jurisprudence that it had developed in the educational law setting.[401] In doing so, the Court used this historical approach to hold that the Nebraska Legislature's practice of having a State-paid chaplain open its sessions with a prayer was not a violation of the Establishment Clause because "the Founding Fathers began their meetings with legislative prayers,"[402] dating back to the First Congress.[403] This history-based legislative prayer exception was also used thirty years later in *Town of Greece* to uphold the constitutionality of town board meeting prayers.[404] However, the use of mere history, without supporting constitutional legal principle, to create the legislative prayer exception to the Establishment Clause was an error by the Court that certainly should not be extended to encompass public school board meeting prayers.[405]

In its school law cases, the Supreme Court has properly rejected historical approaches to the interpretation of the Establishment Clause, stating that "a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted."[406] Instead, the jurisprudence in this area is "one of line-drawing, of determining at what point a dissenter's rights of religious

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400 *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 527 (5th Cir. 2017).

401 Marsh v. Chambers, 463 U.S. 783, 796, 813 (1983) (Brennan, J., dissenting).

402 Eric J. Segall, *Mired in the* Marsh*: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIA. L. REV. 713, 714 (2009).

403 *See Marsh*, 463 U.S. at 787–90.

404 Town of Greece v. Galloway, 572 U.S. 565, 569–70, 575 (2014) (citing *Marsh*, 463 U.S. at 783).

405 *See* Segall, *supra* note 402 (arguing that the "purely historical test [used by the Court in its creation of a legislative prayer exception] was not reflective of Establishment Clause doctrine at the time, and is still not today").

406 Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987).

freedom are infringed by the State."[407] Further, if history were to be relevant at all within this analysis, a proper historical application would reject the constitutionality of school board meeting prayers, given that the country was "founded upon the principle of religious liberty," whereby freedom of conscience was not limited to just that of the "majority's creed."[408]

This is the approach that the Court has taken in its school prayer jurisprudence. In *Engel*, the Court incorporated the history of the origins of America as the basis for its rationale in determining that school prayer was an unconstitutional violation of the Establishment Clause, declaring as "a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America."[409] Given the special circumstances of the public school environment, which extends to the governing bodies of those schools and their meetings, it is constitutionally infirm to conclude that the legislative prayer exception, which is rooted in a historical justification of the Establishment Clause, applies to public school board meeting prayer. History simply does not provide the answer that this type of prayer fits within the narrow legislative prayer exception in order to pass muster under the First Amendment.[410]

In addition to this general positivist application of American history as a limitation on school prayer, the Court has expressly acknowledged that the legislative prayer exception has no place within other school law Establishment Clause cases. In *Lee*, the Court highlighted that *Marsh* could not be applied to school prayer because of the "[i]nherent differences between the public school system and a session of a state legislature."[411] In outlining these differences, the Court emphasized that "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with . . . school event[s that are] most important for the student[s] to attend."[412] Indeed, the *Marsh* majority itself specifically acknowledged that this exception was

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407 Lee v. Weisman, 505 U.S. 577, 598 (1992).

408 Julian R. Kossow, *Preaching to the Public School Choir: The Establishment Clause, Rachel Bauchman, and the Search for the Elusive Bright Line*, 24 FLA. ST. U. L. REV. 79, 81–82 (1996).

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

410 *See generally* Steven K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1753 (2006) (arguing that history alone should not be the basis for constitutional decision-making for the religion clauses of the First Amendment).

411 *Lee*, 505 U.S. at 596.

412 *Id.* at 597.

only for unique circumstances where "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,'" or "peer pressure."[413] Consequently, federal courts should reject any arguments that the legislative prayer exception applies to school board meeting prayers, just as the Court rejected such asserted parallels between *Marsh* and *Lee*.[414] Instead, these courts should be guided, as the *Lee* majority was, by the necessary distinctions of the public school environment that undergird the Court's religious exercises in public schools cases.[415]

The extension of the legislative history exception in *Town of Greece* also cannot be applied to school board prayer, as this is an explicitly narrow exception in which the Court has stated that historical practice essentially allows for what would be deemed an Establishment Clause violation in any other context only in order to "foster an inclusive legislative atmosphere."[416] Given that the Supreme Court has found it inappropriate to apply a historical approach to the evaluation of the constitutionality of religious activities within the public schools, it is equally inappropriate to find that school board meeting prayer falls within the historical approach justification of *Town of Greece*. Unlike that approach, school board meeting prayer is per se noninclusive. Prayer that would violate the Establishment Clause within the schoolhouse gate is still unconstitutional when offered at school board meetings. Prohibiting State-sponsored prayer in schools but allowing it in public school board meetings, the situses for decision-making for all of the community's schoolchildren, presents a mixed constitutional message that would further exacerbate the unequal power dynamic between dominant and minority viewpoints on religious expression for students.

Consequently, it is vitally important that federal courts, and most importantly the Supreme Court, hold the line in not applying the legislative prayer exception to school board meeting prayers in order to guard against a slippery slope degradation of seventy-five years of consistent Establishment Clause jurisprudence analyzing religious practices in public schools.[417] As the Court emphasized in *Wallace*, the importance of "the established principle that the government must pursue a course of complete neutrality toward religion," means that

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

414 *See Lee*, 505 U.S. at 596–97 (rejecting any parallels to *Marsh*) (citation omitted).

415 *See id.* at 597 ("Our decisions in *Engel v. Vitale* . . . and *School Dist. of Abington v. Schempp* . . . require us to distinguish the public school context.").

416 Lund, *supra* note 28, at 1018.

417 *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2089 (1996) (cautioning against "slippery slope" Establishment Clause jurisprudence).

federal courts cannot treat school law religious speech cases as "inconsequential case[s] involving nothing more than a few words of symbolic speech on behalf of the political majority."[418] It is essential, then, that courts hold that these school board meeting prayer cases fit within the taxonomy of the Supreme Court's jurisprudence on religious exercises in public schools, and not within the narrow legislative prayer exception to the Establishment Clause.

C. *Public School Board Meeting Prayer Is Unconstitutional Coercive State-Sponsored Prayer (that Also Lacks a Secular Legislative Purpose) Under the Supreme Court's School Prayer Establishment Clause Jurisprudence*

Rather than being subject to the narrow legislative prayer exception to the Establishment Clause, public school board meeting prayer should be analyzed under the Court's establishment jurisprudence regarding religious exercises in public schools. The crux of this jurisprudence has been adherence to Madisonian neutrality, whereby the government cannot constitutionally aid or inhibit religion.[419] This is reflective of the core Establishment Clause principle that "the state should not compel people to follow the dictates of any given religion or impose burdens on them for failing to do so."[420] The most recent trajectory of the Supreme Court's decision-making in this area has been focused on the invalidation of coercive State-sponsored prayer and prayer policies within the K–12 educational sphere.[421] The lack of a secular purpose has also been used to invalidate these school prayers. These decisions have been based on two primary rationales, which were articulated by the Sixth Circuit's *Coles* case: "One is the fact that students are young, impressionable, and compelled to attend public schools, and the other is that public schools are particularly important to the maintenance of a democratic, pluralistic society."[422] In applying this jurisprudence, federal courts need to follow stare decisis with the Supreme Court's "very strict line with respect to prayer in the public

418 Wallace v. Jaffree, 472 U.S. 38, 60 (1985).

419 *See* Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 50 (2007) (arguing that the Court's Establishment Clause jurisprudence has properly reflected a "recommitment to the Madisonian vision of a secular government, coupled with a vigorous protection of private conscience and freely chosen religious faith").

420 Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 38–39 (2005).

421 *See* William J. Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WIS. L. REV. 1493, 1501 (2006) (discussing the consistent application of the coercion test to school prayer cases by the Court).

422 Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 377 (6th Cir. 1999).

school system"[423] and deem public school board meeting prayer unconstitutional under the Establishment Clause, regardless of personal religious ideology.[424]

In these school board meeting prayer cases, the State crosses the line of neutrality into coercion by impermissibly advancing and endorsing religion.[425] While "coercion [is] not a necessary predicate for a practice to be struck down on Establishment Clause grounds,"[426] the presence of such coercion is a per se violation of this clause.[427] These religion-based invocations at public school board meetings are an exercise of governmental "content control" and not merely support for "a multiplicity of private voices."[428] Regardless of whether the school board members, students, religious leaders, or community members deliver these prayers, what cannot be denied is that the governmental promotion of religious expression at these meetings squarely fits within the dominant Judeo-Christian religious tradition of America, and challenges to these invocations are often deemed anti-religious, and ergo, anti-American, by that state entity.[429]

This results in a majoritarian, coercive religious practice that violates both the Madisonian neutrality at the center of the religious exercises in public schools cases and the Framers' conception that conscientious liberty requires freedom from coercive religious

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423 *Id.* at 379.

424 *See* Evelyn Keyes, *Judicial Strategy and Legal Reason*, 44 IND. L. REV. 357, 381–82 (2011) (discussing the integral importance of judges and legislators "follow[ing] the rules and precedents produced by the system itself and . . . not chang[ing] the rules to fit their own personal conceptions of the 'best' construction of morality").

425 *See* David Cole, *Faith and Funding: Toward an Resressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 589–90 (2002) (noting that government must "not endorse or impermissibly advance religion" in order to remain within the bounds of the Establishment Clause).

426 Mark Strasser, *Passive Observers, Passive Displays, and the Establishment Clause*, 14 LEWIS & CLARK L. REV. 1123, 1128 (2010).

427 *See* Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 U. KAN. L. REV. 227, 259 (2008) (arguing that there is "a right, grounded in the First Amendment's Establishment Clause, not to be confronted or coerced by government displays or acts that have the purpose or effect of endorsing religion or coercing participation in religious activities").

428 Cole, *supra* note 425.

429 *See, e.g.*, Rodney J. Blackman, *Spinning, Squirreling, Shelling, Stiletting and Other Stratagems of the Supremes*, 35 ARIZ. L. REV. 503, 526 (1993) (using Justice Scalia's dissent in *Lee*, which argued that the graduation prayers were constitutional because "they [were] so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself" as an example of the view that "if the government interacts with American religion, there is no violation of the Establishment Clause" (quoting Lee v. Weisman, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting))).

practices.[430] Consequently, even though some may argue that "protecting an individual who subscribes to a minority view" in school prayer cases "strains judicial decision making,"[431] such analysis is a constitutional imperative given the minority of a minority constituency at stake: nonadherent schoolchildren to the majority view—a marginalized population at its extreme in constitutional decision-making.[432]

The unconstitutionally coercive impact of these school board meeting invocations becomes clear given the intended audience of these prayers includes the schoolchildren governed by these public school boards. Unconstitutional coercion is magnified when state prayer is directed toward children,[433] rather than "mature adults."[434] The Court has stated that "symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."[435] K–12 schoolchildren are acutely susceptible to state coercion due to their transitive cognitive development,[436] and they "are particularly vulnerable to the inculcation of orthodoxy in the guise of pedagogy."[437] This pedagogy can occur inside and outside of the classroom, where state officials "mold young minds with the instruction and values inculcation of the public

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430 *See* Rene Reyes, *Justice Souter's Religion Clause Jurisprudence: Judgments of Conscience*, 43 CONN. L. REV. 303, 311 (2010) (quoting Mitchell v. Helms, 530 U.S. 793, 868, 870 (2000) (Souter, J., dissenting)) (discussing this central belief of Madison regarding liberty of conscience).

431 Doug Rendleman, *Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1346 (2002).

432 *See, e.g.*, Nadine Strossen, *Students' Rights and How They Are Wronged*, 32 U. RICH. L. REV. 457, 457 (1998) ("[T]he rights of our nation's youth are always especially embattled—not surprisingly, since they are not yet eligible to vote and, therefore, lack political power." (footnote omitted)).

433 *See* Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 600 n.169 (2005) (discussing the Supreme Court's constitutional concern "that government involvement with religion 'can have a magnified impact on impressionable young minds'" in its Establishment Clause case law (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 383 (1985))).

434 Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) (citing Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

435 *Ball*, 473 U.S. at 390.

436 *See* Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (highlighting students' impressionability); Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) (emphasizing "the impressionable age of the pupils, in primary schools particularly"); Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1120 (1990) (arguing that "the cognitive development of children makes value inculcation [by schools] inevitable").

437 Cole v. Me. Sch. Admin. Dist. No. 1, 350 F. Supp. 2d 143, 150 (D. Me. 2004).

schools."[438] Because schoolchildren are prone to peer pressure and desire to emulate school officials as role models,[439] "[t]he State wields tremendous authority and coercive power over public school students through these processes."[440] Therefore, this vulnerability is a characteristic that increases and distinguishes the efficacy of coercive forces like that which attend the endorsement of religion through public school board meeting prayer by the State.

The Supreme Court even recognized this in its legislative prayer exception case law, where it made much of adulthood in terms of its coercion discussion, stating: "Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith."[441] However, the constitutional calculus is very different when dealing with exposure of schoolchildren to government prayer, given the incredible power the State wields in values and morals inculcation through the mechanisms of its public schools.[442]

And, while coercion of schoolchildren alone is sufficient to deem school environment prayer a violation of the Establishment Clause, coercion of schoolchildren that creates a polarity between minor adherents and nonadherents to the promoted religion by that prayer is an irrefutable basis for federal courts to deem such prayer unconstitutional.[443] The Court emphasized these unique circumstances in *Lee*, where schoolchildren nonadherents required special constitutional protection from state prayer: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[444] These coercive polarities are undeniably created by public school board meeting prayers delivered by adult board members, religious leaders, or community members.

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438 *See* Amanda Harmon Cooley, *Inculcating Suppression*, 107 GEO. L.J. 365, 394 (2019) [hereinafter Cooley, *Inculcating Suppression*] (arguing that American public schools are the primary state force in educating children about civic virtues and democratic principles).

439 *Edwards*, 482 U.S. at 584.

440 Cooley, *Inculcating Suppression*, *supra* note 438.

441 Town of Greece v. Galloway, 572 U.S. 565, 584, 589 (2014).

442 *See* Stanley Ingber, *Religious Children and the Inevitable Compulsion of Public Schools*, 43 CASE W. RSRV. L. REV. 773, 792 (1993) ("Schools cannot avoid instilling values [in schoolchildren].").

443 *See* Engel v. Vitale, 370 U.S. 421, 431–32 (1962) (finding that government support of a certain religious belief in school prayer results in unconstitutional coercion).

444 *See* Lee v. Weisman, 505 U.S. 577, 592 (1992).

This polarizing effect occurs when students are selected to provide these school board invocations, as well. Having students express religious beliefs within this context does not serve the pedagogical aims of public education in terms of supporting a diversity of belief systems and helping to shape student-citizens.[445] Instead, this governmental bestowing of public prayer opportunities communicates a special connection between the leaders of the school community and students who will deliver messages in conformity with the loudest voices of that leadership. Other students could perceive this practice as one that disadvantages them, resulting in a chilling effect from attempting to gain access to this platform to express a message that is at odds with the dominant religious perspective of the school board and community. It is this very type of polarity coercion that the Supreme Court has deemed a strict indicator of an Establishment Clause violation in education law, which necessitates federal judicial invalidation of these school board meeting prayers.[446]

Further, judicial intervention is needed in this area of school law as "those who challenge government-sponsored Christianity are regularly subjected to vitriol and violence,"[447] to the point where many of these Establishment Clause litigants, like those in *Santa Fe*, *Indian River School District*, and *Freedom from Religion Foundation*,[448] are forced to litigate anonymously.[449] The public shaming that has traditionally been foisted upon the student and family litigants in the school prayer jurisprudence of the federal courts is now magnified to an extreme in the age of social media.[450] Consequently, when faced with analyzing public school board meeting prayer, the federal courts have a constitutional and moral obligation to hold that the coercive

445 *See* Ambach v. Norwick, 441 U.S. 68, 79 (1979) (highlighting the importance of schools teaching students "citizen[s'] social responsibilities" as it is "crucial to the continued good health of a democracy"); Stell v. Bd. of Pub. Educ., 860 F. Supp. 1563, 1585 (S.D. Ga. 1994) ("[A] strong educational system is *essential* in preparing our children to meet the demands of an increasingly sophisticated world, and in enabling them to be productive, responsible and thoughtful citizens who may in turn contribute to the community in which they live.").

446 *See Lee*, 505 U.S. at 591–93.

447 Corbin, *The Supreme Court's Facilitation*, *supra* note 360, at 855.

448 *See supra* text accompanying notes 123, 248–52.

449 *See* Corbin, *The Supreme Court's Facilitation*, *supra* note 360, at 855.

450 *See* Jayne S. Ressler, *#Worstplaintiffever: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779, 793–94 (2017) (outlining the intense public shaming on social media against plaintiffs in cases like those that challenge school religious exercises).

environment that is created by this religious State-sponsored speech is a violation of the Establishment Clause.[451]

And, although Establishment Clause coercion analysis alone is a completely sufficient basis to invalidate school board meeting prayer practices, an application of the *Lemon* test also will yield the same result.[452] School board meeting invocations lack a secular purpose, like the school football game invocation policy that was deemed unconstitutional by the Supreme Court in *Santa Fe*.[453] Specifically, school board meeting prayer or invocation policies delineate a state-preferred message of a religious call to order for the audience. Federal courts need not turn "a blind eye to the context" in which these school board meeting prayer policies arise, and typically, "that context quells any doubt that [these policies were] implemented with the purpose of endorsing school prayer."[454] This nonsecular governmental purpose matters,[455] as it is a per se violation of the first *Lemon* test criteria.[456] Consequently, reviewing federal courts, including the Supreme Court, should determine that these public school board meeting prayer policies also have a "purpose and perception of school endorsement of student prayer," which is not permissible under the First Amendment.[457]

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451 *See* Marie A. Failinger, *Women and the Free Exercise Clause: Some Thoughts About a (Religious) Feminist Reading*, 11 FIU L. REV. 47, 67–69 (2015) (arguing that feminist judicial ideology, like Justice Kagan's *Town of Greece* dissent, which emphasizes the impact of the State-sponsored prayer practice on minority religionists, is a necessary and correct approach to Establishment Clause jurisprudence that "embrac[es] contextuality, compassion, generosity, and integrity").

452 The question, though, is whether the oft-maligned *Lemon* test will continue to have validity in the Court's Establishment Clause jurisprudence. *See* Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1727 (2020) ("In its recent *American Legion* decision, the Supreme Court strongly suggested that the three-prong *Lemon* test is essentially dead letter."); Frederick Mark Gedicks, *Atmospheric Harms in Constitutional Law*, 69 MD. L. REV. 149, 157 (2009) (characterizing the *Lemon* test as "terminally ill but still hanging on"); Steven K. Green, *The "Irrelevance" of Church-State Separation in the Twenty-First Century*, 69 SYRACUSE L. REV. 27, 53–54 (2019) (discussing judicial criticism of the *Lemon* test); Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 828 n.37 (2014) (outlining the extensive criticism of *Lemon* by the judiciary).

453 *See supra* text accompanying notes 144–49.

454 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314–15 (2000).

455 *See* Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1, 28 (2007) (discussing the determinative role of governmental purpose in construing the application of the Establishment Clause under the *Lemon* test).

456 *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

457 *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316.

D. *Exclusion of Students During School Board Meeting Prayer Fails to Cure the Constitutional Violation and Teaches a Lesson of Unconstitutional Majoritarianism*

After *Freedom from Religion Foundation*, public school boards might consider adopting invocation policies and practices, like the OCBE policy that provided for the excusing of students during the prayers, as an effort to pass constitutional muster under the Establishment Clause.[458] Here, it seems that the state entities are attempting to escape a judicial determination that these school board meeting prayers are unconstitutionally coercive as the targeted audience no longer includes students. However, these types of invocation policies and practices should also be invalidated by federal courts because exclusion of students during school board prayer fails to cure the constitutional violation, and instead, teaches a lesson of unconstitutional majoritarianism.[459]

The Supreme Court has acknowledged that "[t]he First Amendment is not a majority rule."[460] This extends to the speech and the religion clauses. Consequently, as the Court recognized in *Wallace*, like "the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose [one's] own creed is the counterpart of [one's] right to refrain from accepting the creed established by the majority."[461] Likewise, in *Lee*, the Court emphasized that "[w]hile in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us."[462] And this "counter-majoritarianism of the Bill of Rights, in protecting fundamental minority interests against the will of the majority, enhances democracy."[463]

However, by removing students from what public school boards are pressing to be an integral part of the meeting, they are working in a

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458 *See supra* text accompanying notes 18–19.

459 *See* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 533 ("If the Establishment Clause is to protect religious liberty, it must protect true religious liberty, not the 'love it or leave it' majoritarian version of religious liberty . . . .").

460 Town of Greece v. Galloway, 572 U.S. 565, 582 (2014).

461 Wallace v. Jaffree, 472 U.S. 38, 52 (1985).

462 Lee v. Weisman, 505 U.S. 577, 596 (1992).

463 Thomas Kleven, *The Democratic Right to Full Bilingual Education*, 7 NEV. L.J. 933, 936 (2007).

divisive way that cedes to a majoritarian will.[464] This runs counter to the Establishment Clause and to the democratic role of the public school.[465] Justice Felix Frankfurter emphasized that important role in his *McCollum* concurrence, stating that the public school is "perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people," which requires that it "keep scrupulously free from entanglement in the strife of sects."[466] Certainly, this role also encompasses the decision-making body for the public schools—the public school board.

The removal of students for the prayer also ignores "the unique role that students play at school board meetings."[467] School board meetings are one of the few forums in which students can engage in a democratic process in America and in which they can begin to be molded for full preparation in the civic democracy of our country. This was emphasized by the Third and Sixth Circuits in the *Indian River School District* and *Coles* cases.[468] The State, through all governmental entities, but most importantly, its public school actors, should work to help children "to become self-fulfilling, self-sustaining adults who can contribute to the civic community."[469] Participation in civic democracy begins in the schoolhouse and should continue through participation in the legislative and deliberative processes that govern school matters—school board meetings. So, given the locality and foci of school board

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464 *See* William P. Marshall, *The* Lautsi *Decision and the American Establishment Clause Experience: A Response to Professor Weiler*, 65 ME. L. REV. 769, 780 (2013) ("Placing the prize of government imprimatur of religion as a winnable political spoil is an invitation to the worst sorts of religious divisiveness.").

465 *See* Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 38 [hereinafter Ingber, *Socialization*] ("[O]utsiders, lacking political influence, most need the first amendment to protect them from the tyranny and transient passions of the majority.").

466 Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 216–17 (1948) (Frankfurter, J., concurring).

467 Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 382 (6th Cir. 1999).

468 *See* Doe v. Indian River Sch. Dist., 653 F.3d 256, 277 (3d Cir. 2011) ("The record confirms that student government leaders routinely attend the meetings and speak on a wide variety of issues relating to the student experience in the Indian River School District. Thus, they directly represent student interests at the Board's meeting. The meeting gives student government representatives—and therefore all the students—an opportunity to draw attention to issues that affect their educational experience."); *Coles*, 171 F.3d at 382 ("Meetings of the board serve as a forum for students to petition school officials on issues affecting their education. Simply put, students do not sit idly by as the board discusses various school-related issues. School board meetings are therefore not the equivalent of galleries in a legislature where spectators are incidental to the work of the public body; students are directly involved in the discussion and debate at school board meetings.").

469 Rodney J. Blackman, *Showing the Fly the Way out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 350 (1994).

meetings, and their attendant student-citizens' participation, any "messages of non-inclusion" that are conveyed by this legislative body through absenting students during prayers are even more significant and should be the basis for these policies' invalidation.[470]

Judicial invalidation of these absenting policies is also necessary, given that these State-proffered alternatives to impressionable schoolchildren who are acutely vulnerable to external pressures to opt out of the school board meeting prayer are mostly illusory, and certainly not a remedy to their coercive effect. In his *McCollum* concurrence, Justice Frankfurter highlighted this reality: "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children."[471] The majority of the Court reaffirmed this principle in *Lee*, finding that:

> [a] school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.[472]

Consequently, any state opt-out arguments as a way to evade Establishment Clause liability with these school board invocation policies should be rejected just as they were by the Supreme Court in *Schempp*.[473]

Indeed, any purported choice theory that is used by the State to prop up the constitutionality of school board meeting prayer policies that give attendees the option to leave has no place in educational law Establishment Clause jurisprudence. Just as students should not be forced to choose whether or not to attend a school graduation ceremony or a home varsity football game that would violate their religious liberties,[474] schoolchildren should not have to choose whether to engage in democratic participation in any part of a school board meeting that would violate their constitutional rights.

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470 Donald L. Beschle, *Are Two Clauses Really Better than One? Rethinking the Religion Clause(s)*, 80 U. PITT. L. REV. 1, 10 (2018).

471 *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring).

472 Lee v. Weisman, 505 U.S. 577, 595 (1992).

473 *See supra* text accompanying notes 58–60.

474 *See Lee*, 505 U.S. at 595 (rejecting the State's contention that "the option of not attending the graduation excuses any [impermissible Establishment Clause] inducement or coercion in the ceremony itself").

What becomes clear in this dialectic is that this purported choice theory is actually forfeiture theory, which violates well-established educational law Establishment Clause jurisprudence. The Supreme Court highlighted this in *Lee*, where it determined that a governmental-forced choice upon students "between compliance or forfeiture" with the prayer practice was fundamentally inconsistent with the First Amendment and gave "insufficient recognition to the real conflict of conscience faced by the young student."[475] The Court emphasized that:

> [i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high.[476]

Therefore, federal courts have a constitutional imperative to invalidate any type of school board meeting invocation policy that is premised upon such forfeiture theory that runs directly counter to the First Amendment.

Federal courts should also be weary of state claims that the de minimis nature of the student exclusion from the prayer takes such policies outside of the reach of the Establishment Clause. As the Court stated in its invalidation of school prayer in *Engel*, arguments of the relative insignificance of "governmental endorsement of that prayer . . . when compared to the governmental encroachments upon religion which were commonplace 200 years ago" run counter to the Madisonian neutrality that is the touchstone for determining when state-sponsored prayer within the public school apparatus crosses the line of constitutionality.[477] Further, as the Court determined in *Lee*, it is not constitutionally compliant to require, "with regard to a civic, social occasion," that "the objector, not the majority," is "who must take unilateral and private action to avoid compromising religious scruples."[478] Finally, such a de minimis classification would be an affront to the religion and its adherents, as the Court also concluded in *Lee*.[479]

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475 *Id.* at 595–96.

476 *Id.* at 596.

477 Engel v. Vitale, 370 U.S. 421, 436 (1962) (citing MADISON, *supra* note 56, at 185–86).

478 *Lee*, 505 U.S. at 596.

479 *See id.* at 594 (finding that a de minimis classification of the prayers would be an insult to the religious leader who delivered them "and to all those for whom the prayers were an essential and profound recognition of divine authority").

Likewise, a state claim of brevity cannot be a constitutional basis for evading a violation of the Establishment Clause.[480] The Court rejected any such a finding in *Lee*, where the Court recognized that the constitutional injury extended beyond "the two minutes or so of time" that it took for the prayers to take place.[481] Instead, courts must ever be mindful of "the myriad, subtle ways in which Establishment Clause values can be eroded."[482] And these encroachments certainly should not be allowed for the minors and other adolescents who attend public schools or who attend public school board meetings.[483] It is simply not constitutionally permissible to require these children's forfeiture—even briefly—of participation in important and significant American social, cultural, and political institutions as an attempt to avoid Establishment Clause liability.[484] The State cannot "exact religious conformity from a student as the price of attending" core school events and maintain the bounds of the Constitution.[485] As the Court concluded in *Lee*, "This is the calculus the Constitution commands."[486]

This core school-related environment calculus encompasses public school board meetings, where decision-making occurs that impacts every facet of students' lives. These public school board meetings provide the direction and set the tone for public schools, and they are the lead agents for civic values inculcation and participatory democracy preparation.[487] So, like classrooms, graduation ceremonies, and school football games, public school board meetings cannot be situses of a State-foisted choice of compliance or forfeiture with State-sponsored

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480 *See* Steven G. Gey, *"Under God," The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1894 (2003) (discussing the Supreme Court's staunch rejection of state arguments that school prayer is "constitutionally trivial [and therefore constitutional] because it was brief and objecting students could silently and unobtrusively avoid participating actively in the prayer").

481 *Lee*, 505 U.S. at 594.

482 Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

483 *See* Bruce C. Hafen & Jonathan O. Hafen, *The* Hazelwood *Progeny: Autonomy and Student Expression in the 1990's*, 69 ST. JOHN'S L. REV. 379, 390 (1995) (identifying a school board requirement of student engagement in prayer as an example of a constitutional violation that transcribes the limits of a state's charge to inculcate values through the public schools).

484 *See Lee*, 505 U.S. at 595 (rejecting the state argument of choice theory as a way for a schoolhouse environment prayer to evade a finding of a constitutional violation).

485 *Id.* at 596; *see also id.* at 586 (finding that this applies to school activities beyond those that are subject to compulsory attendance laws).

486 *Id.* at 596.

487 *See* Rosemary C. Salomone, *Struggling with the Devil: A Case Study of Values in Conflict*, 32 GA. L. REV. 633, 636–37 (1998) ("The public schools . . . were conceived as the crucible where our democratic and republican roots would blend together to create citizens who could respect each other's differences while sharing a common ethos of what it means to be an American.").

religious exercises.[488] Such a forced choice is fundamentally inconsistent with the Establishment Clause.

Therefore, all school board meeting invocation policies, including those which absent students from the proceedings during the invocation, should be deemed unconstitutional. By doing so, federal courts will properly interpret the application of the Establishment Clause "as a structural limit on [state] power."[489] This is vitally important in school law because "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[490] And the need for these protections extends beyond the physical public schoolhouse gate to the public school board meeting, because these state bodies "are setting policies and standards for the education of children within the public school system, a system designed to foster democratic values in the nation's youth, not to exacerbate and amplify differences between them."[491]

E. *Judicial Determinations that Public School Board Meeting Prayer Is Unconstitutional Protect Against State Degradation of Religion; Respect Students' Autonomy in the Formation of Conscientious and Religious Beliefs; and Properly Inculcate American Public Schoolchildren with True Civic Democratic Values*

Allowance of public school board meeting prayer is fundamentally inconsistent with the fostering of shared democratic values and with the "fixed star in our constitutional constellation . . . that no official, high or petty, can prescribe what shall be orthodox in . . . religion."[492] Consequently, these prayer policies violate the Establishment Clause. Courts should hold no less to ensure against the degradation of religion by state forces, to respect the autonomy of students' religious choices and conscientious liberties, and to uphold the constitutional and civic democratic values that state entities like public school boards should inculcate in the nation's youth. This is imperative because, as the Supreme Court noted in *Lee*, "[o]ur society would be less than true to

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488 *See* Jonathan C. Drimmer, *Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers*, 74 NEB. L. REV. 411, 418 (1995) (outlining the "myriad educational settings" that have been examined by the Court in its Establishment Clause jurisprudence).

489 Esbeck, *supra* note 30.

490 Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

491 Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 382 (6th Cir. 1999).

492 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

its heritage if it lacked abiding concern for the values of its young people."[493]

Proper Establishment Clause doctrine in education law is neither anti-religious nor hostile to religion.[494] Conversely, it embodies the meaning within the religion clauses "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."[495] The Court's school prayer jurisprudence was largely focused on the avoidance of this unconstitutional dilution of religion.[496] Indeed, the Court recognized the purpose of the Establishment Clause, not as a sword, but as a shield that protects the sanctity of religion in *Schempp*: "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. . . . [I]t is not within the power of government to invade that citadel . . . ." [497] By finding that public school board meeting prayer is unconstitutional, federal courts will be in line with the same constitutional protections at the center of the Court's longstanding religious activities in public schools' jurisprudence.

Future federal court decisions that deem public school board prayer unconstitutional will help to protect against the degradation of religion by keeping it inviolate from the sphere of the State.[498] This is a proper application of the Establishment Clause as "an equal liberty provision,"[499] which respects conscientious liberties and religious convictions. As the Court noted in *Wallace*,

> [T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none

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493 Lee v. Weisman, 505 U.S. 577, 598 (1992).

494 *See id.* (stating that its holding "express[es] no hostility" to religion); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S 290, 290, 294 (2000) (identifying the litigants that challenged the school's actions of student-led invocations prior to football games under the Establishment Clause as a Mormon family and a Catholic family); Kermit V. Lipez, *Reflections on the Church/State Puzzle*, 72 ME. L. REV. 325, 360 (2020) (discussing how the finding in Justice Kagan's *Town of Greece* dissent that the town council meeting prayer was a violation of the Establishment Clause was "no disparagement of religion").

495 *Lee*, 505 U.S. at 589.

496 *See* Thomas C. Berg, *Religious Displays and the Voluntary Approach to Church and State*, 63 OKLA. L. REV. 47, 57 (2010) (framing a focal point of the school prayer jurisprudence as "[c]oncerns about the dilution of religion").

497 Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 226 (1963).

498 *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431–32 (1962) ("The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." (footnote omitted)).

499 Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 568 (1991).

> at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . .[500]

Continued allowance of public school board meeting prayer violates conscientious liberties and also supports the potential for "[a] state-created orthodoxy [that] puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."[501]

However, by declaring public school board meeting prayer unconstitutional, federal courts will properly interpret the Establishment Clause's intent to support autonomous private choices regarding religious belief and to protect the sanctity of religion itself.[502] Despite dissenting views on the scope of the Establishment Clause, almost all of these interpretations share the social value of voluntarism.[503] "Religious voluntarism thus conforms to that abiding part of the American credo which assumes that both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit."[504] This type of freedom was at the core of Madison's writings that provided the foundation for his original drafting of the Establishment Clause.[505]

Finally, just as the school board stands in a pedagogical role for teaching students the mechanisms of participation in a constitutional civic democracy,[506] the courts, in construing the constitutionality of public school board meeting prayers, are charged with ensuring that

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500 Wallace v. Jaffree, 472 U.S. 38, 53–54 (1985).

501 Lee v. Weisman, 505 U.S. 577, 592 (1992).

502 *See id.* at 589 ("The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.").

503 *See* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968).

504 *Id.*

505 *See* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 967–68 (1989) (discussing Madison's defense of "the 'unalienable right' of religious freedom with an explicitly religious premise" in his *Memorial and Remonstrance* (citing Letter from James Madison to William Bradford (Jan. 24, 1774), *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY 47, 47 (R. Alley ed. 1985))).

506 *See* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."); Laura Rene McNeal, *Hush Don't Say a Word: Safeguarding Students' Freedom of Expression in the Trump Era*, 35 GA. ST. U. L. REV. 251, 296 (2019) (arguing that children are prepared for civic participation largely by public schools).

anti-establishment accretions of state prayer harm neither government nor religion. This is in accordance with the Establishment Clause's original purposes of religious and conscientious liberty, as well as the preservation of the sanctity of government and religion.[507] This is necessary, given that "[t]he Establishment Clause exists largely to keep the government from becoming infused with religion to the detriment of the religious liberty of the entire culture."[508] So, by invalidating these school board meeting prayers, federal courts will set a precedent that properly inculcates American public schoolchildren with true civic democratic values that include respect for the individual liberties and governmental limitations established by the First Amendment.

Consequently, the judicial invalidation of school board meeting prayer ensures that conscientious choices lie with the students themselves,[509] rather than a State-imposed forced choice. This will ensure the type of religious autonomy that is at the core of the First Amendment's religion clauses, which is equally as valuable a lesson to impart as is the political autonomy of democratic participation that should be conveyed to schoolchildren through complete access to the open proceedings of the public school board.[510] It will also demonstrate state respect that "[r]eligious faith is a significant component in the lives of many children, forming their identity, values, and sense of self-worth in their developing years."[511] Therefore, it is vital that federal courts

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507 *See, e.g.*, Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1574 (2010) (asserting that the purpose of the Establishment Clause was "religious liberty and equality for all"); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351 (2002) (identifying "[l]iberty of conscience" as the underlying purpose of the Establishment Clause at the time of enactment); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 322 (1989) (arguing that the Establishment Clause was enacted to ensure that "[g]overnment intrusion may not corrupt religious groups, but neither may religious groups wield excessive power over societal policy" (footnotes omitted)).

508 Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 28 (2009) ("The defining paradox of the Establishment Clause is that it exists to protect the government from religion in order to protect religion from the government.").

509 *See* Engel v. Vitale, 370 U.S. 421, 435 (1962) ("It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.").

510 *See* Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1264 (2000) ("The development of a sense of religious identity is an important piece of the adolescent's larger identity formation process[, g]oing as it does to the core of one's beliefs, values, practices, and affiliations . . . ."); Ingber, *Rediscovering*, *supra* note 397, at 85 ("Children are unlikely to internalize the value of the civic virtues of participation and tolerance if their schools appear to systematically trivialize and ignore such virtues.").

511 Steven K. Green, *All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools*, 42 U.C. DAVIS L. REV. 843, 848–49 (2009).

provide a consistent and constitutional approach to the evaluation of Establishment Clause claims involving prayer in an educational law context. And this is why a Supreme Court determination that public school board meeting prayer is unconstitutional is a necessary one.[512]

CONCLUSION

Public school board meeting prayer falls within the category of public school religious activities that the Court has deemed to be a violation of the Establishment Clause, rather than the type of prayer that is subject to the narrow legislative prayer exception. As a result, public school board meeting prayer is unconstitutional because it is State-sponsored, majoritarian, coercive prayer that impacts and affects impressionable young schoolchildren. This violates the purposes of the First Amendment religion clauses to protect the liberties of conscience of all individuals, to shield religious minorities from majoritarian religious compulsion, and to preserve the sanctity of both government and religion.[513] This is the case when the prayer is provided by clergy members, by school board members, by other state officials, and by students themselves.

This latter case is particularly problematic as it allows state officials to attempt to clothe government speech in the indicia of the private speech of the students and to work to subvert the core essence of Establishment Clause restrictions.[514] Federal courts must not fall into this trap, as it would set a particularly dangerous precedent that would give rise to end runs around the religion clauses of the First Amendment. Federal courts also must determine that attempts to absent students from school board meeting prayers do nothing to cure the constitutional violation and work to strip students from the preparatory work of civic participation that is inherent in school board meetings.

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512 *See, e.g.*, Rendleman, *supra* note 431, at 1347 ("A citizen's constitutional liberties and the rule of law are hollow without a court and a procedural process to vindicate them and effective remedies to implement them.").

513 *See* James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595, 628 (2019) (discussing the Court's identification of freedom of conscience as a core purpose of the Establishment Clause in school law cases); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1239 (2010) (identifying the preservation of the distinct spheres of religion and government as a goal of the Establishment Clause).

514 *See* Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1292–93 (2002) (discussing the First Amendment's application only to government conduct and not to private action).

Both of these examples of the need for proper constitutional interpretation regarding the evolving nature of school board meeting prayer are necessary in order to provide a proper application of the Constitution. Here, more than ever, the federal courts have to set the proper constitutional boundaries of the Establishment Clause within public school board meetings as running parallel with these delineations in the public schools themselves.[515] This is necessary to end the mixed messages of allowing prayer at public school board meetings, but prohibiting it in schools, because it is detrimental to students' religious and conscientious liberties. Permitting public school board meeting prayers needlessly adds tension to an educational environment based exclusively on accommodating a select portion of a community that values religious expression in public education and abandoning the interests of the remainder of that school community. However, this runs counter to the Court's directive in *West Virginia State Board of Education v. Barnette* charging these state entities with the need for unparalleled protection of students' constitutional freedoms when those protections are at risk from impingement by state school officials: "That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[516] Therefore, the federal courts need to step in to invalidate these school board meeting prayer policies to avoid that "crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school."[517]

This is acutely important given the unique situating of public schools in the United States in morals and values formation.[518] As Justice Frankfurter asserted in his concurrence to *McCollum*, "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its

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515 *See* Lee Ann Rabe, *A Rose by Any Other Name: School Prayer Redefined as a Moment of Silence Is Still Unconstitutiona*l, 82 DENV. U. L. REV. 57, 78 (2004) (arguing that the Establishment Clause's "constitutional guarantee must be at its strongest in our public schools").

516 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

517 Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985).

518 *See* Michele Estrin Gilman, *"Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses*, 55 VAND. L. REV. 799, 871 (2002) (discussing "the unique role schools play in forming moral character" of schoolchildren).

schools . . . ."[519] However, this task will not be an easy one,[520] given the dissension within the American populace about the proper place of prayer in our country and for our country's schoolchildren.[521] Still, by holding in this way, federal courts can fulfill the command of the Court in *Committee for Public Education and Religious Liberty v. Regan*, which provided that a proper balance of neutrality in "the continuing interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause."[522]

And this construction should be that school board meeting prayers are a violation of the Establishment Clause because they are State-sponsored, coercive prayers that run contrary to the core of this religion clause of the First Amendment.[523] They are not the private speech of the students. They are not subject to the legislative prayer exception. They cannot be cured as constitutional violations by requiring students to not be present during their delivery or by asserting that they are de minimis violations of the Establishment Clause. Any such "[c]laimed *de minimis* Establishment Clause violations . . . are still Establishment Clause violations,"[524] especially within the context of prayer and impressionable schoolchildren who are seeking to participate in one of

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519 Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

520 *See* Susan Welch & John Gruhl, *Does* Bakke *Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools*, 59 OHIO ST. L.J. 697, 719 & n.96 (1998) (using the school prayer cases as a paradigmatic example of how decisions that are viewed as a contradiction of community norms "may be less likely to be fully implemented").

521 *See* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) ("But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country."); Lauren Maisel Goldsmith & James R. Dillon, *The Hallowed Hope: The School Prayer Cases and Social Change*, 59 ST. LOUIS U. L.J. 409, 448 (2015) (noting that the Court's school prayer cases are some of its "most controversial" ones and that many Americans have resisted their ideology); James L. Underwood, *The Proper Role of Religion in the Public Schools: Equal Access Instead of Official Indoctrination*, 46 VILL. L. REV. 487, 487 (2001) (concluding that the debate over religion's roles in public schools "has reached a new level of intensity").

522 *Regan*, 444 U.S. at 662.

523 *See* Caroline Mala Corbin, *Christian Legislative Prayers and Christian Nationalism*, 76 WASH. & LEE L. REV. 453, 457 (2019) (arguing that "government prayers that are mostly or entirely Christian" are "automatically unconstitutional, full stop" given that "[o]ne of the goals of the Establishment Clause was to stave off developments like Christian nationalism and its religious (and racial) hierarchies").

524 Cooley, *Justiciability and Judicial Fiat*, *supra* note 398, at 995.

the few democratic outlets in the nation that is open to them.[525] Quite simply, as the Supreme Court stated in *Schempp*, "[I]t is no defense to urge that the religious practices [in the public school environment] may be relatively minor encroachments on the First Amendment."[526]

Consequently, the federal courts should no longer uphold school board meeting prayers. These prayers encroach upon the religious and conscientious liberties of the minor schoolchildren who are most impacted by this coercive, State-sponsored religious speech; they allow the State to transverse the boundaries of religious sanctity; and they give rise to majoritarian governmental orthodoxy.[527] These are all undeniable Establishment Clause violations. It is time for principled judicial decision-making from all federal courts, including the Supreme Court, which aligns with seventy-five years of established school prayer jurisprudence, to end these significant constitutional abuses.[528]

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525 *See* Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 256 (2012) (discussing how public schools and state school entities should afford students "appropriately structured outlets for their nascent political activism").

526 Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963).

527 *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 673 (2002) (identifying "protection of religious liberty as the central goal of the [Establishment] Clause").

528 *See* Ingber, *Socialization*, *supra* note 465, at 38–39 (discussing the constitutional dangers of the proselytizing of a school board); Robert L. Tsai, *Democracy's Handmaid*, 86 B.U. L. REV. 1, 41 (2006) ("Principled judgment on the part of law's stewards, including adherence to stare decisis, plays a crucial role in projecting law's equilibrium."); John G. West, Jr., *The Changing Battle over Religion in the Public Schools*, 26 WAKE FOREST L. REV. 361, 364 (1991) (discussing the Court's absolute jurisprudential adherence to its stare decisis that "officially sponsored religious activities in the schools constituted an establishment").