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When life hands you Lemons, use them: The Establishment Clause in the 21st Century as Applied to Legislative-Led Prayer

Danielle Falzone

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I. Introduction

Imagine you have recently moved to a new town. You have a list of board requests to make at the next local board meeting and to ensure you make a positive impression, you arrive early and personally introduce yourself to each member. The board meeting is about to start, when one of the board members instructs you to stand for prayer. As a self-professed pagan, being forced to worship Jesus Christ is bothersome. You are at a crossroad: do you remain seated and jeopardize your chances of being granted permission from the board for your requests or do you reluctantly stand in order to seek a favorable ruling? The cases explored throughout this note will illustrate this scenario in greater detail, and demonstrate how legislative regulation of prayer is unconstitutional.

There is a long history of chaplain-led prayer that Courts have found to be consistent with the Establishment Clause.¹ Courts have even gone so far as to hold that open invitation to local clergy, even if it ends up being predominately Christian, is consistent with the Establishment Clause.² Now, however, a new practice has arisen: the legislators themselves offering the prayers.³ The Fourth and Sixth Circuits have issued conflicting opinions interpreting the constitutionality of legislative-led prayers, creating a spirited circuit split.⁴

¹ See generally *Marsh v. Chambers*, 463 U.S. 785, 793-95 (1983).

² See also *Town of Greece v. Galloway*, 134 S. Ct. 1813 (2014)(holding that clergy led prayer which is mostly Christian is consistent with the Establishment Clause, as long as the practice is neither discriminatory or coercive in nature).

³ See generally *Lund v. Rowan Cty.*, N.C., 863 F.3d 268 (4th Cir. 2017); *Bormuth v. Cty. of Jackson*, 870 F.3d 525 (6th Cir. 2017).

⁴ *Id.*

The Establishment Clause (“the Clause”) protects individuals who are unwilling to conform to legislative-led prayers.⁵ For years, the Supreme Court’s Establishment Clause jurisprudence has been in disarray.⁶ As such, and unsurprisingly, circuit court judges are divided, on the constitutionality of the issue related to which standard applies to the review of cases challenging the Clause.⁷ Recently, the Fourth Circuit ruled *en banc* that legislative-led prayers violate the Establishment Clause, asserting that the constitutionality of this issue has yet to be addressed by the Supreme Court of the United States.⁸ Conversely, the Sixth Circuit diverted, also *en banc*, and found instead that legislative-led prayer was indeed constitutional, based upon a “historical analysis.”⁹ The constitutionality of legislative-led prayer is uncertain until the Supreme Court speaks.¹⁰

This note will explore the Establishment Clause jurisprudence and the considerable impact history has had on legislative-led prayer. Section II will discuss the various approaches to the Establishment Clause.¹¹ Section III will recount the history of the Clause in the United States and examine the Supreme Court of the United States position on legislative prayer cases.¹² Section IV will analyze the current split in authority between the Fourth and Sixth Circuits in regards to the legislators themselves offering the

⁵ Robert Destro, *The Court after Scalia: “An establishment of religion”*, SCOTUSBLOG (Sep. 12, 2016, 11:02 AM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-an-establishment-of-religion/>.

⁶ See *supra* note 3.

⁷ *Id.*

⁸ *Lund v. Rowan Cty.*, N.C., 863 F.3D 268, 272 (4th Cir. 2017).

⁹ *Bormuth v. Cty. of Jackson*, No. 15-1869, 2017 U.S. App. LEXIS 17174, at *3 (6th Cir. Sep. 6, 2017). Art.

¹⁰ <http://www.newseuminstitute.org/2017/07/18/full-4th-circuit-invalidates-legislator-led-prayer-could-lead-to-supreme-court-review/>

¹¹ These tests include the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1971); the endorsement test, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O’Connor, J., concurring); the coercion test, *Lee v. Weisman*, 505 U.S. 577 (1992); and the “historical analysis”, *Marsh v. Chambers*, 463 U.S. 785 (1983).

¹² *Marsh v. Chambers*, 463 U.S. 785 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1813 (2014).

prayers'.¹³ Finally, Section V will use the facts of both circuit court cases to contend that legislative-led prayers are impermissible under the Establishment Clause.¹⁴

II. Establishment Clause Approaches

The judiciary's primary role is to protect rights guaranteed under the Constitution.¹⁵ The First Amendment provides that, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise of religion."¹⁶ Under the Fourteenth Amendment, the Establishment Clause applies to both the States and to the Federal Government.¹⁷ The judiciary's role is to protect the aforementioned rights guaranteed under the Constitution.¹⁸ Historically, the courts have understood the importance of separation between religion and state,¹⁹ and have held that "religion is a private matter for the individual, the family, and the institution of private choice."²⁰ In *Lemon v. Kurtzman*, the Court held that the Establishment Clause is designed to protect against three main evils: "(1) sponsorship; (2) financial support; and (3) active involvement of the sovereign in religious activity."²¹ In order for a law to comply with the Establishment Clause, it must "(1) have secular legislative purpose; (2) the principal or primary effect must be one that neither advances nor inhibits religion; and (3) the policy must not foster an excessive government entanglement with religion."²² It is important to note that the Supreme Court recognized how unrealistic it is for complete separation between church and state,²³ and thus

¹³ See generally *Lund v. Rowan Cty.*, N.C., 863 F.3d 268 (4th Cir. 2017); *Bormuth v. Cty. of Jackson*, 870 F.3d 525 (6th Cir. 2017).

¹⁴ *Id.*

¹⁵ U.S. CONST. art. III.

¹⁶ U.S. Const. amend. I.

¹⁷ *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)

¹⁸ U.S. Const. art. III.

¹⁹ *Everson*, 330 U.S. 1. "Neither a state or the federal government can, openly or secretly, participate in the affairs of any religious organization and vice versa" *Id.* at 16

²⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

²¹ *Id.* at 612-13.

²² *Id.* at 612.

²³ *Kurtzman*, 403 U.S. 614 (1971).

implied that there are instances where a “relationship between government and religious organizations” is considered both permissible and required contact.²⁴ Specifically, zoning regulations, fire inspections, and compulsory school-attendance are unavoidable and permissible.²⁵ Despite the fact that total separation between church and state is unrealistic in many contexts, it is possible and practical in the legislative setting.²⁶ Each of the aforementioned permissive contacts between government and religious organizations involve a situation where the government’s objective is to further ensure the safety and overall wellbeing of society. Dissimilarly, legislative-led prayer does not call for such action.²⁷

While the *Lemon* test continues to be used in many contexts, other tests have emerged, including the Endorsement and Coercion tests.²⁸ The Endorsement test was used in *County of Allegheny v. ACLU*, where the Court considered whether holiday displays on public property were constitutional.²⁹ Under this test, the Establishment Clause is violated when a reasonable observer would infer that the government “endorses religion.”³⁰ The test ensures that government action does not convey the “message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”³¹ This is a mere modification of *Lemon*’s purpose and effects prongs. The purpose prong asks whether the government’s legitimate intention’s is to endorse or reject religion.³² On the other hand, the effects prong asks whether a “reasonable observer” would infer the government’s act as endorsement

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See generally *Lund v. Rowan Cty.*, N.C., 863 F.3D 268, 272 (4th Cir. 2017).

²⁸ The endorsement test, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O’Connor, J., concurring); the coercion test, *Lee v. Weisman*, 505 U.S. 577 (1992).

²⁹ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 655-56 (1989).

³⁰ *Id.*

³¹ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

³² *Cnty. of Allegheny*, 492 U.S. at 619.

or rejection of their particular religious belief.³³ The majority applied the endorsement test to determine that a religious symbol placed prominently in a government building violated the Establishment Clause, while a religious symbol surrounded by secular symbols and civic signs did not.³⁴ For the first time, a majority of the Court chose the language of the endorsement test as a new way to analyze Establishment Clause quandaries.³⁵

In Justice Kennedy's dissent, he proposed a second alternative to the *Lemon* test, focusing solely on the effects prong.³⁶ He concentrated on coercion, both direct and indirect, contending that the government may not coerce citizens to take part in or support "any religion or its exercise."³⁷ Although the majority refused to agree with his line of reasoning, this "coercion" test has been used on occasion to decide the constitutionality of Establishment Clause violations in later cases before the Court.³⁸

III. Jurisprudence of Legislative Prayer

The Court has on two occasions addressed the issue of prayers given at the start of a legislative session: by a chaplain and by invited members of local clergy.³⁹ In its first case, *Marsh v. Chambers*, a member of the Nebraska Legislature sued in federal court asserting that prayers offered by a state-selected and state-funded chaplain before a legislative session, violated the Establishment Clause of the First Amendment.⁴⁰ Both the district court and the Eighth Circuit Court applied the three-prong *Lemon* test, holding that state employment of a paid Presbyterian minister violated the Constitution.⁴¹ The

³³ *Id.*

³⁴ *Id.* at 579.

³⁵ *Id.* at 589.

³⁶ *Id.* at 658. (Kennedy, A., dissenting).

³⁷ *Id.*

³⁸ *Lee v. Weisman*, 505 U.S. 587 (1992).

³⁹ *Marsh v. Chambers*, 463 U.S. 785 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1813 (2014).

⁴⁰ *Marsh v. Chambers*, 463 U.S. 785 (1983).

⁴¹ *Id.* at 785-86. (Citing *Chambers v. Marsh*, 675 F.2d 228 (8th Cir. 1982)).

district court did not find that a paid chaplain offering nonsectarian prayers was per se unconstitutional,⁴² however a “single minister being paid to offer legislative prayer . . . over an extended period of time” is excessive entanglement which violated the First Amendment.⁴³ The Supreme Court granted certiorari and reversed the lower courts, holding that employment of the paid minister by the state to open legislative session with the invocation of prayer was constitutional.⁴⁴

The Court deviated from the *Lemon* test, which, at the time had been consistently used in Establishment Clause cases for over a decade, and instead employed a “historical standard” in order to determine whether there was an Establishment Clause violation.⁴⁵ When applying the “historical standard,” the court must identify historical patterns.⁴⁶ The Court found that prayers given in front of legislature are historically permissible,⁴⁷ contending that such a prayer is “deeply embedded in the history and tradition of this country.”⁴⁸ The Founding Fathers clearly did not view the practice as violating the Establishment Clause, as three days after they authorized the appointment of paid chaplains in the First Congress they adopted the exact language in the Bill of Rights.⁴⁹ Moreover, the majority determined that the content of legislative prayer was irrelevant to judges if there is no evidence that the prayers had been “exploited to proselytize any one, or to disparage any other faith or belief.”⁵⁰ Since there was no evidence that the prayers exploited or disparaged one particular faith, the Court thus declined to engage in a fact sensitive analysis to determine if the content of prayers were unfair.⁵¹

⁴² *Chambers v. Marsh*, 675 F.2d 228, 235.

⁴³ *Id.*

⁴⁴ *Marsh v. Chambers*, 463 U.S. 786-88.

⁴⁵ *Id.* at 795.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Chambers*, 463 U.S. at 786.

⁴⁹ *Id.* at 790.

⁵⁰ *Id.*

⁵¹ *Id.*

The dissent was reluctant to support a ruling based upon unique history, stating courts “should not rely heavily on the advice of the founding fathers because the message of history often tends to be ambiguous and not relevant to a society far more heterogeneous than that of the framers.”⁵² Absent the long history of legislative prayer by the Founding Fathers, the dissent found that the practice is unconstitutional.⁵³ Holding that it is a mere assumption that the Framers of the Establishment Clause would not have permitted an act that they believed to be unconstitutional and in violation of the clause.⁵⁴ James Madison, who authorized the appointment of paid chaplain’s in the First Congress, later revealed that he believed this practice to be unconstitutional.⁵⁵ After *Marsh* the Court went back to applying the *Lemon* test, or tests of endorsement or coercion; but it did not rely on a “historical approach.”⁵⁶ Since this ruling, some courts have described *Marsh* as an outlier.⁵⁷

Over thirty years later, in 2015, *Town of Greece v. Galloway* revisited the “historical analysis” of legislative prayer under *Marsh*.⁵⁸ The plaintiffs, represented by Americans United for Separation of Church and State (“AU”), contended that the legislative prayer practice violated the Establishment Clause of the First Amendment, by preferring Christian chaplains instead of non-Christian chaplains and by permitting volunteer chaplain led prayer.⁵⁹ The town adhered to an “informal method for selecting prayer

⁵² *Id.* at 791. (Citing *Abington School Dist. v. Schempp*, 374 U.S. 203, 237) (Brennan, J., concurring) (1963)).

⁵³ *Chambers*, 463 U.S. 814.

⁵⁴ *Id.* at 814-15.

⁵⁵ *Id.* at 815; Fleet, Madison's "*Detached Memoranda*," 3 WM. & MARY QUARTERLY 534, 558 (1946).

⁵⁶ See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 40 (2004) (O'Connor, J., concurring in the judgment) (contending that *Marsh* was an outlier because of the “extremely long and unambiguous history” of legislative prayer); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999) (“*Marsh* is one-of-a-kind[.]”)

⁵⁷ *Id.*

⁵⁸ *Town of Greece v. Galloway*, 134 S. Ct. 1816 (2014).

⁵⁹ *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 196–97 (W.D.N.Y. 2010).

givers, all of whom were unpaid volunteers.”⁶⁰ The guest clergy were allowed to devise the prayers, based upon their own religious beliefs.⁶¹ All of the participating clergy were Christian, and thus, the prayers were predominantly Christian.⁶² The district court dismissed the claim and held the practice to be constitutional,⁶³ asserting that under *Marsh*, legislative prayers are not required to be nonsectarian.⁶⁴ The Second Circuit reversed, holding the practice to be an impermissible affiliation with Christianity.⁶⁵ Under the “totality of the circumstances” a reasonable observer would view this practice as the town being affiliated with a particular religion, Christianity.⁶⁶

In a 5-4 decision, the Supreme Court reversed the Second Circuit.⁶⁷ In reaffirming *Marsh*, it held that prayers offered by volunteer clergy before a legislative session, were constitutional.⁶⁸ Justice Kennedy concluded that, “the town of Greece [did] not violate the First Amendment by opening its meetings with prayers that comport with our tradition and does not coerce participation by non-adherents.”⁶⁹ Although obligated to preserve a policy of nondiscrimination, the town is not required to hunt for non-Christian clergy outside of its borders.⁷⁰ The town did not violate the Constitution simply because most clergy who offered prayers had a strong affiliation with Christianity.⁷¹ The majority of the court contended that mandating nonsectarian prayer was actually prohibited.⁷² Instruction of nonsectarian prayer would force legislators and courts to censor prayer, generating greater government

⁶⁰ *Town of Greece*, 134 S. Ct. at 1816.

⁶¹ *Id.*

⁶² *Id.* at 1819.

⁶³ *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 196–97 (W.D.N.Y. 2010).

⁶⁴ *Id.* at 219, 241.

⁶⁵ *Galloway v. Town of Greece*, 681 F.3d 34 (2d Cir. 2012).

⁶⁶ *Id.*

⁶⁷ *Town of Greece*, 134 S. Ct. at 1819.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1828.

⁷⁰ *Id.*

⁷¹ *Id.* at 1824.

⁷² *Id.* at 1822.

entanglement than the town’s current practice.⁷³ Justice Kennedy’s stance on nonsectarian prayer instructions is consistent with his holding in *Lee v. Weisman*, where he held the practice to be a means by which the government impermissibly “directs and controls the content of prayers.”⁷⁴

Notably, in *Lee v. Weisman*, the Court considered a public prayer policy at a public high school graduation ceremony, wherein the principal, a government figure, had invited a clergy member to offer invocation and prayers.⁷⁵ The principal advised the clergy member that his prayers must be nonsectarian.⁷⁶ Plaintiff sought a “permanent injunction barring petitioners, from inviting the clergy to deliver invocations . . . at future graduations.”⁷⁷ The district court applied the *Lemon* test and found the public prayer policy violated the Establishment Clause.⁷⁸ Petitioners subsequently appealed, and the United States Court of Appeals for the First Circuit affirmed.⁷⁹ The Supreme Court granted certiorari and affirmed the First Circuits holding.⁸⁰

The Supreme Court noted that the nonsectarian instruction constituted a means by which the government impermissibly “directed and controlled the content of prayers.”⁸¹ According to Justice Kennedy, the content of the nonsectarian prayer placed indirect coercive pressure on students to participate.⁸² The dissent, on the other hand, raised a compelling argument that attendance was voluntary, therefore the students were not coerced to attend.⁸³ However, absence from graduation had—

⁷³ *Greece*, 134 S. Ct. 1822.

⁷⁴ *Lee v. Weisman*, 505 U.S. 588-89 (1992).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 584.

⁷⁸ *Id.*

⁷⁹ *Id.* at 585.

⁸⁰ *Weisman*, 505 U.S. at 586.

⁸¹ *Id.* at 588-89.

⁸² *Id.* at 577, 592.

⁸³ *Id.* at 642.

and still has—significant effects on students, leaving them with no “real choice” but to attend.⁸⁴ While the factual context of *Lee* is different from that of legislative prayer, the Supreme Court has explicitly asserted that government instruction of prayer content is impermissible.⁸⁵

Furthermore, in *Town of Greece*, Justice Kennedy found that the town’s prayer practice did not coerce participation by non-adherents,⁸⁶ basing his reasoning on the history of legislative prayer.⁸⁷ A reasonable observer is familiar with traditions of legislative prayer, and understands the purpose is to show appreciation towards religion, not for the government to coerce non-adherents.⁸⁸ Prayer practice is analyzed as a whole, instead of as within the content of a single prayer.⁸⁹ Justice Kennedy is not only used a historical approach in his analysis, but he has also incorporated the elements of the coercion test and even the endorsement test. The “reasonable observer” language comes from the endorsement test.⁹⁰ However, Justice Kennedy’s use of this approach suggests that it is not reasonable to think this prayer practice is coercive, especially since the legislative context with a citizen audience differs from the school context with impressionable children. Accordingly, an independent constituent feeling offended by a particular prayer does not violate the Constitution.⁹¹

Justice Kagan’s dissenting opinion instead focused on the *Town of Greece*’s violation of the “norm of religious equality.”⁹² Although Justice Kagan agreed with the Court’s decision in *Marsh*, she differentiated the legislative prayer practices in *Marsh* from those in *Town of Greece*.⁹³ First, the

⁸⁴ *Id.* at 577, 595.

⁸⁵ *Id.* at 577, 592; <https://www.fed-soc.org/publications/detail/who-said-that-a-simple-question-that-may-change-the-way-courts-view-legislative-prayer>

⁸⁶ *Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J.).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1824.

⁹⁰ *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 579 (1989).

⁹¹ *Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.).

⁹² *Id.* at 1841. (Kagan, J., dissenting).

⁹³ *Id.* at 1842.

location where the chaplain-led prayers took place is considerably different.⁹⁴ *Marsh* took place at a congressional session,⁹⁵ whereas, *Town of Greece* took place at a local town meeting.⁹⁶ Second, the prayers that took place in these two locations have differing audiences.⁹⁷ In *Marsh*, the chaplains directed the prayer only to the elected state representatives, since “members of the public take no part in the proceedings.”⁹⁸ Whereas, in *Town of Greece*, the town meetings included extensive involvement by citizens, who were there to discuss local affairs with their government.⁹⁹ Consequently, the prayers being offered by the Christian chaplains were directed to the public, regardless of their particular religious beliefs.¹⁰⁰ Lastly, the content of the prayers significantly differ. In *Marsh*, the chaplains removed all Christian references from the prayers, therefore not advancing one particular faith or belief over another.¹⁰¹ However, in *Town of Greece*, the prayers were explicitly Christian for close to a decade, and the town made no effort to remove the sectarian references from the prayers.¹⁰²

Justice Kagan asserted how explicit the command of the Establishment Clause is, emphasizing that, “one religious denomination can not be officially preferred over another one.”¹⁰³ Justice Kagan also suggested ways in which the town could have employed religious equality, for example, town council members could have instructed Christian chaplains to give nonsectarian and generic prayers, or they could have invited chaplains of minority religious groups to give the prayers.¹⁰⁴

⁹⁴ *Id.* at 1847.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Greece*, 134 S. Ct. at 1847.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1848.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Greece*, 134 S. Ct at 1843.

¹⁰⁴ *Id.* at 1851.

The Supreme Court has established two ways in which legislative prayer is consistent with the Establishment Clause.¹⁰⁵ Legislative prayers are permitted when given by a paid chaplain offering nonsectarian prayers.¹⁰⁶ Also, legislative prayers are permitted when given by various clergy members, of different faiths, offering sectarian prayers when a neutral selection process has been used.¹⁰⁷

IV. Circuit Split

There are four standard tests the courts regularly apply to determine whether an Establishment Clause violation exists: the *Lemon* test, the Endorsement test, the Coercion test and, the “historical analysis” test.¹⁰⁸ The Circuit Courts have been confronted by an area of first impression, prayers led not by clergy but by government officials themselves.¹⁰⁹ These legislative-led prayer practices differ substantially from previous Supreme Court cases, because invocations are reserved solely for board members.¹¹⁰ The decisions made in *Marsh* and *Town of Greece* did not concern legislative-led prayer, therefore, they do not resolve whether this particular prayer practice is constitutional.¹¹¹ The Fourth and Sixth Circuit have issued conflicting opinions interpreting the constitutionality of legislative-led prayers, creating a spirited circuit split, in *Lund v. Rowan Cty.*, and *Bormuth v. Cty. of Jackson*.¹¹²

¹⁰⁵ *Marsh v. Chambers*, 463 U.S. 785 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1813 (2014).

¹⁰⁶ *Marsh v. Chambers*, 463 U.S. 785 (1983).

¹⁰⁷ *Town of Greece*, 134 S. Ct at 1842.

¹⁰⁸ These tests include the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1971); the endorsement test, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O’Connor, J., concurring); the coercion test, *Lee v. Weisman*, 505 U.S. 577 (1992); and the “historical analysis”, *Marsh v. Chambers*, 463 U.S. 785 (1983).

¹⁰⁹ See generally *Lund v. Rowan Cty.*, N.C., 863 F.3d 268, 272 (4th Cir. 2017); *Bormuth v. Cty. of Jackson*, 849 F.3d 266 (6th Cir. 2017).

¹¹⁰ *Id.*

¹¹¹ See generally *Marsh v. Chambers*, 463 U.S. 785 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1813 (2014).

¹¹² *Lund v. Rowan Cty.*, N.C., 863 F.3d 275 (4th Cir. 2017); *Bormuth v. Cty. of Jackson*, 870 F.3d 525 (6th Cir. 2017).

In *Lund v. Rowan Cty.*, in 2015, residents of Rowan County, North Carolina, filed suit against the county, alleging claims of Establishment Clause violations.¹¹³ Plaintiffs alleged that the County Board of Commissioner’s delivered sectarian legislative prayers and coerced non-adherents to participate.¹¹⁴ The board members led predominately Christian prayers on a rotating basis¹¹⁵ and no one other than the members, were permitted to offer invocations.¹¹⁶ Facing the audience, the members would usually invite those present to pray with them, and the prayers almost always included Christian doctrinal references.¹¹⁷ Over ninety-seven percent of the prayers were Christian.¹¹⁸ The district court distinguished this case from *Town of Greece*, finding that legislative-led prayer made legislators impermissible supervisors of prayer and religious speech.¹¹⁹ Legislative-led prayer it argued, leads to “a closed-universe of prayer givers” discriminating against minority religious groups.¹²⁰

Unlike the district court, the Fourth Circuit relied heavily on *Town of Greece v. Galloway*, reversing the lower court and holding that legislative-led prayer is a long-standing American tradition.¹²¹ The court specifically found that legislative-led prayer was comparable to chaplain-led prayer, since the Supreme Court had remained silent on such practice.¹²² The Supreme Court has never specified whether a speaker’s identity should be required as part of the analysis¹²³ and, therefore, it was unreasonable to

¹¹³ *Lund v. Rowan Cty.*, 103 F. Supp. 3d 715 (M.D.N.C 2015).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 716.

¹¹⁶ *Rowan Cty.*, N.C., 863 F.3D 268, 272.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 273.

¹¹⁹ *Supra* note 96 at 723.

¹²⁰ *Id.*

¹²¹ *Lund*, 837 F.3d 407, 411 (4th Cir. 2016).

¹²² *Id.* at 418.

¹²³ *Id.*

assert that silence on the issue equates to disapproval of the practice.¹²⁴ The court also pointed out that legislative-led prayer is intended for the lawmakers themselves to enjoy, not for the public.¹²⁵

Furthermore, the Fourth Circuit held that the invocations were not coercive.¹²⁶ Coercive invocations occur when legislators seek to sway nonbelievers or censor those who believe differently.¹²⁷ For example, if the prayers' nature and purpose was intended to "convert others to that belief" or "belittle those who believed differently" than the invocations would be coercive and therefore unconstitutional under *Town of Greece*.¹²⁸ However, when examining the prayer practice as a whole, as required by *Town of Greece*, no violation of the Constitution exists.¹²⁹ The court went as far as to hold that "a few remarks are insufficient to despoil a practice that on the whole reflects and embraces our tradition."¹³⁰

On rehearing *en banc*, however, the full Fourth Circuit reversed and determined that Rowan County's practice of legislative-led prayer was repugnant the Establishment Clause.¹³¹ The court held that "*Marsh* and *Town of Greece* in no way sought to dictate the outcome of every subsequent case."¹³² In *Town of Greece*, the Supreme Court conceded that they have yet to define the Establishment Clause's precise boundaries.¹³³ Since *Marsh* and *Town of Greece* were not sought to determine the constitutionality of legislative-led prayer, the Fourth Circuit must carry out a fact sensitive analysis of the prayer practice.¹³⁴

¹²⁴ *Id.*

¹²⁵ *Rowan Cty.*, 837 F.3d at 420.

¹²⁶ *Id.* at 421.

¹²⁷ *Id.* at 422.

¹²⁸ *Id.*

¹²⁹ *Id.* at 422; *Town of Greece v. Galloway*, 134 S. Ct. 1824 (2014).

¹³⁰ *Rowan Cty.*, 837 F.3d at 422-23.

¹³¹ *Lund v. Rowan Cty.*, N.C., 863 F.3D 275 (4th Cir. 2017)

¹³² *Id.* at 276.

¹³³ *Rowan Cty.*, 837 F.3d at 276; *Town of Greece*, 134 S. Ct. at 1819.

¹³⁴ *Lund*, N.C., 863 F.3D 275 at 276.

The fact sensitive analysis paid special attention to the identity of the prayer giver.¹³⁵ Prayer opportunity was strictly reserved for the Commissioners, which created a “closed universe of prayer givers.”¹³⁶ In a five-year span, only “four out of one hundred and forty-three prayers were non-sectarian.”¹³⁷ Invocations were in accordance to legislator’s specific faiths and the prayers proclaimed that Christianity was exceptional and superior to other faiths.¹³⁸ A notable amount of prayers, portrayed Christianity as “the one and only way to salvation”, which implies that all other faiths are inferior, thus, coercing participation by non-adherents.¹³⁹ Additionally, the audience booed a town member, who had expressed opposition to the Board members’ prayer practices.¹⁴⁰

These facts are clearly distinguishable from prior Supreme Court cases. In *Marsh* and *Town of Greece*, expansion of faiths for prayer practices was practical by welcoming clergy of different faiths.¹⁴¹ Here, however, the only form of recourse is to vote for a board member with similar religious views.¹⁴² As pointed out in *Lemon*, “political divisiveness of such conflict is a threat to the normal political process,” and is consequently “one of the principle evils against which the First Amendment was intended to protect.”¹⁴³

In *Bormuth v. Cnty. Of Jackson*, the Board of Commissioners in Jackson County, Michigan opened each monthly meeting with legislative-led prayer.¹⁴⁴ Each commissioner was afforded a chance to open session, without the content of prayers being reviewed.¹⁴⁵ To refrain from hearing prayers they

¹³⁵ *Id.* at 279.

¹³⁶ *Id.* at 282.

¹³⁷ *Id.* at 283.

¹³⁸ *Id.* at 281-82, 284.

¹³⁹ *Id.* at 284.

¹⁴⁰ *Lund*, N.C., 863 F.3D 275 at 282.

¹⁴¹ *Town of Greece*, 134 S. Ct. at 1820-21.

¹⁴² *Lund*, N.C., 863 F.3D 275 at 282.

¹⁴³ *Lemon*, 403 U.S. at 622.

¹⁴⁴ *Bormuth v. Cty. of Jackson*, 849 F.3d 269 (6th Cir. 2017).

¹⁴⁵ *Id.* at 289.

disagreed with, the Board members refused to allow non-commissioners to offer invocations.¹⁴⁶ Plaintiff, a self-professed pagan attended meetings because he sought appointment to serve on Jackson Counties Solid Waste Planning Committee.¹⁴⁷ While in attendance, a commissioner requested for the public to “rise and assume a reverent position.”¹⁴⁸ Plaintiff was the only member of the public who did not “rise and bow his head.”¹⁴⁹ Feeling excluded, he raised this First Amendment issue during the public-comment period.¹⁵⁰ The Board members were unresponsive to his concerns, and reacted with “disgust.”¹⁵¹ As a result, Plaintiff filed suit against the County, contending claims of Establishment Clause violations, advocating for the *Lemon* test to be applied.¹⁵² While his suit was pending, the Commissioners rejected his application to serve on committee and appointed two other less-qualified individuals to serve.¹⁵³ The district court found that legislative-led prayer was consistent with the Supreme Court’s holding in *Marsh* and *Town of Greece*, and therefore did not violate the Establishment Clause.¹⁵⁴ Plaintiff subsequently appealed.¹⁵⁵

In its review, the Sixth Circuit found that the Board of Commissioners violated the Establishment Clause because legislative-led prayer was “outside the tradition of historically tolerated prayers.”¹⁵⁶ Also, the Sixth Circuit found that the invocations coerced residents to participate.¹⁵⁷ The court established that the Board’s practice fell outside the tradition of legislative prayer in *Marsh* and *Town of*

¹⁴⁶ *Bormuth v. Cty. of Jackson*, 870 F.3d 525 (6th Cir. 2017).

¹⁴⁷ *Bourmuth*, 849 F.3d at 269.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 270.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 271.

¹⁵² *Bourmuth v. Cty. of Jackson*, 116 F. Supp. 3d 851 (E.D. Mich. 2015).

¹⁵³ *Bourmuth*, 849 F.3d at 270.

¹⁵⁴ *Bourmuth*, 116 F. Supp. 3d at 860.

¹⁵⁵ *Bourmuth*, 849 F.3d at 269.

¹⁵⁶ *Id.* at 291.

¹⁵⁷ *Id.* at 269.

Greece,¹⁵⁸ and found the most distinguishable factor to be the identity of the prayer giver, contending that the Courts evaluation of prayer practice may be different if town board members were leading the prayers.¹⁵⁹ As held in *Town of Greece*, the Sixth Circuit noted that the government is forbidden from coercing its citizens “to support or participate in any religion or its exercise.”¹⁶⁰ Moreover, in *Town of Greece*, Justice Kennedy asserted, “the analysis may be different if town board members directed the public to participate in prayers or singled out dissidents for opprobrium, or indicated that their decision might be influenced by a person’s acquiescence in the prayer opportunity.”¹⁶¹ In *Bourmuth*, the Sixth Circuit found all three of the afore-mentioned elements to be satisfied.¹⁶² First, the Board instructs the public to join in prayers at the meetings.¹⁶³ Second, the Board has unambiguously “singled out Bourmuth for opprobrium.”¹⁶⁴ Lastly, the Plaintiff presented compelling proof that the Board had “allocated benefits and burdens based on participation in the prayer.”¹⁶⁵

When the full circuit heard the case *en banc*, however, it reversed and found that Jackson County’s practice of legislative-led prayer was consistent with *Marsh* and *Town of Greece*, and did not in fact violate the Establishment Clause.¹⁶⁶ Although the Plaintiff here advocated for the *Lemon* test to be applied, the Sixth Circuit held that test was irrelevant and using it would “rewrite thirty-plus years of Supreme Court Jurisprudence.”¹⁶⁷ Instead, the court used a “historical standard” to determine whether there was an Establishment Clause violation.¹⁶⁸ It found that neither *Marsh* nor *Town of Greece*

¹⁵⁸ *Id.* at 281-82.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 285; *Town of Greece*, 134 S. Ct. at 1825.

¹⁶¹ *Bourmuth*, 849 F.3d at 285; *Town of Greece*, 134 S. Ct. at 1826.

¹⁶² *Bourmuth*, 849 F.3d at 285.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 286.

¹⁶⁵ *Id.*

¹⁶⁶ *Bormuth v. Cty. of Jackson*, 870 F.3d 497 (6th Cir. 2017).

¹⁶⁷ *Id.* at 514.

¹⁶⁸ *Id.*

controlled who the prayer giver was,¹⁶⁹ and asserted that, “since the founding of our Republic, Congress, Legislatures, and many municipal bodies have commenced legislative sessions with prayer.”¹⁷⁰

Additionally, the court found that a pattern of coercion against non-adherents is needed, to establish a constitutional violation.¹⁷¹ Therefore, a challenge based on one prayer, which denigrates nonbelievers, is permissible.¹⁷²

The Sixth Circuit acknowledged that Justice Kennedy’s plurality opinion in *Town of Greece* is controlling within this circuit.¹⁷³ Although the previous Sixth Circuit found all three elements of Justice Kennedys coercion test to be satisfied, the Sixth Circuit *en banc* ultimately held differently.¹⁷⁴ First, it held that a request for members of the “public to assist in prayer by rising and remaining quiet” was not coercive and therefore constitutional.¹⁷⁵ Second, it held that the Commissioners raising their backs to the Plaintiffs, was constitutionally sound, and “not indicative of a pattern and practice of coercion” towards non-adherents.¹⁷⁶ Lastly, Plaintiff assumed that the County deliberately rejected his application based upon his pending suit, and thus, amounted to a frivolous claim.¹⁷⁷

Both the Fourth and Sixth Circuit used different approaches to determine whether or not an Establishment Clause violation existed.¹⁷⁸ The Fourth Circuit did not use a formal test to achieve its constitutional analysis, but instead held that Establishment Clause inquiries are matters of degree,¹⁷⁹

¹⁶⁹ *Id.* at 537.

¹⁷⁰ *Id.* at 497.

¹⁷¹ *Bourmuth*, 870 F.3d at 512.

¹⁷² *Id.*

¹⁷³ *Id.* at 533.

¹⁷⁴ *Id.* at 517.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Bourmuth*, 870 F.3d at 516-18.

¹⁷⁸ See generally *Lund v. Rowan Cty.*, N.C., 863 F.3D 268 (4th Cir. 2017); *Bormuth v. Cty. of Jackson*, 870 F.3d 525 (6th Cir. 2017).

¹⁷⁹ *Lund*, N.C., 863 F.3D 275 at 276.

basing their evaluation on the circumstances surrounding the legislative-led prayer.¹⁸⁰ The Sixth Circuit, on the other hand, held the *Lemon* test to be inapplicable to legislative-led prayer case.¹⁸¹ Instead, the court applied both a “historical analysis” and coercion test to determine whether or not an Establishment Clause violation existed.¹⁸² Consequently, the Fourth and Sixth Circuits have issued conflicting opinions interpreting the constitutionality of legislative-led prayers, creating a circuit split.¹⁸³

V. Impermissibility of Legislative-Led Prayer under *Town of Greece*, *Marsh* and *Lemon*

A. Constitutionality Fails Under a “Historical Analysis”

Our nation’s history does not encompass prayers by legislators, and, as has been observed, legislative-led prayer is different from clergy authorized prayers.¹⁸⁴ Although the Sixth Circuit argues that legislative-led prayer is permissible under both a *Marsh* and *Town of Greece* analysis, the facts are vastly distinguishable between the cases.¹⁸⁵ There is a difference between extending prayers to lawmakers, and limiting prayers solely to lawmakers.¹⁸⁶ Also, there is not one authority that confirms that Congress engaged in similar practices of legislative-led prayer.¹⁸⁷ Although the Supreme Court has cited instances of legislative-led prayer, none occurred before 1973, and is therefore not indicative of contemporary practices.¹⁸⁸ Accordingly, history is irrelevant to this analysis.

B. Constitutionality Fails Under a Coercion Test

¹⁸⁰ *Id.*

¹⁸¹ *Bourmuth*, 870 F.3d at 515.

¹⁸² *Id.*

¹⁸³ *See generally Lund v. Rowan Cty.*, N.C., 863 F.3D 268 (4th Cir. 2017); *Bormuth v. Cty. of Jackson*, 870 F.3d 525 (6th Cir. 2017).

¹⁸⁴ *Bourmuth*, 849 F.3d at 39.

¹⁸⁵ *See generally Marsh v. Chambers*, 463 U.S. 785 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1826 (2014); *Bormuth v. Cty. of Jackson*, 870 F.3d 497 (6th Cir. 2017).

¹⁸⁶ *Lund*, 863 F.3d at 279.

¹⁸⁷ *Id.* at 294.

¹⁸⁸ *Id.*

Justice Kennedy, writing for the majority, held in *Lee v. Weisman* held that instructing clergy to give prayers that are nonsectarian constituted a means by which the government impermissibly “directed and controlled the content of prayers.”¹⁸⁹ Instruction of nonsectarian prayer was found impermissible because it would force legislators and courts to censor prayer, generating even greater government entanglement than the town’s current practice.¹⁹⁰ Legislative-led prayer cases illustrate exactly that excessive government entanglement.¹⁹¹ Justice Kennedy feared precisely these circumstances.¹⁹² Concluding that it would be a different story, if council members instructed the public to pray, shamed anyone who refused to pray, or indicated that a members decisions might be contingent on whether they pray or not.¹⁹³ In both the Fourth and Sixth Circuits, the invocation practices were coercive in nature, whereas in the *Town of Greece*, the government had not intentionally discriminated against non-Christians.¹⁹⁴

C. Proposal to use *Lemon* test for Legislative-Led Prayers

If a law student were prompted by a professor to answer the question of whether legislative-led prayer was constitutional, he or she would answer that it was unconstitutional, based upon a *Lemon* analysis.¹⁹⁵ The Establishment Clause’s fundamental objective is to ensure religious neutrality, in order to respect the religious beliefs of all citizens.¹⁹⁶ In *Lemon*, the Court held that the three main evils in which the Establishment Clause was intended to protect are: “(1) sponsorship; (2) financial support;

¹⁸⁹ *Lee v. Weisman*, 505 U.S. 587 (1992).

¹⁹⁰ *Greece*, 134 S. Ct. 1822.

¹⁹¹ *Lund*, 863 F.3d at 292.

¹⁹² *Town of Greece v. Galloway*, 134 S. Ct. 1826 (2014).

¹⁹³ *Town of Greece v. Galloway*, 134 S. Ct. 1826 (2014); *See generally* Amy Howe, *Tradition! Today’s legislative prayer decision in Plain English*, SCOTUSBLOG (May 5, 2014, 10:12 PM), <http://www.scotusblog.com/2014/05/tradition-todays-legislative-prayer-decision-in-plain-english/>.

¹⁹⁴ <https://www.bna.com/legalty-legislatorled-prayer-n57982084242/>

¹⁹⁵ *Marsh v. Chambers*, 463 U.S. 800 (1983).

¹⁹⁶ *McCreary Cty. v. ACLU*, 545 U.S. 860 (2005).

[and] (3) active involvement of the sovereign in religious activity.”¹⁹⁷ Legislative-led prayer is in direct violation with the first and third element. In both of these cases, local board members, who are apart of the government, are not only sponsoring the advancement of certain religions but also are actively involved in such religious activity.

Under the facts of both circuit court cases, *Lemon* is the most efficient test to use to ensure that the Nations values are preserved. It is superior to the “historical approach” because it is better at addressing the relevant values at stake. The “historical approach” places too much weight on the founding fathers message of history, which often tends to be vague and inapplicable to a far more diverse society.¹⁹⁸ Indeed, we have no clear historical example of prayer being led by the legislators themselves.

Both the coercion and endorsement test are used in specific circumstances.¹⁹⁹ As seen in *Lee v. Weisman*, the psychological coercion test is frequently used in the school context,²⁰⁰ whereas the endorsement test is more appropriate to use when assessing the context of religious symbols, such as in *County of Allegheny v. ACLU*.²⁰¹ It is arguable that these tests could be used when reviewing legislative-led prayers, but they are highly context-specific tests. *Lemon* provides a way to draw a line between chaplain and clergy-led prayers on the one hand, and legislative-led prayer on the other. Consequently, it is more appropriate to use the *Lemon* test in cases involving legislative-led prayer.

¹⁹⁷ *Cnty. of Allegheny* at 612-13.

¹⁹⁸ *Chambers*, 463 U.S. 783 (Citing Brennan’s concurring opinion in *Abington School Dist. v. Schempp*, 374 U.S. 203, 237 (1963)).

¹⁹⁹ The endorsement test, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O’Connor, J., concurring); the coercion test, *Lee v. Weisman*, 505 U.S. 577 (1992).

²⁰⁰ *Lee v. Weisman*, 505 U.S. 577 (1992).

²⁰¹ *Lee v. Weisman*, 505 U.S. 587 (1992); *Cnty. of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 579 (1989).

The *Lemon* test best addresses these evils by requiring a court to determine if a States policy survives constitutional scrutiny.²⁰² In order to comply with the Establishment Clause, state action must “(1) have secular legislative purpose; (2) the principal or primary effect must be one that neither advances nor inhibits religion; [and] (3) the policy must not foster an excessive government entanglement with religion,”²⁰³ Justice Kagan’s dissent in *Town of Greece*, focused on the towns violation of religious equality.²⁰⁴ The town failed to recognize religious diversity, by never seeking to “involve, accommodate, or in anyway reach out to adherents of non-Christian religions.”²⁰⁵ Justice Kagan suggested ways in which the town could have employed religious equality, such as town council members could have instructed Christian chaplains to give nonsectarian and generic prayers, or they could have invited chaplains of minority religious groups to give the prayers.²⁰⁶ However, those suggestions were never employed.²⁰⁷ Therefore, the towns practice was in direct violation with the “First Amendment’s promise that every citizen, irrespective of her religion, owns an equal share in her government.”²⁰⁸ In both circuit court cases, there is no way to achieve religious equality, precisely because the conduct lacks a secular purpose, advances religion as its primary effect, and excessively entangles religion with government.²⁰⁹

In *McCreary Cty. v. ACLU*, the Supreme Court held that “a determination of the counties purpose is a sound basis for ruling on the Establishment Clause complaints.”²¹⁰ When the government’s purpose

²⁰² *Lemon*, 403 U.S. 612-13 (1971).

²⁰³ *Id.* at 612.

²⁰⁴ *Greece*, 134 S. Ct. at 1842 (Kagan, J., dissenting).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1851.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1842.

²⁰⁹ *Lemon*, 403 U.S. 612-13 (1971).

²¹⁰ *McCreary Cty. v. ACLU*, 545 U.S. 850 (2005).

pre-eminently advances religion, it violates the Establishment Clause's fundamental values.²¹¹

Furthermore, the Court held that “examination of purpose is a staple of statutory interpretation for every American appellate court.”²¹² In an Establishment Clause analysis, examining purpose is imperative.²¹³

The purpose of legislative-led prayer is pre-eminently religious rather than secular. However, the Fourth and Sixth Circuits do not examine whether these legislative-led prayer policies have a secular purpose. This is due to the fact that the historical test, the endorsement test, and the coercion test do not require such an analysis.²¹⁴ However, *Lemon*'s “purpose” requirement was specifically designed to prohibit the government from abandoning neutrality, and the analysis is essential in protecting the rights guaranteed under the Establishment Clause of the First Amendment.²¹⁵

Neither the Fourth nor Sixth Circuits disagree that the effects of legislative-led prayer are clearly religious.²¹⁶ The heart of the disputes is whether or not the effects of legislative-led prayer are coercive in nature.²¹⁷ Thus, placing coercive strains upon religious minorities to adhere to the majorities' religious beliefs'.²¹⁸ The Supreme Court has acknowledged the importance of prayer, as well as the recognition that the Nation is made up of pluralistic people.²¹⁹ However, the Court was explicit in holding that any state action, that's primary effect is to advance or inhibit one particular religion, is

²¹¹ *Id.*

²¹² *Id.* at 861.

²¹³ *Id.* at 862.

²¹⁴ The endorsement test, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring); the coercion test, *Lee v. Weisman*, 505 U.S. 577 (1992); and the “historical analysis”, *Marsh v. Chambers*, 463 U.S. 785 (1983).

²¹⁵ *McCreary Cty. v. ACLU*, 545 U.S. 850 (2005).

²¹⁶ See generally *Lund v. Rowan Cty.*, N.C., 863 F.3D 268 (4th Cir. 2017); *Bormuth v. Cty. of Jackson*, 870 F.3d 525 (6th Cir. 2017).

²¹⁷ *Id.*

²¹⁸ *Lund*, N.C., 863 F.3D 275 at 284.

²¹⁹ *Greece*, 134 S. Ct. at 1849 (Kagan, J., dissenting).

unconstitutional.²²⁰ In both instances, legislative-led prayers primary effect is to advance one religion over another.²²¹ Accordingly, legislative-led prayer should be deemed unconstitutional.

Lastly, the practice of legislative-led prayer leads to excessive entanglement between church and state.²²² In *Marsh*, the dissent held that “entanglement can take two forms.”²²³ In cases involving legislative prayer, “the process of choosing a suitable chaplain, whether on a permanent or rotating basis, and insuring that the chaplain limits himself or herself to suitable prayers involves the sort of supervision . . . government should avoid.”²²⁴ If the dissent found legislative prayer to be considered excessive entanglement, there is no doubt that the Court would find legislative-led prayer to be excessive entanglement between church and state.²²⁵

In both the Fourth and Sixth Circuits, board members are not only censoring prayers but also delivering them, which creates excessive government entanglement.²²⁶ The need for impartiality and accountability by local boards is essential for local governments to run smoothly. It is pertinent that local board members, acting as government officials, remain neutral. *Lemon* takes into account the issue of fusion of governmental and religious functions, when the church takes over state duties and, as here, when the government engages in religious tasks.²²⁷ By allowing a state-paid chaplain and private clergy to offer prayers, there is still a separation between church and state. However, when the legislators themselves are offering prayer, they are participating in a religious task, rather than a government one.

²²⁰ *Lemon*, 403 U.S. 612 (1971).

²²¹ See generally *Lund v. Rowan Cty., N.C.*, 863 F.3d 268 (4th Cir. 2017); *Bormuth v. Cty. of Jackson*, 870 F.3d 525 (6th Cir. 2017).

²²² *Marsh v. Chambers*, 463 U.S. at 797-99 (1983).

²²³ *Id.* at 798

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Supra* note 221.

²²⁷ See generally *Larkin v. Grendals Den*, 495 U.S. 127 (1982); *Bd. of Educ. V. Grumet*, 512 U.S. 687 (1994).

Lemon ensures for an across the board holding that these types of prayers have no secular purpose, entangle the church and state by getting the state involved in religious functions and has a primary effect of advancing religion. Accordingly, legislative-led prayer is incompatible with the fundamental principles of the First Amendments Establishment Clause.

D. Conclusion

Due to the current circuit split,²²⁸ legislators and judges outside of the Fourth and Sixth Circuits may be apprehensive on how to approach the issue of legislative-led prayer. The Fourth Circuit follows a fact sensitive analysis,²²⁹ acknowledging that the Supreme Court has yet to address legislative-led prayer practice, whereas, the Sixth Circuit, on the other hand, follows a “historical analysis” and finds that legislative-led prayer is in fact consistent with the Court’s precedent.²³⁰ Further guidance from the Supreme Court is necessary to determine whether legislative-led prayer policies are constitutional or not.²³¹ Addressing this question will provide much needed clarity to legislators and judges about what the government is permitted to do. Until then, legislators and judges should proceed with caution. Perhaps, local board members should resort to diversified prayers of local clergy or nonsectarian prayers offered by a state-selected chaplain, which are neither coercive nor discriminatory in nature.

The Establishment Clause was established to protect individuals who are unwilling to conform to legislative-led prayers.²³² Therefore, the obvious next move for the Supreme Court is to grant certiorari

²²⁸ See generally *Lund v. Rowan Cty.*, N.C., 863 F.3d 268 (4th Cir. 2017); *Bormuth v. Cty. of Jackson*, 870 F.3d 525 (6th Cir. 2017).

²²⁹ *Lund*, 863 F.3d at 275.

²³⁰ *Bourmuth*, 870 F.3d at 497.

²³¹ <http://dailysignal.com/2017/06/14/2-cases-threaten-shut-public-prayer-supreme-court-may-need-act/>

²³² Robert Destro, *The Court after Scalia: “An establishment of religion”*, SCOTUSBLOG (Sep. 12, 2016, 11:02 AM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-an-establishment-of-religion/>.

and shed light on this issue. This can occur by ending the spirited split between the Circuits and holding that legislative-led prayers are impermissible under the Establishment Clause.²³³

²³³ *Lund*, 863 F.3D at 275.